

(31,722)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 999

PAN AMERICAN PETROLEUM & TRANSPORT
COMPANY AND PAN AMERICAN PETROLEUM
COMPANY, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF ATTORNEYS.

For Appellants:

Messrs. O'MELVENY and TULLER, Esqs.,
Title Insurance Building, Los Angeles,
California, and

Messrs. CHARLES WELLBORN, OLIN
WELLBORN, Jr., and OLIN WELL-
BORN, III, Esqs., Security Building, Los
Angeles, California, and

FREDERICK R. KELLOGG, Esq., FRANK
J. HOGAN, Esq., JOSEPH J. COTTER,
Esq., MARC F. MITCHELL, Esq., DEAN
EMERY, Esq., and HAROLD WALKER,
Esq., Pan American Petroleum Company,
Los Angeles, California.

For Appellees:

ATLEE POMERENE and OWEN J. ROB-
ERTS, Esqs., Special Counsel, and SAM-
UEL W. McNABB, Esqs., United States
Attorney, and J. EDWIN SIMPSON,
Esq., Assistant United States Attorney,
Federal Building, Los Angeles, California.

CITATION.

United States of America,—ss.

To the United States of America, Plaintiff, and to
Atlee Pomerene, Owen J. Roberts, and S. W.
McNabb, Esquires, Solicitors for said Plaintiff,
GREETING:

You are hereby cited and admonished to be and

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appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 13th day of August, A. D. 1925, pursuant to the order allowing an appeal entered July 15, 1925, and of record in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain suit in equity, B-100-M, therein, wherein the United States of America is plaintiff and Pan American Petroleum Company, a corporation, and Pan American Petroleum & Transport Company, a corporation, are defendants, and you are ordered to show cause, if any there be, why the final decree made and entered on the 11th day of July, A. D. 1925, in the said equity suit mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable PAUL J. McCORMICK, United States District Judge for the Southern District of California, this 15th day of July, A. D. 1925, and of the Independence of the United States, the one hundred and fiftieth.

[Seal] PAUL J. McCORMICK,
U. S. District Judge for the Southern District of
California.

Service of the foregoing citation at the City of Los Angeles in the State of California is hereby acknowledged by the plaintiff-appellee, the United

States of America, by its solicitors, this 15th day of July, A. D. 1925.

ATLEE POMERENE,
OWEN J. ROBERTS,
S. W. McNABB,

Solicitors for the United States of America, Plaintiff-Appellee.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit, Pan American Petroleum Company, a Corporation, and Pan American Petroleum & Transport Company, a Corporation, Appellants, vs. United States of America, Appellee. Citation. Filed Jul. 15, 1925. Chas. N. Williams, Clerk. Louis J. Somers, Deputy.

CITATION.

United States of America,—ss.

To Pan American Petroleum and Transport Company and Pan American Petroleum Company,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the thirteenth day of August, A. D. 1925, pursuant to a cross-appeal filed July 15, 1925, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action in equity in said Court wherein the United States of America is plaintiff and Pan

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American Petroleum and Transport Company and Pan American Petroleum Company are defendants, and you are ordered to show cause, if any there be, why the final decree in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable PAUL J. McCORMICK, United States District Judge for the Southern District of California, this 15th day of July, A. D. 1925, and of the Independence of the United States, the one hundred and fiftieth.

[Seal] PAUL J. McCORMICK,
U. S. District Judge for the Southern District of California.

Service of the above citation is accepted on behalf of Pan American Petroleum and Transport Company and Pan American Petroleum Company, defendants and cross-appellees.

FREDERICK R. KELLOGG,
FRANK J. HOGAN,

Attorneys for Defendants-Cross-Appellees.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Cross-Appellant, vs. Pan American Petroleum & Transport Company and Pan American Petroleum Company, Cross-Appellees. Citation. Filed Jul. 15, 1925. Chas. N. Williams, Clerk, Louis J. Somers, Deputy.

In the District Court of the United States for the
Southern District of California, Northern Di-
vision.

EQUITY—No. B-100-M.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAN AMERICAN PETROLEUM COMPANY, a
Corporation, and PAN AMERICAN PE-
TROLEUM & TRANSPORT COMPANY,
a Corporation,

Defendants.

BE IT REMEMBERED, that in that certain
cause in equity in the above-named court entitled
as above shown the following proceedings were had
and documents filed, and the same are included
herein as a transcript of record on appeal to the
United States Circuit Court of Appeals for the
Ninth Circuit, in accordance with praecipe filed
with the Clerk of the said Court by defendants-ap-
pellants indicating the portions of the record to be
incorporated into the transcript on their appeals,
and praecipe filed with the Clerk of the said Court
by plaintiff-appellee indicating the portions of the
record to be incorporated into the transcript on
plaintiff's cross-appeal:

Mar. 17, 1924.	Memo.	Original bill of complaint filed.
Mar. 17, 1924.	Memo.	Defendants accepted service and entered their appearance in the case.
Mar. 17, 1924.	Memo.	Stipulation of plaintiff and defendants transferring the cause for hearing from Los Angeles, Calif., in the Southern Division of this Court, with same force and effect as if heard in the Northern Division, filed.
Mar. 17, 1924.	Memo.	H, A. Rousseau and J. Crampton Anderson appointed receivers to take possession, hold and operate, <i>pendente lite</i> , the properties located in the State of California, in controversy in this suit, and enjoining defendants <i>pendente lite</i> from further operating the same.

Mar. 24, 1924. Memo. Receivers duly qualified by filing bonds as required by the Court and entered upon their duty.

Apr. 15, 1924. Memo. Order extending time for defendants to plead.

Apr. 22, 1924. Memo. Order granting plaintiff leave to file amended bill of complaint.

Amended bill of complaint.

Filed April 22, 1924. Chas. N. Williams, Clerk.

[1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

(Name of Court and Title of Case.)

AMENDED BILL OF COMPLAINT.

To the Honorable the Judges of the said Court:

The United States of America, appearing herein by its attorneys, Atlee Pomerene and Owen J. Roberts, special counsel duly appointed and empowered thereunto by the President of the United States, by and with the advice and consent of the Senate of the United States, under a joint resolution of the Congress, brings this its bill of complaint against Pan American Petroleum Company, a corporation, and Pan American Petroleum and Transport Company, a corporation, and thereupon complains and says:

1. Defendant Pan American Petroleum Company is now, and at all times hereinafter mentioned was, a corporation duly organized and existing under and by [2] virtue of the laws of the state of California and is a citizen and resident of said state and of the southern district thereof. Defendant Pan American Petroleum and Transport Company is now, and was at all times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the state of Delaware, and is now doing business in the state of California and in the southern district thereof. The defendant last named owns all of the capital stock of the defendant first named.

2. At the times hereinafter mentioned, Edward L. Doheny was, and now is, the duly elected chief

executive officer of each of defendants, and was at the times hereinafter mentioned, and still is, the owner and holder of a large number of shares of the capital stock of Pan American Petroleum and Transport Company.

3. Albert B. Fall, from to wit, March 5, 1921, until to wit, March 4, 1923, was the duly appointed, qualified, and acting Secretary of the Interior of the United States of America.

4. Edwin Denby, at all of the times hereinafter mentioned, was the duly appointed, qualified, and acting Secretary of the Navy of the United States of America.

5. At the times hereinafter mentioned, the United States of America was and now is the owner in fee simple of the following described land situate in the county of Kern, State of California: Mount Diablo base and meridian, T 30 S., R. 22 E., all of sec. 24; T. 30 S., R. 23 E., all of sec. 10, all of sec. 12, all of secs. 14 and 15, north 62½ acres of NW. ¼ of sec. 16, [3] NE. ¼, S. ½ sec. 17, all of sec. 18, NE. ¼, S. ½ sec. 19, all of secs. 20 to 30, inclusive, all of secs. 32 to 35; inclusive; T. 31 S., R. 23 E., all of secs. 1 to 4, inclusive, all of secs. 10 to 12, inclusive, N. ½ of sec. 13, all of sec. 14; T. 30 S., R. 24 E., all of sec. 18, all of sec. 20, all of sec. 28, all of sec. 30, all of sec. 32, W. ½, W. ½ E. ½, west 147 feet of E. ½ E. ½ of sec. 34; T. 31 S., R. 24 E., S. ½ of sec. 2, S. ½, NW. ¼ of sec. 3, all of secs. 4 to 6 inclusive, N. ½, SE. ¼ of sec. 7, all of secs. 8 to 12, inclusive, all of sec. 18. At the times hereinafter mentioned the United States of America was

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and now is the owner in fee simple of the following described land situate in the county of Kern, State of California: Mount Diablo base and meridian, T. 31 S., R. 24 E., sec. 3, NE. $\frac{1}{4}$. All of said lands were a part of the unappropriated public domain of said United States, and contained petroleum in large quantities.

6. On certain dates hereinafter set forth, defendants became possessed of certain writings purporting to create certain rights and certain interests in said lands in favor of the defendants, adversely to the title, ownership, and possession of said United States, which writings were executed or caused to be executed by said Edward L. Doheny, the said Abert B. Fall, and said Edwin Denby without authority of law, and as a result of a conspiracy entered into by said Albert B. Fall and said Edward L. Doheny at a time prior to the execution of said writings.

7. Said lands hereinabove described, at and long prior to the happening of the things herein complained [4] of, by proclamation and order of the President of the United States and action of the Congress thereof, were set apart and dedicated as naval oil reserves, and by said proclamation, order, and action all entry rights theretofore existing and not previously exercised were terminated and repealed.

8. By Act of Congress of the United States approved June 4, 1920, it was provided:

That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves as are or may be

come subject to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled "An Act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," or pending applications for United States patent under any law; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States; And provided further, That the rights of any claimant under said act of February 25, 1920, are not affected adversely thereby; And provided further, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, [5] are hereby made available for this purpose until July 1, 1922; Provided further, That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct.

Said act is unrepealed and unmodified by any

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subsequent legislation, and has at all times since its enactment been in full force and effect.

9. Prior to May 31, 1921, said Albert B. Fall made and caused to be made certain representations to the President of the United States, and obtained and caused to be obtained from the President of the United States, acting pursuant to such representations in good faith, a certain Executive Order bearing date May 31, 1921, a true copy whereof is hereto annexed and made a part hereof, marked Exhibit "A." Said order was without legal authority and of no force or virtue, and was known so to be by said Fall and by said Doheny and by the defendants.

10. The representations made by said Fall, then acting as Secretary of the Interior, to the President of the United States, were to the effect that said order was proper, necessary, and for the best interests of the Government of the United States and the public, all of which representations were false, fraudulent, and untrue, and were at the time known to said Albert B. Fall to be false and untrue, and were made by the said Albert B. Fall not in good [6] faith and for the benefit of the public interest, but for the unlawful purpose of enabling him, as Secretary of the Interior, to effect a fraudulent transfer of rights in said lands to defendant.

11. Subsequent to the making of the said order, said Fall and said Doheny did combine, confederate, and conspire to defraud the United States by bringing about the execution and delivery of the writings hereinafter recited. And further, said

Fall and said Doheny did also conspire to bring about the execution of the said writings for the private gain of said Fall and of defendants, for whom said Doheny acted in that behalf.

12. Pursuant to said conspiracy it was agreed and arranged between said Fall and said Doheny that in the event certain rights were created in defendants, which by the terms of said writings hereinafter mentioned were to all intents and purposes created in said defendants, said Fall was to receive certain rewards from said Doheny, and he did in fact receive certain rewards from said Doheny in consideration of his unlawful conduct in the furtherance of said conspiracy.

13. On or about November 30, 1921, in furtherance of the conspiracy between said Fall and said Doheny, said Doheny did pay unto the said Fall that certain reward theretofore promised him, to wit, the sum of \$100,000 lawful money of the United States of America.

14. On, to wit, March 7, 1922, said Albert B. Fall, purporting to act on behalf of the United States, in [7] writing, invited proposals for the acceptance of royalty crude oil accruing to the United from leases in naval petroleum reserves No. 1 or No. 2 in the State of California, or both, in exchange for fuel oil and storage facilities to be furnished and provided by the bidder at Pearl Harbor, Hawaii. Said invitation provided that bids should be made in barrels of crude oil, for the furnishing, erecting, and completing of certain structures and storage facilities and the filling of said structures

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with fuel oil. Said invitation for proposals provided, *inter alia*.

"In event that any proposer finds it unacceptable to make a lump-sum bid covering every item in the work of providing storage facilities, he may offer such alternative as he may care to suggest: Provided, That such alternative proposal be supported by acceptable bids for lump-sum subcontracts covering at least two-thirds of the work.

In event that any bidder desires, he may similarly offer an alternative bid for providing the fuel oil in storage, not stated in fixed terms of a ratio of exchange per barrel, but such alternative offer must be clearly stated, must be complete, and must provide for payment by exchange for crude royalty oil in the field."

Said invitation for proposals was so drawn pursuant to said conspiracy and understanding that no one but defendant Pan American Petroleum and Transport Company could or would bid thereon. The [8] provision of said invitation providing for alternative bids was intended to permit said defendant to make a bid not in competition with any other who might venture to bid, but as the basis of a special, secret, and noncompetitive contract with the United States.

15. On, to wit, April 14, 1922, Pan American Petroleum and Transport Company did submit a certain bid in accordance with the invitation for proposals and specifications thereto attached, and did further submit under the authority of said

invitation an alternative proposal, designated "Proposal B," wherein and whereby it named a lower lump-sum consideration than in its bid made in accordance with the terms of the invitation, and agreed that if certain savings should be affected in the construction of the required storage facilities at Pearl Harbor it would proportionately reduce the contract consideration in barrels of oil to be delivered by the United States. Said "Proposal B" further specified that in consideration of this concession the bidder, Pan American Petroleum and Transport Company, should have a certain prior right to become the lessee in leases for oil and gas thereafter to be made in petroleum reserve No. 1.

16. Without competitive bidding, and without authority of law, and pursuant to the conspiracy above set forth, said Albert B. Fall did award a contract pursuant to said invitation and said "Proposal B," to defendant Pan American Petroleum and Transport Company, and pursuant to said award said Albert B. Fall caused to be prepared a certain [9] agreement which was executed and delivered on behalf of the United States of America by Edward C. Finney, Acting Secretary of the Interior, acting in that behalf under the instructions of the said Albert B. Fall, and by Edwin Denby, Secretary of the Navy, and on behalf of Pan American Petroleum and Transport Company by its proper officers, on the 25th day of April, 1922. A true copy of said agreement is hereto annexed and made a part hereof, marked Exhibit "B."

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17. Said contract or agreement not only operated as an agreement of sale and delivery of all naval royalty oil due and to become due to the United States out of naval reserves No. 1 and No. 2 in the State of California, but also gave to defendant Pan American Petroleum and Transport Company a prior right or option to become the lessee of any oil or gas rights which might be leased on a certain easterly portion of naval petroleum reserve No. 1. Said agreement was purposefully and intentionally so drawn in pursuance of said conspiracy in order to insure to defendant, to the great detriment and in fraud of the rights of the United States, any and all oil which might be found within said naval reserve No. 1, to prevent any other person or corporation from becoming lessee of said valuable oil and gas, or any part thereof, and to prevent competitive bidding or any open competition for said naval leases.

18. In connection with and as a part or supplement of said agreement, Exhibit "B" hereof, the Assistant Secretary of the Interior of the United States, [10] as Acting Secretary, with the knowledge and by the direction of said Albert B. Fall, did thereafter deliver to defendant, Pan American Petroleum and Transport Company, a certain letter, a true copy whereof is hereto annexed, made a part hereof, and marked Exhibit "E." Said letter was written as a result of said conspiracy, was a fraud upon the rights of the United States, was intended to and, on its face, did confer upon said

defendant an especially valuable right to a lease to the lands last described in paragraph 5 hereof, which lands were then known to contain great and valuable deposits of petroleum and were in close proximity to other lands then actually producing great quantities of petroleum. Said letter was written with the intent that said land should be acquired by said defendant secretly, without competitive bidding, without authority of law and in violation of law, and wholly without right or authority in the officers of the United States who executed the same.

19. At the time of the execution of said agreement, Exhibit "B" hereof, said Fall and said Doheny, and the other officers and the directors of defendant, well knew and understood that the oil accruing to the United States as royalty from existing leases on naval reserves No. 1 and No. 2 would be wholly insufficient to pay defendant Pan American Petroleum and Transport Company for the oil and the structures covered by said agreement within any reasonable time, if ever. They further well knew and understood that there was a vast amount of valuable oil and gas contained [11] in naval reserve No. 1 which under the terms of said agreement could be leased to said defendant or its nominee without competitive bidding and at such price or prices, and upon such terms, as the said Fall and the said Doheny might agree. They agreed and conspired that thereafter, under the pretense that royalty oil was not accruing fast enough to press forward the construction work

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at Pearl Harbor, Hawaii, a further construction contract and a further lease should be made which should turn over to said defendant the whole remaining unleased portion of naval reserve No. 1, amounting to approximately 32,000 acres.

20. Pursuant to said plan and conspiracy, and pursuant to the terms of said letter, Exhibit "E" hereof, said Albert B. Fall did cause to be executed and delivered to defendant Pan American Petroleum and Transport Company, and said company did also execute and deliver, on June 5, 1922, a certain lease covering the lands last described in paragraph 5 hereof, a true copy whereof is hereto annexed marked Exhibit "F" and made a part hereof.

21. Pursuant to said plan and conspiracy, said Albert B. Fall did, on or about November 30, 1922, ostensibly enter into negotiation with said defendant Pan American Petroleum and Transport Company for the consummation of a contract supplement to the above-mentioned agreement of April 25, 1922, and for the consummation of a lease of all the remaining unleased oil and gas lands in naval reserve No. 1, [12] being the lands hereinabove in paragraph 5 first described.

22. Immediately thereafter, on, to wit, December 11, 1922, the said Fall, in pursuance of said conspiracy, did cause two certain agreements to be executed and delivered, the one thereof purporting to be an agreement supplemental to the agreement of April 25, 1922, and the other thereof purporting to be a lease upon the lands first described in para-

graph 5 hereof, being all of the then unleased lands in naval reserve No. 1, amounting to about 32,000 acres. A true copy of the said supplement agreement is hereto annexed, made a part hereof, and marked Exhibit "C," and a true copy of the said lease is hereto annexed, made a part hereof, and marked Exhibit "D."

23. Solely for the convenience of said defendant Pan American Petroleum and Transport Company, said lease Exhibit "D" was at its instance and request made to defendant Pan American Petroleum Company, a corporation the entire stock of which is and was owned by Pan American Petroleum and Transport Company, and which was and is wholly and absolutely owned, controlled, and managed by the latter company. Said lease is in effect and in contemplation of law therefore held, owned, controlled, and constitutes an asset of defendant Pan American Petroleum and Transport Company.

24. Said supplemental contracts of April 25, 1922, Exhibit "E" herein, and of December 11, 1922, Exhibit "C" herein, and said leases of June 5, 1922, Exhibit [13] "F" herein, and of December 11, 1922, Exhibit "D" herein, were all, pursuant to said conspiracy, entered into secretly and privately, and no advertisement was made of the intention to make any of the same, and no competitive bidding was had for any of them.

25. The lands covered by said leases of June 5, 1922, Exhibit "F" herein, and of December 11, 1922, Exhibit "D" herein, are underlaid by vast quantities of oil and gas of enormous value, and

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said leases so made insured to the lessee enormous profits which have been estimated by said Doheny at not less than \$100,000,000.

26. Said leases of June 5, 1922, Exhibit "F" herein, and of December 11, 1922, Exhibit "D" herein, constitute liens, encumbrances, and clouds upon the title of plaintiff to said lands, which plaintiff is entitled to have removed; were and are the result of an unlawful conspiracy; were and are a fraud upon the United States of America; are illegal, null, void, and of no force or validity, by reason of the matters and things herein set forth; and for the further reason that the same were executed without authority in the officers of the United States who purported to execute them, and were wholly unauthorized by law or any statute, and should be delivered up to the United States to be canceled.

27. Under color of said agreement of April 25, 1922, Exhibit "B" hereof, and supplemental agreement of December 11, 1922, Exhibit "C" hereof, defendant Pan American Petroleum and Transport Company has received all of the royalty oil due the United [14] States under all leases upon naval petroleum reserves No. 1 and No. 2 in the State of California, including the royalty oil accruing under the leases of June 5, 1922, Exhibit "F," and of December 11, 1922, Exhibit "D," under color and pretense of an exchange therefor for the matters and things set forth to be furnished, erected, constructed, made, and done by said defendant under said agreements of April 25, 1922,

and December 11, 1922, Exhibits "B" and "C" hereof.

28. Under color of said leases Exhibits "F" and "D" hereof, said defendant Pan American Petroleum and Transport Company, acting by itself and through its owned and controlled subsidiary, Pan American Petroleum Company, has been and is trespassing upon the lands described in paragraph 5 hereof, has extracted, taken, and received crude oil and gas from Naval Petroleum Reserve No. 1, and continues to drill wells and to extract therefrom oil and gas, and thereby has defrauded and continues to defraud the United States of America. Under color of said leases said defendants will continue to drill wells and to remove oil and gas and will continue to trespass upon said lands unless and until restrained by your Honorable Court, and continuance of said trespasses and operations will work great and irreparable damage to plaintiff unless restrained.

29. Said agreements of April 25, 1922, Exhibits "B" and "E" hereof, and of December 11, 1922, Exhibit "C" hereof, and said leases of June 5, 1922, Exhibit "F" hereof, and of December 11, 1922, Exhibit "D" hereof, were obtained by bribery, were the result of said [15] unlawful conspiracy, were and are a fraud upon the United States of America, are illegal, null, void, and of no force or validity, by reason of the matters and things hereinabove more fully set forth, and for the further reason that the same were executed without authority in the officers of the United States who pur-

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ported to execute them, and were wholly unauthorized by law or any statute, and should be delivered up to the United States to be canceled.

30. Defendants should cease to trespass upon the lands described in paragraph 5 hereof, should deliver up said agreements of April 25, 1922, and of December 11, 1922, Exhibits "B," "E," and "C" hereof, and said leases of June 5, 1922, and of December 11, 1922, Exhibits "F" and "D" hereof, to be canceled, should make discovery of all that they and each of them have received under each and every of said agreements and leases, and should render to plaintiff a full, true, and accurate accounting of all oil and gas received by them or either of them under the terms of said agreements and leases, and of all matters and things and all items of account showing their and each of their transactions under said agreements and leases from the dates of said papers respectively.

31. Said leases of June 5, 1922, Exhibit "F" hereof, and of December 11, 1922, Exhibit "D" hereof, were made only and solely pursuant to said agreements of April 25, 1922, and of December 11, 1922, Exhibits "B," "E," and "C" hereof, and said transactions under said agreements, and said leases, and the writings themselves, [16] form but a single transaction and are so inextricably bound together that plaintiff cannot obtain full relief except by the joinder of both corporate defendants, who are in fact and in law but one defendant.

32. Wherefore plaintiff is without an adequate remedy at law, in that there is no remedy at law

as complete, practicable, and efficient to the end of prompt administration of justice as the remedy in equity, and the intervention of a court of equity will prevent a multiplicity of suits.

Plaintiff therefore prays:

(1) That your Honorable Court will grant a writ of injunction, temporary until final hearing and perpetual thereafter, enjoining and restraining the defendants and each of them, their officers, servants, agents, and employees, from further drilling wells or operating under said leases of June 5, 1922, and of December 11, 1922, or performing further work of any sort thereunder, or under any contract or order of any department of the United States pursuant to said leases.

(2) That your Honorable Court will appoint a receiver or receivers to take possession and control of the lands in the bill described and all property thereon situate, and of all oil and gas thereon produced, and in his or their discretion to sell and turn to account the same, and hold and store the same or safely hold the proceeds thereof pending the final termination of this cause and until the further order [17] of the Court in the premises. That your Honorable Court grant a final injunction directed to the defendants and each of them, their officers, servants, agents, and employees, enjoining and commanding them and each of them to cease from further trespassing upon the lands described in the bill, and to cease to harass and molest the plaintiff in the quiet and peaceable enjoyment thereof.

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(3) That your Honorable Court enter a decree declaring the said agreements of April 25, 1922, and December 11, 1922, and the leases of June 5, 1922, and of December 11, 1922, set forth in the bill, to be null, void, and of no effect.

(4) That your Honorable Court enter a decree enjoining and commanding the defendants, their officers, and directors, to surrender and deliver the said agreements and said leases to the proper officer of the United States of America to be canceled.

(5) That your Honorable Court will enter a decree that said defendants and each of them be required to make full, just, true, and complete account for all oil and other minerals produced and converted to their or either of their use, and for any waste committed by them or either of them under color or cover of said agreements of April 25, 1922, and December 11, 1922, and said leases of June 5, 1922, and December 11, 1922, and that judgment may be rendered against the defendants for the amount shown to be due by each of them to the United States of America by such accounting. [18]

(6) Such other and further relief as to your Honorable Court shall seem meet in the premises.

ATLEE POMERENE,

OWEN J. ROBERTS,

JOSEPH C. BURKE,

Solicitors for Plaintiff, United States of America.

United States of America,
District of Columbia,—ss.

Personally appeared before me, the undersigned, a notary public duly commissioned for the District of Columbia, Atlee Pomerene and Owen J. Roberts, special counsel for the United States, the plaintiff in the above cause, who, being duly sworn as to the truth of the allegations made in the above bill, say that they have read the foregoing bill and know its contents, and that so far as the matters therein stated are of their own knowledge, the same are true, and that as to all matters therein stated the same are true to the best of their knowledge, information, and belief.

ATLEE POMERENE.

OWEN J. ROBERTS.

Sworn to and subscribed before me this 16 day of April, A. D. 1924.

[Seal]

META A. FARELCONER,

Notary Public.

My commission expires Jan. 29, 1926. [19]

EXHIBIT "A."

EXECUTIVE ORDER.

Under the provisions of the Act of Congress approved February 25, 1920 (41 Stat. 437), authorizing the Secretary of the Interior to lease producing oil wells within any naval petroleum reserve; authorizing the President to permit the drilling of additional wells or to lease the remainder or

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any part of a claim upon which such wells have been drilled, and under authority of the Act of Congress approved June 4, 1920 (41 Stat. 912), directing the Secretary of the Navy to conserve, develop, use, and operate, directly or by contract, lease, or otherwise, unappropriated lands in naval reserves, the administration, and conservation, of all oil and gas bearing lands in naval petroleum reserves Nos. 1 and 2, California, and naval petroleum reserve No. 3 in Wyoming and naval shale reserves in Colorado and Utah, are hereby committed to the Secretary of the Interior subject to the supervision of the President but no general policy as to drilling or reserving lands located in a naval reserve shall be changed or adopted except upon consultation and in cooperation with the Secretary or Acting Secretary of the Navy. The Secretary of the Interior is authorized and directed to perform any and all acts necessary for the protection, conservation, and administration of the said reserves subject to the conditions and limitations contained in this order and the existing laws or such laws as may hereafter be enacted by Congress pertaining thereto.

WARREN G. HARDING.

The White House, May 31, 1921.

Copy sent: Mr. Mendenhall, Survey. Comr. G. L. O. Director, Mines. [20]

EXHIBIT "B."

[Endorsed]: No. B-100-Eq. U. S. vs. Pan Am. Pet. & Tr. Co. U. S. Exhibit No. 124. Filed

Oct. 27, 1924. Chas. N. Williams, Clerk. By Louis J. Somers, Deputy Clerk.

This agreement, made and entered into this 25th day of April, 1922, by and between the Pan-American Petroleum and Transport Company, a corporation organized and existing under the laws of the State of Delaware, having its principal place of business at New York City, State of New York, party of the first part (hereinafter designated as the contractor), and The United States of America, acting in this behalf by the Acting Secretary of the Interior, and the Secretary of the Navy, party of the second part (hereinafter designated The Government), for themselves, their successors and assigns—

Witnesseth, That by virtue of authority contained in and the policy expressed by applicable acts of Congress, and in accordance with Proposal B of the contractor dated April 14, 1922, the parties hereto have mutually covenated and agreed, and by these presents do mutually covenant and agree to and with each other as follows:

Article I. The contractor for the consideration hereinafter mentioned and contained, and under penalty of a bond in the penal sum of two hundred fifty thousand dollars (\$250,000), hereby covenants and agrees to faithfully and fully furnish all such materials, labor, or both, or other things, as may be called for in said Proposal B, and the specifications, or plans or drawings, or any other paper or document relating thereto and which by attachment hereto are intended to be and are thereby made

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a part of this agreement, and all of which relate to and are considered to call for, the delivery by the contractor, at the United States naval station at Pearl Harbor, Territory of Hawaii, of one million five hundred thousand (1,500,000) barrels of fuel oil, and the furnishing by said contractor of storage facilities for said fuel oil. The Government hereby agrees to accept as the penal bond above provided for the personal bond of Mr. E. L. Doheny in the sum of two hundred fifty thousand dollars (\$250,000) but it reserves the right to call later for a corporate bond, when and if in the judgment of the Secretary of the Interior such bond shall be deemed necessary or advisable, provided that if the cost of furnishing such bond by the contractor exceeds fifty-two thousand eight hundred dollars (\$52,800), then that number of barrels of basic crude oil equivalent in value to such excess shall be added to the amount of the proposed sum hereinafter agreed upon. [21]

Article II. It is the intention of the parties hereto to effect an exchange of crude oil which is unsuitable for fuel for the United States Navy, and which is produced from naval petroleum reserves Nos. 1 and 2, in the State of California, said crude oil being the property of the Government, for fuel oil suitable for the use of the United States Navy, to be delivered by the contractor at the United States naval station at Pearl Harbor, Territory of Hawaii.

Article III. The contractor hereby agrees to furnish one million five hundred thousand (1,500,-

000) barrels of fuel oil delivered into storage facilities to be constructed and erected by the contractor according to the specifications dated March 1, 1922, hereto attached and made a part hereof, in consideration of the delivery to said contractor of the lump sum of five million eight hundred seventy-eight thousand nine hundred five (5,878,905) barrels of crude oil from California naval petroleum reserves Nos. 1 and 2 of from 14 to 17.9 degrees (Baumé) gravity or crude oil in such other quantity and quality as shall be of equal value, which lump sum shall be termed the proposal sum. It is hereby mutually understood and agreed that said proposal sum is based upon the November-December, 1921, published field price of California crude oil of from 14 to 17.9 degrees (Baumé) gravity (\$1.10 per barrel), which for the purposes of this agreement shall be termed the reference price of basic crude oil, and upon the November-December, 1921, market price of fuel oil at Bay Point, California (\$1.50 per barrel), which for the purposes of this agreement shall be termed the reference price of fuel oil.

It is further understood and agreed that if on the date of delivery of a given number of barrels of basic crude oil by the Government to the contractor, the published field price of basic crude oil has changed from the reference price of basic crude oil, the Government shall be credited on account of the proposal sum, with a number of barrels of basic crude oil which bears to the actual number of barrels delivered the ratio which the published field

price on that date bears to the reference price of basic crude oil.

The contractor agrees in lieu of deliveries of basic crude oil to accept crude oil of any other gravity, which for the purposes of this agreement shall be termed particular crude oil, in such amounts as the Government may deliver. For such deliveries the contractor will credit the Government on account of the proposal sum, with a number of barrels of basic crude which bears to the number of barrels of particular crude actually delivered, the ratio which the published field price of such particular crude on the date of delivery bears to the reference price of basic crude. [22]

It is further mutually understood and agreed that if on the date of delivery of a given amount of fuel oil by the contractor to the Government, the Bay Point, California, market price of fuel oil shall be higher than the reference price of fuel oil, there shall be added to the proposal sum an increment equal to the one hundred thousandth part of nine hundred and nine times the number of barrels in said delivery, multiplied by the number of cents by which the Bay Point, California, market price on such date is higher than the reference price of fuel oil.

It is further mutually understood and agreed that if on the date of delivery of a given amount of fuel oil by the contractor to the Government the Bay Point California market price of fuel oil shall be lower than the reference price of fuel oil, there shall be subtracted from the proposal sum a decrement

equal to the one hundred thousandth part of nine hundred and nine times the number of barrels in said delivery, multiplied by the number of cents by which the Bay Point California market price on such date is lower than the reference price of fuel oil.

The parties hereto mutually agree that the difference between credits and debits made by the contractor to the Government in barrels of basic crude oil on account of the proposal sum, for crude oil received by the contractor on the one hand and storage facilities constructed on the other, shall bear interest in barrels of basic crude oil at the rate of five per cent per annum determined on monthly balances; the proposal sum to be increased by the number of barrels of basic crude oil representing interest when the debits exceed the credits and diminished when the credits exceed the debits, provided, however, that no interest shall be calculated for debits on account of fuel oil delivered to the Government at Pearl Harbor, as distinguished from storage facilities constructed.

Article IV. The Government hereby agrees to deliver at the place of production, to the contractor, month by month, all of the royalty oil that may be furnished by its lessees in said naval petroleum reserves Nos. 1 and 2, until all claims of the contractor under this contract are satisfied.

Article V. In the event that production from the leases heretofore granted or which may be hereafter granted in said naval petroleum reserves Nos. 1 and 2 shall decrease to such an extent that the time of this contract shall be unduly prolonged, then the

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Government will, in the discretion of the Secretary of the Interior, grant additional leases on such lands as he may designate in naval petroleum reserve No. 1 as shall be sufficient to maintain total deliveries of royalty oil under this contract at the approximate rate of five hundred thousand barrels (500,000) per annum. [23]

Article VI. Upon the execution and delivery to the contractor of a copy of this contract, the Government agrees to deliver to said contractor, and the contractor agrees to take on account of the proposal sum aforesaid all royalty oil which has been accumulated from leases in naval petroleum reserves Nos. 1 and 2 and which is now being held in storage by certain pipe-line companies.

Article VII. All and every expense incident to the movement of the crude oil from the field and the movement of the fuel oil to storage shall be borne by the contractor, who shall be permitted to supply the fuel oil in storage at Pearl Harbor, Territory of Hawaii, in any amount he may elect, provided that the total amount required to be supplied under this contract be furnished and the transaction completed within the time that the Government has furnished sufficient royalty oil to pay for the fuel oil and storage facilities herein called for.

Article VIII. It is hereby mutually agreed that the fuel oil to be delivered by the contractor shall be jointly gaged and tested by the contractor and the Government in the storage facilities which are to be erected at Pearl Harbor, Territory of Hawaii, said gaging and testing to be governed by

the specifications for fuel oil attached hereto and made a part hereof. In the event of a disagreement between the Government and the contractor as to the results of said gaging and testing a referee shall be selected by the two parties, whose decision as to the question in dispute shall be final.

Article IX. In the event that the vessels of the contractor transporting fuel oil shall be delayed in discharging said fuel oil at the place of storage at Pearl Harbor, Territory of Hawaii, because of the acts or omissions of the Government or of its officers, agents, or employees, the contractor shall be allowed demurrage at the rates and under the conditions prevailing in commercial transactions, the amounts thus allowed to be calculated in barrels of oil and added to the proposal sum.

Article X. Should the number of concrete piles called for in connection with providing the storage facilities at Pearl Harbor be in excess of or less than the number indicated in the drawings and specifications, it is hereby mutually agreed that the amount by which the proposal shall be increased or decreased for each concrete pile in excess or less than the number indicated in the drawings, based on a length of 45 feet per pile, shall be one hundred twenty-two and seventy-three hundredths (122.73) barrels of basic crude oil. [24]

Should any of the concrete piles hereinabove referred to be in excess of or less than 45 feet in length, the parties hereto agree that the amount by which the proposal sum shall be increased or decreased for each linear foot in excess of or less than

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45 feet per pile shall be 4.55 barrels of basic crude oil for all increases, 2.73 barrels basic crude oil for all decreases, the measurement to be made of each separate pile and not upon the average length of piles in the entire structure or any part thereof.

If the actual dredging required in connection with providing the storage facilities shall differ in amount from that estimated in section 160 of the specifications it is hereby agreed that the amount per cubic yard (based on dredging as measured in place), by which the proposal sum shall be increased or decreased shall be six hundred thirty-six thousandths (0.636) of a barrel of basic crude oil.

It is further agreed that for any dredging that shall be found to consist of rock, the proposal sum shall be increased 4.55 barrels of basic crude oil per cubic yard, based on dredging as measured in place.

Article XI. It is further mutually understood and agreed that if during the life of this contract future leases shall be granted by the Government within that portion of California naval petroleum reserve No. 1, situated in townships 30 and 31 south, range 24 east, Mount Diablo base and meridian, the contractor shall first be called upon by the Secretary of the Interior to meet such drilling conditions and to pay such royalties as the Secretary may deem just and proper, and in the event of his acceptance of such conditions and of his agreement to pay such royalties, the contractor shall be granted by the Government a preferential lease on such tracts as the Secretary of the Interior may decide to lease. In the event of the failure of the contractor to agree to

the conditions and royalties as proposed by the Secretary of the Interior, then said lease or leases may be offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in said bidding.

Article XII. The contractor hereby agrees that in the event of his effecting the construction and erection of the storage facilities herein called for at a less cost than three million one hundred and ninety-seven thousand and eighty-six barrels of basic crude oil at reference price he will give to the Government the benefit of this saving as determined by agreement between the contractor and the Secretary of the Interior by crediting such saving in barrels of basic crude oil on account of the proposal sum. [25]

In witness whereof the undersigned have hereunto subscribed their names and affixed their seals on the day and year first above written.

PAN AMERICAN PETROLEUM &
TRANSPORT COMPANY.

J. M. DANZIGER,

Vice-Pres.

Attest: O. D. BENNETT,

Secretary.

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Two witnesses, with address to each signature:

GEO. W. JOHNSON, Jr.,
602 W. 146 St., N. Y. C.
W. A. O'NEILL,

107 Clermont Ave., Brooklyn, N. Y.,

As to J. M. Danziger and O. D. Bennett:

THE UNITED STATES OF AMERICA,

By EDWARD C. FINNEY, ✓

Acting Secretary of the Interior,

By EDWIN DENBY, ✓

Secretary of the Navy,

For and on Behalf of the United States of
America.

PROPOSALS FOR EXCHANGE OF NAVAL
OIL—ALTERNATE PROPOSAL B.

The Secretary of the Interior, Washington, D. C.

Sir: The following proposals are submitted, pursuant to the letter of March 7, 1922, of the First Assistant Secretary of the Interior.

Item. 1.—The Pan American Petroleum & Transport Co. hereby proposes to furnish 1,500,000 barrels of fuel oil delivered into storage facilities, which said company hereby proposes to construct and erect ✓ in 500 days in accordance with the plans and specifications issued by the Department of the Interior under date of March 1, 1922, hereto attached and made a part hereof, in consideration of the delivery to said company, from Government leases in naval petroleum reserves No. 1 and No. 2 in California, of the lump sum of 5,878,905 barrels of crude oil of from 14 to 17.9 degrees Baumé gravity, or crude oil

in such other quantity and quality as shall be of equal value, which lump sum we shall term the proposal sum.

The above proposal sum is based upon the November-December, 1921, published field price of crude oil of 14 to 17.9 degrees Baumé gravity, which we shall term the reference price of basic crude, and upon November-December, 1921, Bay Point market price of fuel (\$1.50 per barrel), which we shall term the reference price of fuel.

(1) If on the date of delivery of a given number of barrels of basic crude by the Government to the company, the [26] published field price of basic crude has changed from the reference price of basic crude, the Government shall be credited on account of the proposal sum with a number of barrels of basic crude which bears to the actual number of barrels delivered the ratio which the published field price on that date bears to the reference price of basic crude.

(2) The contractor agrees in lieu of deliveries of basic crude, to accept crude of any other gravity, which we shall term particular crude, in such amounts as the Government may deliver. For such deliveries the company will credit the Government on account of the proposal sum with a number of barrels of basic crude which bears to the number of barrels of particular crude actually delivered the ratio which the published field price of such particular crude on the date of delivery bears to the reference price of basic crude.

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(3) If on the date of delivery of a given amount of fuel by the company to the Government, the Bay Point market price of fuel shall be higher than the reference price of fuel, there shall be added to the proposal sum an increment equal to the one hundred-thousandth part of nine hundred and nine times the number of barrels in said delivery, multiplied by the number of cents by which the Bay Point market price on such date is higher than the reference price of fuel.

If on the date of delivery of a given amount of fuel by the company to the Government the Bay Point market price of fuel shall be lower than the reference price of fuel, there shall be subtracted from the proposal sum a decrement equal to the one hundred-thousandth part of nine hundred and nine times the number of the barrels in said delivery, multiplied by the number of cents by which the Bay Point market price on such date is lower than the reference price of fuel.

(4) The company proposes that the fuel shall be gauged jointly by the company and the Government or that an independent gauger be agreed upon, the fuel to be gauged and tested for quantity and quality at the tanks where delivery is made.

(5) (a) As called for in the proposal, the amount by which the proposal sum shall be increased or decreased for each concrete pile in excess of or less than the number indicated in the drawings, based on a length of 45 feet per pile, is 122.73 barrels of basic crude.

(b) As called for in the proposal, the amount by

which the proposal sum shall be increased or decreased for each linear foot of concrete pile in excess of or less than 45 feet per pile is, amount to be added, 4.55 barrels of basic crude; amount to be deducted, 2.73 barrels of basic crude.

NOTE.—Our bid upon this item is based upon each separate pile and not upon average length of piles in the entire structure or any part of it. [27]

The difference between the amount to be added and the amount to be deducted is due to the necessity of increasing the size of piles on account of additional length with consequent increase in amount of reinforcement and increased cost in handling and driving.

(c) As called for in the proposal, the amount per cubic yard (based on dredging as measured in place) by which the proposal sum shall be increased or decreased as the actual dredging required may differ in amount from that estimated in the bid, as called for in section 160 of the specifications, is 0.636 barrel of basic crude.

(d) As called for in the proposal, the amount per cubic yard (based on dredging as measured in place) by which the proposal sum shall be increased for any dredging which shall be found to consist of rock is 4.55 barrels of basic crude.

(e) As called for in the specifications, the type of reinforcement for concrete in quay wall will be square deformed steel bars satisfactory to the Navy Department.

(6) The company proposes that the difference between credits and debits made by it to the Govern-

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ment in barrels of basic crude on account of the proposal sum for crude oil received by the company on the one hand and storage facilities constructed on the other, shall bear interest in barrels of basic crude at the rate of 5 per cent per annum, determined on daily balances. The proposal sum will be increased by the number of barrels of basic crude representing interest when the debits exceed the credits and diminished when the credits exceed the debits, but debits for fuel delivered to the Government, as distinguished from storage facilities constructed, shall not be included in interest calculations.

(7) The company proposes in the event that it succeeds in effecting the construction and erection of the storage facilities for a lesser cost than represented by the number of barrels of basic crude entering into its estimate for such construction and erection, on which the proposal sum is based, that it will give to the Government the benefit of the saving by crediting such saving in barrels of basic crude on account of the proposal sum.

(8) The whole of this proposal B is made on the condition that if it is accepted the Secretary of the Interior will agree that the company be given preferential right to lease from the Government any lands within naval petroleum reserve No. 1, California, which the Government may decide to lease.

Very respectfully yours,

PAN AMERICAN PETROLEUM &
TRANSPORT CO.

J. M. DANZIGER,
Vice-President. [28]

EXHIBIT "C."

This agreement made and entered into this 11th day of December, 1922, by and between the Pan American Petroleum & Transport Company, a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in New York City, State of New York, party of the first part (hereinafter designated as the contractor) and the United States of America, acting in this behalf by the Secretary of the Interior and the Secretary of the Navy, party of the second part (hereinafter designated the Government) for themselves, their successors, and assigns.

Witnesseth, whereas a certain contract was entered into by the above-named parties dated April 25, 1922, providing for the exchange of royalty crude oil belonging to the Government and produced from naval reserves Nos. 1 and 2 in the State of California for fuel oil in storage at Pearl Harbor, T. H., including tanks and incidental facilities;

And whereas, in accordance with the plans of the General Board of the Navy, it is now desired to fill said tanks as promptly as they are individually completed and also to procure for the Navy additional amounts of fuel oil and other petroleum products in storage at Pearl Harbor, T. H., and elsewhere, and the Secretary of the Navy in his letter of November 29, 1922, copy of which is hereto attached and made a part hereof, has requested the Secretary of the Interior as administrator of the naval petro-

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leum reserves to arrange for such additional fuel oil and other petroleum products in storage through exchange therefor of additional royalty crude oil belonging to the Government in said California naval reserves, the probable cost of the additional products and storage immediately planned for being estimated at fifteen million dollars, more or less;

And whereas said contractor has expressed a willingness to furnish the desired amounts of fuel oil and other petroleum products in storage in exchange for crude oil in the field;

And whereas the furnishing of such additional amounts of fuel oil and other products in storage on the basis of exchange for the Government royalty crude oils can not be accomplished from the present leases in the California naval reserves;

And whereas under the terms of said contract of April 25, 1922, contractor is granted preferential right to leases to certain lands in naval reserve No. 1 on such terms and conditions [29] as may be determined by the Secretary of the Interior;

And whereas contractor is planning to provide refinery facilities at Los Angeles, California, for 10,000 barrels per day, to be increased to 20,000 per day as soon as the situation justifies, together with pipe lines connecting the leases in the field and the refinery and docks, and to erect storage to the amount of 2,000,000 barrels or more;

Now, therefore, the following agreement, supplemental to the said contract of April 25, 1922, is hereby entered into by and between the parties hereto:

Article I. Contractor agrees for the considerations herein mentioned and contained, and under penalty of the bond furnished in connection with said above-mentioned contract of April 25, 1922, in the sum of \$250,000, which bond is hereby made to guarantee contractor's compliance with the terms and conditions of this present agreement, to which the guarantor on said bond, E. L. Doheny, has assented in the agreement signifying such assent hereto attached to—

1. Provide the fuel oil required to be furnished under said contract of April 25, 1922, and to fill the storage tanks therein called for when, and as directed by the Secretary of the Interior.

2. Construct for the Government at Pearl Harbor, T. H., such storage facilities for crude oil products in addition to those covered by the above-mentioned contract of April 25, 1922, as and when the Government may require, up to 2,700,000 barrels, and in accordance with such plans and specifications as the Government may furnish, such facilities to be constructed for and furnished to the Government at the cost thereof and without profit to contractor. Contractor further agrees, if requested by the Government, to complete the storage facilities referred to in this paragraph within two years from date of receipt of Government's request accompanied by plans and specifications. Contractor will call for bids for the facilities referred to in this section and section 7 of this article and award contracts to the lowest responsible bidders, subject to the supervision and direction of the Gov-

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ernment, or will handle the construction work in such other manner as the Government may desire. ^u

3. Furnish fuel oil in accordance with the specifications attached to the aforesaid contract of April 25, 1922, and deliver same into the storage facilities referred to in the preceding paragraph hereof and to deliver said fuel oil into the storage facilities as and when they are completed unless otherwise directed by the Government, irrespective of whether or not at that time the Government shall have delivered to contractors sufficient royalty crude oil to reimburse contractor; contractor to charge Government for such fuel oil delivered to [30] Pearl Harbor, T. H., at the Baypoint, California, market price thereof at date of delivery into contractor's or other tankers, plus the cost of transportation thereof from Baypoint, California, to Pearl Harbor, T. H., in contractor's or other tankers, such transportation charge to be at going rates.

4. Furnish the petroleum products other than fuel oil when required by the Navy for storage at Pearl Harbor, T. H., and not exceeding in amount the quantities mentioned in the above referred to letter of the Secretary of the Navy dated November 29, 1922, such products to conform to specifications to be furnished by the Government and the Government to be charged by contractor for such products on the basis of the contractor's current sales price for such products of like grade and in similar quantity, and in the event that it becomes necessary for the contractor to purchase any such products for purpose of making this exchange such purchased

products shall be valued at their net cost to him, the Government to be charged by contractor for transporting such products to Pearl Harbor, T. H., in contractor's or other tankers at going rates. In no case shall the charge to the Government for these petroleum products exceed the then current prices under Navy contracts for similar products, and contractor shall have the privilege to fill these requirements, if he so elects, through contracts placed by the Navy Department.

5. Furnish without charge until expiration of this contract storage for 1,000,000 barrels of fuel oil adjacent to refinery at Los Angeles, California, and place same in the custody of the Government; and to fill same with fuel oil for the Navy at such time as the Government's royalty oil from the California naval reserves shall have been paid for all work done and crude-oil products furnished at Pearl Harbor, and shall therefore be available as exchange for said 1,000,000 barrels of fuel oil, and to bunker Government ships from said 1,000,000 barrels of fuel oil at cost, and also to carry during the life of this contract all the royalty oils derived from the leases in naval petroleum reserves Nos. 1 and 2 from said reserves to the refinery or tidewater at Los Angeles, California, free from any pipe-line charge.

6. To maintain subject to demands of the Navy, for a period of fifteen years from the date of this contract 3,000,000 barrels of contractor's C grade fuel oil, specifications for which are hereto attached and form a part of this contract, at Atlantic coast points, oil from such supply to be drawn by the

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Navy in case it is desired from the following storage depots of contractor, each of the respective storage capacities stated, or from any additional storage which may be constructed by the contractor in the same region, the [31] Government to be promptly notified by contractor of all new storage so constructed:

* * * * *

Upon written notice from the Government contractor will within thirty days set aside and hold for the Navy any amount of such fuel oil up to 60% of the capacity of any of such depots, not exceeding a total of 3,000,000 barrels, said 60% to be in tanks which at or before the expiration of the notice referred to will be allocated to the Navy and be subject to such supervision and guarding as the Navy may demand while so allocated: Provided, That after such oil is so set aside the Government shall pay to contractor one cent per barrel per month as storage charge until and unless such oil is purchased or released by the Navy and such allocation shall not be maintained for a longer period than six months.

Provided further, That if and when such oil is purchased by the Navy contractor shall be paid therefor at market prices from current available Navy funds, and no charge shall be made against the Government under this section except for and on account of oil so set aside.

7. Furnish such reasonable amount of crude-oil products and storage facilities therefor at such points as shall be designated by the Government

under terms and conditions similar to those provided in sections 2, 3, and 4 of this article, when the royalty oils delivered by the Government to the contractor shall have been sufficient to reimburse contractor for all claims on account of oil furnished and work done at Pearl Harbor, T. H., as provided for in the above-mentioned contract of April 25, 1922, and for the additional work and crude-oil products hereinbefore covered specifically by this present contract.

8. Give the Navy the privilege of purchasing any additional available fuel oil produced from Government lands in the California naval reserves which it may require above the amount which it is entitled to in exchange for its royalties, at 10% less than market price at tidewater, said market price to be determined from time to time in such manner as may hereafter be agreed upon by the parties hereto, payment therefor to be made from current available Navy funds.

9. Sell to the Navy, manufactured products from the California refinery, to wit: Gasoline, kerosene, lubricating oils, greases, etc., at 10% less than market prices, said market prices to be determined from time to time in such manner as may hereafter be agreed upon by the parties hereto, payment therefor to be made from current available Navy funds. [32]

Article II. For the considerations herein mentioned and contained, to wit, the furnishing of oils in storage and facilities and options as specified above, the Government agrees:

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A. To deliver in exchange to contractor all royalty oil, gas, and casing-head gasoline owned by it and produced or to be produced from naval reserves Number 1 and 2 in the State of California, after a sufficient quantity of said crude oil therefrom is delivered to contractor to satisfy the Government's obligations under the existing contract of April 25, 1922, above referred to, until the Government's obligations under this instant contract are discharged, and in any event for a period of 15 years from the date of the expiration of said contract of April 25, 1922, the Government to be given credit by contractor for such crude oil delivered by the Government at the published field price thereof on date of delivery and for such gas and casing-head gasoline at the prices and under the conditions fixed in the various leases any surplus of Government credits thus accruing are to be satisfied by delivery of fuel oil or other petroleum products, by construction of additional storage facilities, or to be payable in cash, as the Government may at that time elect.

B. To lease, and it does hereby lease, in accordance with the contract of lease dated this day, and hereto attached, to the Pan American Petroleum Company, a corporation existing under and by virtue of the laws of the State of California, and having its principal place of business in the city of Los Angeles, California, and which corporation is a wholly owned subsidiary of contractor, Government lands in naval reserve Number 1 in the State of California described in said contract of lease.

Article III. It is mutually agreed by and between the parties hereto that the gaging and testing of all crude-oil products to be delivered hereunder shall be in accordance with the provisions of article 8 of the above-mentioned contract of April 25, 1922, except that upon notice by the Government such gaging and testing shall be done at point of shipment.

It is further agreed by and between the parties hereto that the difference between credits and debits made by contractor to the Government for crude oil received by the contractor on the one hand and expenditures made by contractor for storage facilities and crude-oil products delivered by him on the other shall bear interest at the rate of five per cent per annum, determined on monthly balances; provided that credits made by contractor for crude oil delivered by Government shall first apply in reduction of any interest due contractor by Government, and provided that this agreement shall modify that portion of article 3 of the above-mentioned [33] contract of April 25, 1922, referring to interest on debits on account of fuel oil delivered at Pearl Harbor, T. H., as distinguished from storage facilities constructed, to the effect that interest on said debits shall be allowed contractor.

It is further agreed that no Member or Delegate to Congress or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior shall be admitted to

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any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of section 3741 of the Revised Statutes of the United States, and sections 114, 115, and 116 of the codification of the penal laws of the United States, approved March 4, 1919 (35 Stat. 1109), relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

In witness whereof—

THE UNITED STATES OF AMERICA.

By ALBERT B. FALL,
Secretary of the Interior.

By EDWIN DENBY,
Secretary of Navy.

PAN AMERICAN PETROLEUM &
TRANSPORT CO.

By E. L. DOHENY,
President.

Witnesses:

JOS. J. COTTEE.

J. C. ANDERSON. [34]

EXHIBIT "D."

Serial ———

LEASE OF OIL AND GAS LANDS UNDER
THE ACT OF JUNE 4, 1920.

This indenture of lease, entered into, in triplicate, as of the 11th day of December, 1922, by and between the United States of America, acting in this behalf by the Secretary of the Interior of the United States and the Secretary of the Navy of the United States, party of the first part, hereinafter

called the lessor, and the Pan American Petroleum Co., a corporation of the State of California, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the act of Congress approved June 4, 1920, entitled "An act making appropriations for the naval service for the fiscal year ending June 30, 1921, and for other purposes,"

Witnesseth:

Sec. 1. Purposes.—The lessor in consideration of royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits for a period of 20 years from the date hereof and so long thereafter as oil or gas is produced in paying quantities from said lands in or under the following-described tract of lands situated in the naval petroleum reserve No. 1, California, and more particularly described as follows:

Mount Diablo base and meridian—T. 30 S., R. 22 E., all of sec. 24. T. 30 S., R. 23 E., all of sec. 10, all of sec. 12, all of secs. 14 and 15, north $62\frac{1}{2}$ acres of NW. $\frac{1}{4}$ of sec. 16, NE. $\frac{1}{4}$, S. $\frac{1}{2}$ sec. 17, all of sec. 18, NE. $\frac{1}{4}$, S. $\frac{1}{2}$ sec. 19, all of secs. 20 to 30, inclusive, all of secs. 32 to 35, inclusive. T. 31 S., R. 23 E., all of secs. 1 to 4, inclusive, all of secs. 10 to 12, inclusive, N. $\frac{1}{2}$ of sec. 13, all of sec. 14. T. 30 S., R. 24 E., all of sec. 18, all of sec. 20, all of sec. 28, all of sec. 30, all of sec. 32, W. $\frac{1}{2}$, W. $\frac{1}{2}$ E. $\frac{1}{2}$, west 147 feet of E. $\frac{1}{2}$ E. $\frac{1}{2}$ of sec. 34. T. 31 S., R. 24 E., S.

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$\frac{1}{2}$ of sec. 2, S. $\frac{1}{2}$, NW. $\frac{1}{4}$ of sec. 3, all of secs. 4 to 6, inclusive, N. $\frac{1}{2}$, SE. $\frac{1}{4}$ of sec. 7, all of secs. 8 to 12, inclusive, all of sec. 18, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof and also the right to construct and maintain upon, across, and under [35] any other public lands under the laws and regulations pertaining to the construction and maintenance of pipe lines across the public domain, such pipe line or pipe lines as may be necessary for the carrying out of the purposes hereof, together with such buildings, pumping stations, tanks, and other structures as may be necessary to the efficient and economical operation thereof.

Sec. 2. That in consideration of the foregoing the lessee hereby agrees:

(a) Bond.—To furnish a bond with approved surety in the penal sum of twenty-five thousand dollars (\$25,000), conditioned upon compliance with the terms of the lease.

(b) Wells.—To proceed with due diligence to drill a sufficient number of wells spaced in accordance with good practice; to produce all oil and gas that is practicable, with due regard to economy from the lands leased to the party of the second part and hereinbefore described in section 1: Provided, That lessee shall not be required to operate, including offset drilling, more than 10 strings of tools at any one time unless it shall be necessary to op-

erate more than 10 strings of tools in order to comply with the requirements hereinafter contained in this paragraph with respect to the offset drilling. The lessee further agrees to drill all necessary wells to offset the wells of others on adjoining land or deposits not the property of the United States, and on adjoining land operated under Government lease at 5 per cent royalty: Provided, however, That the lessee shall not be required to drill an offset to any producing well which does not produce at least an average of fifty (50) barrels per day for a period of 60 days after such well has been producing for 30 days: And provided further, That this offset provision does not apply to wells now drilled, or that may be drilled, on Government land located within the boundaries of naval reserve No. 1; to maintain in a state of production all wells producing oil or gas in paying quantities.

(c) Royalty and rents.—To pay the lessor during the continuance of this lease a royalty on all oil and gas produced from the land leased herein (except oil or gas used for development and production purposes on said land or unavoidably lost), as follows:

(1) For all oil produced of 30° Baumé or over:	Per cent.
On that portion of the average production per well not exceeding 50 barrels per day for the calendar month	12½
On that portion of the average production per well of more than 50	

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barrels and not more than 100 barrels per day for the calendar month $16\frac{2}{3}$

On that portion of the average production per well of more than 100 barrels and not more than 150 barrels per day for the calendar month 20
[36]

(1) For all oil produced of 30° Baumé or over—Contd. Per cent.

On that portion of the average production per well of more than 150 barrels and not more than 200 barrels per day for the calendar month 25

On that portion of the average production per well of more than 200 barrels and not more than 500 barrels per day for the calendar month 30

On that portion of the average production per well of more than 500 barrels per day for the calendar month 35

(2) For all oil produced of less than 30° Baumé:

On that portion of the average production per well not exceeding 50 barrels per day for the calendar month $12\frac{1}{2}$

On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month $14\frac{1}{2}$

On that portion of the average production per well of more than 100 barrels and not more than 150 barrels per day for the calendar month .	16 $\frac{2}{3}$
On that portion of the average production per well of more than 150 barrels and not more than 200 barrels per day for the calendar month.	20
On that portion of the average production per well of more than 200 barrels and not more than 500 barrels per day for the calendar month	25
On that portion of the average production per well of more than 500 barrels per day for the calendar month	30

Only wells which have a commercial production during at least part of the month shall be considered in ascertaining the average production above provided for the purpose of computing the royalty.

The lessee agrees to pay and deliver to the lessor as royalties under this lease a royalty on all gas and casing-head gasoline produced and sold from said lease, or used other than for drilling, production, and operation of the lease or unavoidably lost, as follows:

On gas, whether same shall be gas from which the casing-head gasoline has been extracted or otherwise, 12 $\frac{1}{3}$ per cent of the value thereof in the field where produced when the average production per day for the calendar month from the land leased

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is less than 3,000,000 cubic feet, and $16\frac{2}{3}$ per cent when the average daily production is 3,000,000 cubic feet or over.

On casing-head gasoline, $16\frac{2}{3}$ per cent of the value of the casing-head gasoline extracted from the gas produced and sold computed on the basis provided for in the operating regulations.

The value in the field where produced of gas and casing-head gasoline for royalty purposes, unless such gas or casing-head gasoline is disposed of under an approved sales [37] contract or other method as provided in subdivision (d) of this section shall be as fixed by the Secretary of the Interior.

In cases where the gas produced and sold has a value both for casing-head gasoline content and as dry gas from which the casing-head gasoline has been extracted, then the royalties above provided shall be paid on both of such values.

The lessor reserves the right to take the oil, gas, and casing-head gasoline in kind or to accept payment therefor. When the royalty oil is paid in kind such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced, unless otherwise agreed to by the parties hereto, at such times as may be required by the lessor: Provided, That the lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced: And provided further, That the said lessee shall be in no manner responsible or held liable for the loss or destruction of such oil in storage from causes over which the

lessee has no control; such royalties, whether in value or kind, shall be subject to reduction whenever the average daily production of any oil well shall not exceed 10 barrels per day if in the judgment of the lessor the wells can not be successfully operated upon the royalties fixed herein.

The lessee agrees that no drilling shall be done without the consent of the lessor first had and obtained on Government land within naval reserve No. 1 located west of the range line dividing range 24 east and range 23 east, excepting on sections 24, 25, 26, and 35, all in township 20 south, range 23 east, and sections 1 and 2, township 31 south, range 23 east, which sections may be drilled by the lessee. The lessee agrees to start drilling a sufficient number of wells properly to protect the aforesaid six sections from further drainage, as set forth in paragraph (b), section 2, hereof, such drilling to be commenced within a reasonable time: Provided, however, That the lessee is entitled and shall be required to drill a sufficient number of wells properly to protect any area within the lands covered by this lease lying west of the range line dividing said ranges 23 and 24 east, which may be drained from offset wells located on land not included in naval petroleum reserve No. 1, as set forth in paragraph (b), section 2, hereof.

The lessor and the lessee agree that the following described lands covered by this lease, to wit, S. $\frac{1}{2}$ sec. 28, SE. $\frac{1}{4}$ sec. 30, all of sec. 32, W. $\frac{1}{2}$ sec. 34, Tp. 30 S., R. 24 E., NW. $\frac{1}{4}$ sec. 3, N. $\frac{1}{2}$ sec. 4, N. $\frac{1}{2}$ sec. 5, NE. $\frac{1}{4}$ sec. 6, Tp. 31 S., R. 24 E., shall

continue subject to the existing agreement between the Secretary of the Interior and the Pacific Oil Co. with respect to drilling upon said land: Provided, however, That upon request of the lessee the Secretary of the Interior will give to the Pacific Oil Co. the six months' notice provided for in said [38] agreement, and upon the expiration of six months after the giving of such notice the lessee shall have the same rights with respect to drilling, etc., upon said lands as upon the other lands covered by this lease lying east of the range line dividing aforesaid ranges 23 and 24 east.

The lessor and lessee agree that for the purpose of supervision of drilling for and production of oil and gas and the computation of royalties the practices adopted by the Department of the Interior in the supervision of work under the act of Congress of February 25, 1920 (Public, No. 146, 1921), as set forth in the following:

1. Plan for conducting work under operating regulations to govern the production of oil and gas under the act of February 25, 1920 (Public, No. 146, 1921).

2. Circular No. 5, April 8, 1922, Department of the Interior, Bureau of Mines, method of determining the producing wells on a lease or permit for purposes of computing Government royalty. (Signed) F. B. Tough, supervisor oil and gas operations.

3. Leasing circular No. 3D, schedule adopted for royalties on gas and casing-head gasoline from Government leases under leasing act (Public, 146)

where royalties are not specified in lease or special contract with the Government shall, in so far as applicable, be applied to this lease.

The lessee further agrees:

(d) Sales contracts.—To file with the Secretary of the Interior copies of all sales contracts for the disposition of oil and gas and casing-head gasoline produced hereunder except for production purposes on the land leased, and in the event the United States shall elect to take its royalties in money instead of oil or gas, not to sell or otherwise dispose of the products of the land leased except in accordance with a sales contract or other method first approved by the Secretary of the Interior.

(e) Monthly statements.—To furnish monthly statements in detail in such form as may be prescribed by the lessor, showing the amount, quality, and value of all oil and gas produced and saved during the preceding calendar month as the basis for computing the royalty due the lessor. The leased premises and all wells, improvements, machinery, and fixtures thereon or connected therewith and all books and accounts of the lessee shall be open at all reasonable times for the inspection of any duly authorized officer of the department.

(f) Plat and reports.—To furnish when and at such times as the Secretary of the Interior shall require, in the manner and form prescribed by the Secretary of the Interior, a plat showing all development work and improvements on the leased lands and other related information, with a report

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as [39] to all buildings, structures, or other works placed in or upon said leased lands.

(g) Log of wells.—To keep a log in the form prescribed by the Secretary of all the wells drilled by the lessee, showing the strata and character of the ground passed through by the drill, which log or copy thereof shall be furnished to said lessor on demand.

(h) Diligence—Prevention of waste—Health and safety of workmen.—To exercise reasonable diligence in drilling and operating wells for the oil and gas on the lands covered hereby, while such products can be secured in paying quantities, unless consent to suspend operations temporarily is granted by the Secretary of the Interior; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessees to the oil sands or oil-bearing strata to the destruction or injury of the oil deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug securely any well before abandoning the same so as to effectually shut off all water from the oil or gas-bearing strata; not to drill any well within 200 feet of any of the outer boundaries of the lands covered hereby, unless the adjoining lands have been patented or the title thereto otherwise vested in private owners; to conduct all mining,

drilling, and related productive operations subject to the inspection of the lessor; to carry out at expense of the lessee all reasonable orders and requirements of lessor relative to prevention of waste and preservation of the property and the health and safety of workmen, and on failure to do so the lessor shall have the right to enter on the property to repair damage or prevent waste at the lessee's cost; to abide by and conform to regulations in force at the time the lease is granted covering the matters referred to in this paragraph: Provided, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

(i) Taxes and wages—Freedom of purchase.—To pay when due all taxes lawfully assessed and levied under the laws of the State upon improvements, oil and gas produced from the lands, hereunder, or other rights, property, or assets of the lessee; to accord all workmen and employees complete freedom of purchase, and to pay all wages due workmen and employees at least twice each month in the lawful money of the United States.

(j) Assignment.—This lease or any interest therein, as to all or any part of the lands covered thereby, may be assigned or sublet by the lessee, subject to the approval and consent [40] in writing, of the Secretary of the Interior first had and obtained.

Sec. 3. The lessor expressly reserves:

(a) Rights reserved—Easements and rights of way.—The right to permit for joint or several use

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easements or rights of way upon, through, or in the lands leased.

(b) Disposition of surface.—The right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing laws or laws hereafter enacted, in so far as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein.

(c) Helium.—The lessor reserves the right to take all helium from any gas produced under this lease, but the lessee shall not be required to extract and save the helium for the lessor; in case the lessor elects to take the helium, the lessee shall deliver at the well all gas containing same, or portion thereof, desired, to the lessor in the manner required by the lessor for the extraction of the helium in such plant or reduction works for that purpose as the lessor may provide, whereupon the residue shall be returned to the lessee with no substantial delay in the delivery of the gas produced from the well to the purchaser thereof: Provided, That the lessee shall not, as a result of the operation in this section provided for, suffer a diminution of value of the gas from which the helium has been extracted; the lessor further reserves the right to erect, maintain, and operate any and all reduction works and other equipment necessary for the extraction of helium on the premises leased.

Sec. 4. Surrender and termination of lease.—The lessee may, on consent of the Secretary of the Interior, first had and obtained in writing, sur-

render and terminate this lease upon payment of all royalties and other obligations due and payable to the lessor, and upon payment of all wages and moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made full provision for conservation and protection of the property; upon like consent had and obtained the lessee may surrender any legal subdivisions of the area included herein.

Sec. 5. Purchase of materials, etc., on termination of lease.—Upon expiration of this lease or the earlier termination thereof pursuant to the last preceding section, the lessee shall exercise due diligence in the removal of such materials, tools, machinery, appliances, structures, and equipment as the lessee shall elect: Provided, however, That the lessee shall not have the right to remove the casing in wells and other equipment or apparatus necessary for the preservation of the well or wells. Such materials, tools, machinery, [41] appliances, structures, and equipment which the lessee has not removed or has indicated within a reasonable period will not be removed from the land may be purchased by the lessor or another lessee on the payment to the lessee of such sum as may be fixed as a reasonable price therefor by a board of three appraisers, one of whom shall be chosen by the lessor, one by the lessee, and the other by the two so chosen.

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Sec. 6. Judicial proceedings in case of default.—If the lessee shall make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the general regulations, promulgated and in force at the date hereof, and such default shall continue for 90 days after service of written notice thereof by the lessor, then the lessor may institute appropriate judicial proceedings for the forfeiture and cancellation of this lease; but this provision shall not be construed to prevent the exercise by the lessor of any legal or equitable remedy which the lessor might otherwise have. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture or for the said cause occurring at any other time.

Sec. 7. Heirs and successors in interest.—It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon and every benefit shall inure to the heirs, executors, administrators, successors of, or assigns of the respective parties hereto.

Sec. 8. Unlawful interest.—It is further agreed that no Member or Delegate to Congress or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of section 3741 of the Revised Statutes of the United States and sections

114, 115, and 116 of the Codification of the Penal Laws of the United States, approved March 4, 1919 (35 Stat. 1109), relating to contracts, enter into and form a part of this lease so as the same may be applicable.

In witness whereof:

THE UNITED STATES OF AMERICA,

By ALBERT B. FALL,

Secretary of the Interior.

By EDWIN DENBY,

Secretary of the Navy.

PAN AMERICAN PETROLEUM CO.

By E. L. DOHENY,

Chairman.

Witnesses to signature:

JOS. J. COTTER.

J. C. ANDERSON. [42]

EXHIBIT "E."

April 25, 1922.

Mr. J. J. Cotter,

Pan American Petroleum & Transport Co.,

New York, N. Y.

Dear Mr. Cotter: In your proposals (A) and (B) of April 14, 1922, under each of which your bid was the lowest received by the Government, your company submitted two bids for the erection and construction of storage facilities at Pearl Harbor, T. H., and the filling of these with fuel oil. In proposal (B) you offer to accept an amount of royalty crude oil for fulfilling the contract, which expressed in money was \$235,184.40 less than the

amount in proposal (A) and your company offered to give the Government in addition any saving in the cost of construction under the amount estimated, provided that the Government would give the company preferential right to lease certain lands in naval petroleum reserve No. 1, California.

It is evident from our conversation of April 18 that your interpretation of preferential right was to the effect that the Pan American Petroleum & Transport Co. desired the right to lease certain specified land in naval petroleum reserve No. 1 as well as preferential right to lease other land in naval petroleum reserve No. 1 to the extent described in Article XI of contract. It is also my understanding from your conversation that unless the Pan American Petroleum & Transport Co. could get a lease to certain lands, your company would not desire to enter into a contract under the terms outlined in proposal (B) and preferred the government would accept proposal (A).

The Department of the Interior looks favorably upon proposal (B) for the following reasons: (1) It provides for an immediate and certain saving to the Government of \$235,184.40 over proposal (A). (2) You suggest that it gives opportunity to effect an additional possible saving of a considerable amount should the contractor succeed in erecting the storage facilities for less than the amount estimated.

It is my understanding that unless you secure definite assurance from the department that your company would obtain leases for certain tracts

in naval reserve No. 1 the Pan American Petroleum & Transport Co. would prefer not to enter into a contract as outlined in proposal (B). In order that the Government may take advantage of a contract [43] embodying the terms outlined in proposal (B), I wish to advise you that the Department of the Interior will agree to grant to the [Pan American Petroleum & Transport Co. within one year from the date of the delivery of a contract relative to the Pearl Harbor project leases to drill the following tracts of land: The NE. $\frac{1}{4}$ of sec. 3, T. 31 S., R. 24 E., and the strip of land lying in the east half of sec. 34, T. 30 S., R. 24 E., bounded on the east by the tract of land to be leased to the Belridge Oil Co..

The rate of royalty which the department will require on the two tracts of land referred to above will not be greater than the following:

For all oil produced of less than 30° Baumé:

	Per cent
On that portion of the average production per well not exceeding 20 barrels per day for the calendar month	121 $\frac{1}{2}$
On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month	14 $\frac{1}{2}$
On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month	16 $\frac{2}{3}$

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On that portion of the average production per well of more than 100 barrels and not more than 200 barrels per day for the calendar month	20
On that portion of the average production per well of more than 200 barrels and not more than 300 barrels per day for the calendar month	25
On that portion of the average production per well of more than 300 barrels and not more than 400 barrels per day for the calendar month	30
On that portion of the average production per well of more than 400 barrels per day for the calendar month.....	35

Respectfully,

EDWARD C. FINNEY,

Acting Secretary.

EDWIN DENBY,

Secretary of the Navy. [44]

EXHIBIT "F."

DEPARTMENT OF THE INTERIOR.

General Land Office.

Serial Visalia 010188.

LEASE OF OIL AND GAS LANDS UNDER
THE ACT OF JUNE 4, 1920 (41 STAT. 812.)

This Indenture of Lease, entered into, in triplicate,
as of the 5th day of June, A. D. 1922, by and
between the United States of America, party of
the first part, hereinafter called the lessor, acting

in this behalf by the Secretary of the Interior, and PAN AMERICAN PETROLEUM & TRANSPORT COMPANY, a corporation organized under the laws of the State of Delaware, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the Act of Congress approved June 4, 1920 (41 Stat. 812), making appropriations for the naval service and other purposes, WITNESSETH:

Sec. 1. Purposes.—That the lessor in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits in or under the following-described tract of land situated in the County of Kern, California, and more particularly described as follows: Northeast quarter (NE. $\frac{1}{4}$) of section three (3), township thirty-one (31) south, range twenty-four (24) east, of the Mount Diablo Meridian, containing 160 acres, more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof, for a period of twenty (20) years, with the preferential right in the lessee to renew this lease for successive periods of ten (10) years, upon such reasonable terms and conditions as may be

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prescribed by the lessor, unless otherwise provided by law at the time of the expiration of such periods.

Sec. 2. In consideration of the foregoing, the lessee hereby agrees:

(a) Bond.—To furnish a bond with approved corporate surety in the penal sum of \$5,000, conditioned upon compliance with the terms of the lease. [45]

(b) Wells.—To start drilling one well within 90 days from the date the lease is granted and to keep one string of tools in continuous operation thereafter until all the territory has been fully developed, so long as the initial average daily production of each additional well shall amount to at least 100 barrels for the first 30 days after completion thereof and allowing not more than 60 days to elapse between the end of such production test period and the commencement of the next well; but the lessee shall not be required to drill nearer than 660 feet to any other completed well on the same parcel of land. If a well on any such parcel of land shall fail to produce a daily initial average of 100 barrels as aforesaid when operated with diligence and in good faith, the lessee shall have the right to discontinue drilling on said parcel, in which case the lessee agrees, upon demand of the Secretary of the Interior, to surrender the undeveloped portion of said parcel. If any portion of said parcel is so surrendered, the lessor agrees not to permit drilling to be done on said surrender parcel within 660 feet of a well owned or operated by the lessee under the lease to be granted. No well

shall be drilled within 200 feet of the boundary lines. Drilling shall start on the northeast corner location of the tract.

(c) Royalties and rents.—To pay the lessor in advance, beginning with the date of the execution of this lease, a rental of one dollar per acre per annum during the continuance thereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty on all oil and gas produced from the land leased herein (except oil or gas used for production purposes on said land or unavoidably lost), as follows:

(1) For all oil produced of 30° Baumé or over:

Per cent.

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month . . . 12½

On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month 16⅔

On that portion of the average production per well of more than 50 barrels per day and not more than 100 barrels per day for the calendar month 20

On that portion of the average production per well of more than 100 barrels and not more than 200 barrels per day for the calendar month 25

On that portion of the average production per well of more than 200 bar-

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rels and not more than 300 barrels per day for the calendar month 30

On that portion of the average production per well of more than 300 barrels and not more than 400 barrels per day for the calendar month 35

On that portion of the average production per well of more than 400 barrels per day for the calendar month .. 45
[46]

(2) For all oil produced at less than 30° Baumé:
Per cent.

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month 12½

On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month..... 14½

On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month 16⅔

On that portion of the average production per well of more than 100 barrels and not more than 200 barrels per day for the calendar month 20

On that portion of the average production per well of more than 200 barrels and not more than 300 barrels per day for the calendar month 25

On that portion of the average production per well of more than 300 barrels and not more than 400 barrels per day for the calendar month 30

On any portion of the average production per well of more than 400 barrels per day for the calendar month 35

Only wells which have a commercial production during at least part of the month shall be considered in ascertaining the average production above provided for; and the Secretary of the Interior shall determine what are commercially productive wells under this provision.

The lessor reserves the right, upon thirty days' notice, to take the royalty in cash or in kind.

(3) On gas and casing-head gasoline:

On gas, whether same shall be gas from which the casing-head gasoline has been extracted or otherwise, $12\frac{1}{2}$ per cent of the value thereof in the field where produced where the average production per day for the calendar month from the land leased is less than 3,000,000 cubic feet, and $16\frac{1}{2}$ per cent where the average daily production is 3,000,000 cubic feet or over.

On casing-head gasoline, $16\frac{1}{2}$ per cent of the value of the casing-head gasoline extracted from the gas produced and sold, computed on the basis provided for in the operating regulations.

The value in the field where produced, of gas and casing-head gasoline, for royalty pur-

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poses, unless such gas or casing-head gasoline is disposed of under an approved sales contract or other method as provided in subdivision (d) of this section, shall be as fixed by the Secretary of the Interior.

In cases where the gas produced and sold has a value both for casing-head gasoline content and as dry gas from which the casing-head gasoline has been extracted, then the royalties above provided shall be paid on both of such values.

When paid in value, such royalties shall be due and payable monthly on the 15th of each calendar month following the calendar month in which produced, to the Receiver of Public Moneys of the land district in which the land is situated; when paid in kind, such royalty oil shall be delivered in [47] tanks provided by the lessee on the premises where produced, unless otherwise agreed to by the parties hereto, at such times as may be required by the lessor: Provided, That the lessee shall not be required to hold such royalty oil in storage longer than thirty days after the end of the calendar month in which said oil was produced: And provided further, That the said lessee shall be in no manner responsible or held liable for the loss or destruction of such oil in storage from causes over which the lessee has no control; such royalties, whether in value or kind, shall be subject to reduction whenever the average daily production of any oil well shall not exceed ten (10) barrels per day, if in the

judgment of the lessor the wells can not be successfully operated upon the royalties fixed herein.

(d) Sales contracts.—To file with the Secretary of the Interior copies of all sales contracts for the disposition of oil and gas produced hereunder except for production purposes on the land leased, and in the event the United States shall elect to take its royalties in money instead of in oil or gas, not to sell or otherwise dispose of the products of the land leased except in accordance with a sales contract or other method first approved by the Secretary of the Interior.

(e) Monthly statements.—To furnish monthly statements in detail in such form as may be prescribed by the lessor, showing the amount, quality, and value of all oil and gas produced and saved during the preceding calendar month as the basis for computing the royalty due the lessor. The leased premises and all wells, improvements, machinery, and fixtures thereon or connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized officer of the department.

(f) Plats and reports.—To furnish annually and at such times as the Secretary shall require, in the manner and form prescribed by the Secretary of the Interior, a plat showing all the development work and improvements on the leased lands, and other relating information, with a report as to all buildings, structures, or other works placed in or upon said leased lands, accompanied by a report in detail as to the stockholders, investment, deprecia-

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tion, and cost of operation, together with a statement as to the amount and grade of oil and gas produced and sold, and the amount received therefor by operations hereunder.

(g) Log of wells.—To keep a log in the form prescribed by the Secretary of all the wells drilled by the lessee, showing the strata and character of the ground passed through by the drill, which log, or copy thereof, shall be furnished to said lessor on demand. [48]

(h) Diligence—Prevention of waste—Health and safety of workmen.—To exercise reasonable diligence in drilling and operating wells for the oil and gas on the lands covered hereby, while such products can be secured in paying quantities, unless consent to suspend operations temporarily is granted by the Secretary of the Interior; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the oil sands or oil-bearing strata to the destruction or injury of the oil deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug securely any well before abandoning the same so as to effectively shut off all water from the oil or gas bearing strata; not to drill any well within 200 feet of any of the outer boundaries of the lands covered hereby, unless the adjoining lands have been

patented or the title thereto otherwise vested in private owners; to conduct all mining, drilling, and related productive operations subject to the inspection of the lessor; to carry out at expense of the lessee all reasonable orders and requirements of lessor relative to prevention of waste, and preservation of the property and the health and safety of workmen, and on failure so to do the lessor shall have the right to enter on the property to repair damage or prevent waste at the lessee's cost; to abide by and conform to regulations in force at the time the lease is granted covering the matters referred to in this paragraph: Provided, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond lessee's control. The regulations herein referred to are the "Operating Regulations to Govern the Production of Oil and Gas" under the act of Feb. 25, 1920, and General Land Office Cir. 872 in so far as applicable.

(i) Taxes and wages—Freedom of purchase.—To pay, when due, all taxes lawfully assessed and levied under the laws of the State, upon improvements, oil, and gas produced from the lands hereunder, or other rights, property, or assets of the lessee; to accord all workmen and employees complete freedom of purchase, and to pay all wages due workmen and employees at least twice each month in the lawful money of the United States.

(j) Reserved deposits.—To comply with all statutory requirements and regulations thereunder,

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if the lands embraced herein have been or shall hereafter be disposed of under the laws reserving to the United States the deposits of oil and gas therein, subject to such conditions as are or [49] may hereafter be provided by the laws reserving such oil or gas.

(k) Assignment of lease.—Not to assign this lease or any interest therein, nor sublet any portion of the leased premises, except with the consent in writing of the Secretary of the Interior first had and obtained.

(l) Deliver of premises in case of forfeiture.—To deliver up the premises leased, with all permanent improvements thereon, in good order and condition in case of forfeiture of this lease; but this shall not be construed to prevent the removal, alteration, or renewal of equipment and improvements in the ordinary course of operations.

Sec. 3. The lessor expressly reserves:

(a) Rights reserved—Easements and rights of way.—The right to permit for joint or several use easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same or of other lands containing the deposits described in said act of Feb. 25, 1920 (41 Stat. 437), and the treatment and shipment of products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(b) Disposition of surface.—The right to lease, sell, or otherwise dispose of the surface of the

lands embraced within this lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein.

(c) Pipe lines to convey at reasonable rates.—The right to require the lessee, his assignees or beneficiary, if owner or operator of, or owner of a controlling interest in, any pipe line, or any company operating the same which may be operated accessible to the oil derived from lands under such lease, to accept and convey at reasonable rates and without discrimination the oil of the Government or of any citizen or company, not the owner of any pipe line, operating a lease or purchasing oil or gas under the provisions of said act of Feb. 25, 1920.

(d) Monopoly and fair prices.—Full power and authority to carry out and enforce all the provisions of Section 30 of the said act of Feb. 25, 1920, which shall be deemed applicable to this lease to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, to prevent monopoly, and to safeguard the public welfare.

(e) Helium.—The lessor reserves the right to take all helium from any gas produced under this lease, but the lessee shall not be required to extract and save the helium for the lessor; in case the lessor elects to take the helium the [50] lessee shall deliver all gas containing same, or portion thereof desired, to the lessor in the manner re-

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quired by the lessor, for the extraction of the helium in such plant or reduction works for that purpose as the lessor may provide, whereupon the residue shall be returned to the lessee with no substantial delay in the delivery of gas produced from the well to the purchaser thereof: Provided, That the lessee shall not, as a result of the operation in this section provided for, suffer a diminution of value of the gas from which the helium has been extracted, or loss, otherwise, for which the lessee is not reasonably compensated, save for the value of the helium extracted; the lessor further reserves the right to erect, maintain, and operate any and all reduction works and other equipment necessary for the extraction of helium on the premises leased.

Sec. 4. Surrender and termination of lease.—The lessee may, on consent of the Secretary of the Interior first had and obtained in writing, surrender and terminate this lease upon payment of all rents, royalties, and other obligations due and payable to the lessor, and upon payment of all wages and moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made full provision for conservation and protection of the property; upon like consent had and obtained the lessee may surrender any legal subdivisions of the area included herein.

Sec. 5. Purchase of materials, etc., on termination of lease.—Upon the expiration of this lease,

or the earlier termination thereof pursuant to the last preceding section, the lessor or another lessee may, if the lessor shall so elect within six months from the termination of the lease, purchase all materials, tools, machinery, appliances, structures, and equipment placed in or upon the land by the lessee, and in use thereon as a necessary or useful part of an operating or producing plant, on the payment to the lessee of such sum as may be fixed as a reasonable price therefor by a board of three appraisers, one of whom shall be chosen by the lessor, one by the lessee, and the other by the two so chosen; pending such election all equipment shall remain in normal position. If the lessor, or another lessee, shall not, within six months, elect to purchase all or any part of such materials, tools, machinery, appliances, structures, and equipment, the lessee shall have the right at any time, within ninety days, to remove from the premises all the materials, tools, machinery, appliances, structures, and equipment which the lessor shall not have elected to purchase, save and [51] except casing in wells and other equipment or apparatus necessary for the preservation of the well or wells.

Sec. 6. Judicial proceedings in case of default.— If the lessee shall fail to comply with the provisions of the act, or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the general regulations promulgated and in force at the date hereof, and such default shall continue after service of written notice thereof by the lessor, then the lessor may in-

stitute appropriate judicial proceedings for the forfeiture and cancellation of this lease in accordance with the provisions of section 31 of said act of Feb. 25, 1920; but this provision shall not be construed to prevent the exercise by the lessor of any legal or equitable remedy which the lessor might otherwise have. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

Sec. 7. Heirs and successors in interest.—It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the respective parties hereto.

Sec. 8. Unlawful interest.—It is also further agreed that no Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of section 3741 of the Revised Statutes of the United States, and sections 114, 115, and 116 of the Codification of the Penal Laws of the United States approved March 4, 1919 (35 Stat. 1109), relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

In witness whereof:

THE UNITED STATES OF AMERICA,

By E. C. FINNEY,

First Assistant Secretary of the Interior.

PAN AMERICAN PETROLEUM &
TRANSPORT CO.

By JOS. J. COTTER,

Vice-President.

Witness to signature of:

GEORGE W. JOHNSON, Jr.

W. A. O'NEILL. [52]

(Name of Court and Title of Case).

THE ANSWER OF THE DEFENDANTS TO
THE AMENDED BILL OF COMPLAINT.

The above-named defendants, Pan American Petroleum Company and the Pan American Petroleum & Transport Company, appearing by their attorneys, whose names are subscribed hereto, answering the amended bill of complaint in the above-entitled action, respectfully show the Court:

1. Answering paragraph numbered 1 of the amended bill of complaint, they admit the facts therein alleged, except that they deny that the defendant Pan American Petroleum & Transport Company is now or at any time has been doing business in the State of California, whether in the Southern District thereof, or otherwise. [53]

2. Answering paragraph numbered 2 of the amended bill of complaint, they admit that Edward

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L. Doheney was, up to July 24, 1922, the President of each of the said defendant corporations. On or about July 24th, 1922, he retired as President of the Pan American Petroleum Company and became Chairman of its Board of Directors. He continued as President of the said defendant Pan American Petroleum & Transport Company up to December 7th, 1923, at which time he retired as such President, and was duly elected Chairman of the Board of Directors of the said corporation.

They deny that he is or was at the times mentioned in the amended bill of complaint, the owner and holder of a large number of shares of the capital stock of Pan American Petroleum & Transport Company.

3. Answering paragraph numbered 3 of the amended bill of complaint, they admit the allegations set forth therein.

4. Answering paragraph numbered 4 of the amended bill of complaint, they admit the allegations set forth therein.

5. Answering paragraph numbered 5 of the amended bill of complaint, they admit the allegations set forth therein, except that they are without knowledge that all of the lands described in the said paragraph contain petroleum in large quantities, and, therefore, if material, they call for strict proof of this allegation.

6. Answering paragraph numbered 6 of the amended bill of complaint, they deny each and every allegation set forth therein. [54]

7. Answering paragraph numbered 7 of the

amended bill of complaint, they admit the allegations of fact set forth therein, but are advised that they are not required to admit or deny the conclusions of law in said paragraph pleaded, and, therefore, neither admit nor deny the same.

8. Answering paragraph numbered 8 of the amended bill of complaint, they admit the allegations set forth therein.

9. Answering paragraph numbered 9 of the amended bill of complaint, they admit that an Executive Order, bearing date May 31, 1921, a true copy whereof is annexed to said amended bill of complaint and is marked Exhibit "A" was, in good faith, executed by the President of the United States; they are advised by counsel, and therefore aver, that the allegation of said paragraph that said Order was without legal authority and of no force and virtue, is a conclusion of law which they are not called upon to admit or deny; they deny that the said Order was known to be without legal authority by these defendants, or either of them, or by the said Doheny; they are without knowledge concerning each and every other allegation set forth in said paragraph number 9, and, therefore, deny the same.

10. Answering paragraph numbered 10 of the amended bill of complaint, they deny each and every allegation set forth therein.

11. Answering paragraph numbered 11 of the amended bill of complaint, they deny each and every allegation set forth therein.

12. Answering paragraph numbered 12 of the

amended bill of complaint, they deny each and every allegation set forth therein. [55]

13. Answering paragraph numbered 13 of the amended bill of complaint, they deny each and every allegation set forth therein.

14. Answering paragraph numbered 14 of the amended bill of complaint, they admit that on or about March 7th, 1922, the above-named plaintiff, in writing, invited proposals for the exchange of royalty crude oil accruing to the plaintiff from leases in Naval Petroleum Reserve No. 1 or No. 2 in the State of California, or both, for fuel oil and storage facilities to be furnished and provided by the bidder at Pearl Harbor, T. H.

They further admit that the said invitation provided that bids should be made in barrels of crude oil for the furnishing, erecting and completing of certain structures and storage facilities, and the filling of said structures with fuel oil.

They further admit that said invitation for proposals contained the clauses quoted in said paragraph numbered 14 of the said amended bill of complaint.

Except as specifically above admitted, they deny each and every other allegation set forth in the said paragraph numbered 14.

15. Answering paragraph numbered 15 of the amended bill of complaint, they admit the allegations set forth therein, except insofar as said allegations purport to construe the Proposal "B" therein referred to, and they refer to the terms of the said proposal itself, which constitutes a part of Exhibit

"B," which is annexed to and made a part of said amended bill.

16. Answering paragraph numbered 16 of the amended bill of complaint, they admit that on or about the 25th [56] day of April, 1922, a contract was entered into between the plaintiff and the defendant, Pan American Petroleum & Transport Company, and that a substantially true copy of the said agreement is annexed to and made a part of said amended bill of complaint, and is marked Exhibit "B." These defendants reserve the right, however, to correct any errors which may at any time be found in the said copy.

Except as thus specifically admitted, they deny each and every other allegation set forth in said paragraph numbered 16.

17. Answering paragraph numbered 17 of the amended bill of complaint, they deny each and every allegation set forth therein.

18. Answering paragraph numbered 18 of the amended bill of complaint, they admit that on April 25th, 1922, a certain letter, signed by E. C. Finney, Assistant Secretary of the Interior of the United States, and by Edwin Denby, Secretary of the Navy of the United States, was delivered to the defendant Pan American Petroleum & Transport Company, and that a true copy thereof is annexed to the said amended bill of complaint and marked Exhibit "E." They state that they have no knowledge as to whether the execution and delivery of the said letter took place with the knowledge and by the

direction of Albert B. Fall in said paragraph mentioned.

Except as hereinbefore stated, they deny each and every other allegation set forth in said paragraph numbered 18.

19. Answering paragraph numbered 19 of the amended bill of complaint, they deny each and every allegation set forth therein. [57]

20. Answering paragraph numbered 20 of the amended bill of complaint, they admit that on June 5th, 1922, a lease was executed by the plaintiff to the defendant Pan American Petroleum & Transport Company, and that a substantially true copy thereof is annexed to and made a part of said amended bill of complaint and marked Exhibit "F." These defendants reserve the right, however, to correct any errors that may at any time be found in the said copy.

Except as hereinbefore specifically stated, they deny each and every other allegation set forth in said paragraph numbered 20.

21. Answering paragraph numbered 21 of the amended bill of complaint, they deny each and every allegation set forth therein.

22. Answering paragraph numbered 22 of the amended bill of complaint, they admit that on December 11, 1922, a further contract was entered into between the plaintiff and the defendant Pan American Petroleum & Transport Company, and that on the same day a lease was executed between the plaintiff and the defendant Pan American Petroleum Company, of which said contract

and lease substantially correct copies are annexed to the said bill of complaint and marked Exhibit "C" and Exhibit "D," respectively. These defendants reserve the right, however, to correct any errors which may at any time be found in the said copies.

Except as above admitted, they deny each and every allegation set forth in paragraph numbered 22.

23. Answering paragraph numbered 23 of the amended bill of complaint, they admit the allegations of fact set forth therein. [58]

24. Answering paragraph numbered 24 of the amended bill of complaint, they deny each and every allegation set forth therein.

25. Answering paragraph numbered 25 of the amended bill of complaint, they deny each and every allegation set forth therein.

26. Answering paragraph numbered 26 of the amended bill of complaint, they deny each and every allegation set forth therein.

27. Answering paragraph numbered 27 of the amended bill of complaint, they admit that the defendant Pan American Petroleum & Transport Company has received, pursuant to the said agreements of April 25 and December 11, 1922, and in virtue of its legal right thereto under the terms of said agreement, certain of the royalty oil accruing to the plaintiff under leases upon Naval Petroleum Reserves No. 1 and No. 2 in the State of California, including the royalty oil accruing under the said leases dated December 11, 1922, and June 5th, 1922;

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but they deny that said defendant has received all royalty oil due the plaintiff under all such leases; and further deny each and every other allegation set forth in said paragraph numbered 27.

28. Answering paragraph numbered 28 of the amended bill of complaint, they admit that the defendant Pan American Petroleum Company, pursuant to the terms of the said leases of December 11, 1922, and June 5th, 1922, has extracted, taken and received crude oil and gas in Naval Petroleum Reserve No. 1, and has drilled wells and extracted therefrom oil and gas. [59]

They deny each and every other allegation set forth in said paragraph numbered 28.

29. Answering paragraph numbered 29 of the amended bill of complaint, they deny each and every allegation set forth therein.

30. Answering paragraph numbered 30 of the amended bill of complaint, they deny each and every allegation set forth therein.

31. Answering paragraph numbered 31 of the amended bill of complaint, they deny each and every allegation set forth therein.

32. Answering paragraph numbered 32 of the amended bill of complaint, they deny each and every allegation set forth therein.

33. Further answering said amended bill of complaint, these defendants, hereby reiterating each and every averment and denial hereinbefore contained, further respectfully show the Court that the said defendant Pan American Petroleum & Transport Company had, prior to the commence-

ment of this action, duly and fully completed, in accordance with the terms of the said contract of April 25th, 1922, being Exhibit "B" annexed to the amended bill of complaint herein, and with the terms of the specifications which were annexed to the original of said contract, the construction, upon property owned by the plaintiff at Pearl Harbor, T. H., of all storage facilities, and other things required by the said contract and specifications to be constructed, and had duly and fully performed each and every other [60] obligation upon it imposed by the said contract; and that the said defendant had, prior to the commencement of this action, duly furnished to plaintiff and delivered into the storage facilities thus and there constructed, the quantity of 1,453,275 barrels of fuel oil of the quality specified in said contract and specifications.

All of the said storage facilities constructed, things done and fuel oil delivered, were duly constructed, done and delivered at the special instance and request of the plaintiff. That the same were duly approved and certified to have been constructed, done and delivered in accordance with the terms of the said contract and specifications, by the plaintiff's duly authorized official representative in charge of operations at Pearl Harbor, T. H., and have been duly and formally delivered to, and accepted and approved by the above-named plaintiff, which became and is vested with title thereto.

34. That all of the storage facilities constructed and delivered to the plaintiff as aforesaid, pursuant to the said contract of April 25th, 1922, were thus

constructed and furnished by the expenditure of moneys advanced by the said defendant Pan American Petroleum and Transport Company, and at the actual cost thereof, and without any profit whatsoever to either of defendants herein, and that all of the said fuel oil delivered to the plaintiff was thus delivered at the cost price thereof actually paid by the said defendant, and without any profit to the said defendant, plus the reasonable cost of transportation to Pearl Harbor, T. H.; and that all of the said storage facilities and fuel oil were thus furnished to the plaintiff at the reasonable market price and cost thereof, all of which was actually paid by the said defendant, or was [61] firmly obligated to be paid by the said defendant. That the said price and cost represents and represented the actual and reasonable value thereof to the plaintiff, and that the plaintiff has, by reason of the foregoing facts, been benefited and enriched by the said defendant in the said sum. That the said sum amounts to approximately \$5,472,000 subject to such changes as may be involved in the adjustment of certain outstanding claims.

That the said defendant Pan American Petroleum & Transport Company had received from the plaintiff prior to the commencement of this action, pursuant to the terms of the said contract, royalty petroleum products delivered to it by the plaintiff of the value of \$3,856,400, and no more; but that no part of the balance of money advanced and expended, and obligated to be so advanced and expended by the said defendant, in performing said

contract, for the benefit and advantage of the plaintiff, has been paid to the said defendant by the plaintiff, and that the full balance thus expended or obligated to be expended was, at the time of the commencement of this action, due and owing to the said defendant by the said plaintiff, and is payable in the manner specified by said contract, Exhibit "B" annexed to said bill of complaint. That the amount of the said balance is approximately \$1,616,200, less any credits to which plaintiff may have become entitled since the commencement of this action and subject to such changes as may be involved in the adjustment of certain outstanding claims.

35. These defendants further show the Court that said defendant Pan American Petroleum & Transport Company had, prior to the commencement of this action, duly completed, in accordance with the terms of the said contract of December 11th, 1922, being Exhibit "C" annexed to the bill of complaint herein, and with the terms of the [62] specifications which were annexed to the original of said contract, the construction, upon property owned by the plaintiff at Pearl Harbor, T. H., of over seventy per cent of all storage facilities and other things required by the said contract and specifications to be constructed, in addition to the storage facilities and other things required by the said contract of April 25th, 1922, hereinbefore referred to. That all of the foregoing matters and things had been constructed, furnished and done at the special instance and request of

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the plaintiff. That the same were duly approved and certified to have been constructed and done in accordance with the terms of the said contract and specifications, by the plaintiff's duly authorized official representative in charge of operations at Pearl Harbor, T. H., and have been duly and properly delivered to, and accepted and approved by the above-named plaintiff, which became and is vested with the title thereto.

That all of the said storage facilities constructed and delivered to the plaintiff as aforesaid, pursuant to the said contract of December 11th, 1922, were thus constructed and furnished by the expenditure of moneys advanced by the said defendant Pan American Petroleum & Transport Company, and at the actual cost thereof, and without any profit whatsoever to either of the defendants herein, and that all of the said storage facilities were thus furnished to the plaintiff at the reasonable market price and cost thereof, all of which was actually paid by the said defendant or was firmly obligated to be paid by the said defendant; that the said sum represents and represented the actual and reasonable value thereof to the plaintiff, and that the plaintiff has, by reason of the foregoing facts, been benefited and enriched by the said defendant [63] in the said sum. That the said sum expended and obligated to be expended is approximately \$3,800,000.

That no part of the said sum thus advanced by the said defendant to the plaintiff, and for its benefit, has been paid to the said defendant by the said

plaintiff, and said defendant is entitled to and hereby claims the full amount thereof.

That the said defendant Pan American Petroleum & Transport Company was, at the time of the commencement of this action, and still is, duly continuing the performance of all of the obligations upon it imposed by the said contract of December 11, 1922, and the specifications thereunto annexed, subject to the conditions thereof, and that the said defendant has been, and is ready and willing to continue and complete performance of each and every of the said obligations as provided in the said contract, and to advance and provide all moneys necessary therefor.

That all work done and materials furnished have been and will be done and furnished without any profit whatsoever to either of these defendants, and at the reasonable cost price thereof, and that the said reasonable cost price thereof represents and will represent the actual and reasonable value thereof to the plaintiff, and that the said plaintiff will, by reason of the foregoing facts, be benefited and enriched by the said defendant to the extent of all sums expended as aforesaid not only prior to but subsequent to the commencement of this action.

36. That prior to the commencement of this action these defendants, pursuant to the obligations of the said contracts of April 25th, 1922, and December 11th, 1922, and pursuant to the leases of December 11th, 1922, and [64] June 5th, 1922 (being Exhibits "D" and "F" annexed to the

amended bill of complaint herein, and which are hereby made a part hereof as fully as if again set forth at length), had advanced and expended upon the properties covered by the said leases, large amounts of money, in the exploration and development of, and in the making of permanent and useful improvements upon the said properties belonging to the plaintiff, such improvements consisting of the drilling and equipment of oil wells, the furnishing and erection of edifices, structures, pipe-lines, tanks, compressor and absorption plant, and other equipment and appurtenances, and in the creation and operation of other facilities of the general nature provided in Section 1 of each of the said leases which were necessary in order to produce and handle petroleum from the said lands, pursuant to the terms of the said leases and contracts. That all of the said sums of money were advanced by these defendants in good faith and under advice of counsel, under the supervision of plaintiff's representatives and for the purpose of complying with the obligations and duties assumed by the said defendants, and in the belief that the said contracts and the said leases are, in all respects, valid, legal and enforceable instruments as between the plaintiff and the said defendants, respectively.

That all moneys advanced by the said defendants for the purposes aforesaid represented the actual and reasonable cost thereof, and that all of the said wells, edifices, structures, equipment and other appurtenances were thus erected and constructed upon plaintiff's properties covered by the said lease, and

were and are of the reasonable and fair value of all sums expended therefor, and were [65] worth the said sums to the said plaintiff, and that the plaintiff has, by reason of the foregoing facts, been benefited and enriched by the said defendants in the full amount of all of the said sums thus expended, with all of which these defendants are entitled to be reimbursed by the plaintiff.

37. That in addition to the foregoing disbursements and expenditures, said defendants have also, prior to the commencement of this action, expended, or became firmly obligated to expend, approximately Ten Million Dollars (\$10,000,000) in the construction of refinery facilities, together with pipe-lines, storage, docking and other facilities, in the vicinity of Los Angeles, California, all of which were necessary, and known by the plaintiff to be necessary to be provided in order to enable the said defendants to perform the obligations imposed by the contract of December 11th, 1922, Exhibit "C" annexed to the amended bill of complaint, and by the lease of the same date, Exhibit "D," similarly annexed, and that all of the said expenditures were made with the knowledge and approval of, and at the special instance and request of the said plaintiff. That if for any reason the contract of December 11th, 1922, and the leases of June 5th and December 11th, 1922, should be cancelled and annulled, all of the said facilities would be thereby greatly depreciated in value, and a large loss, the exact amount of which cannot now be estimated, would be caused thereby to the said defendants, for

all of which the said defendants would have no adequate, efficient or complete remedy at law, and that the said defendants are entitled to be reimbursed by the plaintiff with the amount of all such losses. [66]

38. That by reason of all of the matters hereinbefore in this counterclaim and defense set forth, the plaintiff is, in justice and in equity, bound to reimburse to these defendants, in the manner and form provided in the said contracts and leases hereinbefore referred to or otherwise, all amounts advanced by these defendants or either of them, whether prior to the commencement of this action or subsequent thereto, together with all losses sustained or which may be sustained as hereinbefore stated, less any lawful credits to which the above-named plaintiff has been or may hereafter become entitled pursuant to the said contracts and leases, or otherwise.

39. That the above-named plaintiff has threatened to and is endeavoring to prevent these defendants from continuing to operate under and enjoy the benefits of the said contracts of April 25th and December 11th, 1922, and said leases of December 11th, 1922, and June 5, 1922, and to thus prevent these defendants from obtaining reimbursement, pursuant to the terms of the said contracts and lease, for all moneys advanced, as aforesaid, without the plaintiff having made, or offered to make or tender any provision for such reimbursement,—for all of which these defendants, unless protected by your Honorable Court, will have no

complete, adequate, practical and efficient remedy at law; and these defendants, again reiterating that the plaintiff has no cause of action whatsoever against these defendants or either of them, nevertheless, respectively submit to your Honorable Court that full payment of all sums advanced by the said defendants, and of any other sums which these defendants may hereafter advance in connection with the performance of the said contracts, or either of them, or with the operation under [67] the said leases, together with all losses sustained or which may be sustained as hereinbefore stated, should, in any event, be required to be made or provided for by the plaintiff to the said defendants as a condition precedent to the granting of any relief whatsoever to which the plaintiff may show itself to be entitled herein.

40. Further answering said amended bill of complaint, and in lieu of demurrer thereto, the defendants and each of them respectively say that the said bill is bad in substance for the reason that the facts set forth therein are insufficient to constitute a valid cause of action in equity against the said defendants, or either of them; that the plaintiff, prior to the filing of its original or its said amended bill, did not pay or tender to the defendants, or either of them, the amount to which they and each of them were and are justly and equitably entitled to receive by reason of the matters and things herein set forth; that the plaintiff did not, in and by its original or its said amended bill herein, tender to the defendants, or either of them, the

said amounts, or any part thereof; that the plaintiff has not, by its original or its said amended bill herein, offered to do equity in the premises; and that the said amended bill is without equity.

WHEREFORE, the above named defendants pray:

1. That the said amended bill of complaint be, in all respects, dismissed, with costs of this action, and that an order be made vacating any and all injunctions or other orders which the plaintiff may have obtained herein, and vacating any and all orders appointing receivers which may have been made, and that the receivers appointed herein be discharged and directed to account for and turn [68] over and pay to these defendants all sums of money which may have come into their hands in the discharge of their duties.

2. That if the above prayer be not granted, then that no relief be accorded to the plaintiff against these defendants, or either of them, except upon condition that the said plaintiff shall permit these defendants to continue to operate under and enjoy such benefits and privileges as may have been created by the said contracts of April 25, 1922, and December 11, 1922, and by the leases of December 11, 1922, and June 5, 1922, until they, and each of them, shall have been reimbursed all amounts which may be due to them, and each of them, by reason of each and every matter and thing hereinbefore set forth, whether occurring prior or subsequent to the commencement of this action; or until plaintiff shall have otherwise fully reimbursed

these defendants, and each of them, in respect of each and every the said matters and things, and shall have done all things required by equity and good conscience; and that the amount of the balance to which these defendants are thus entitled, be ascertained by the taking and stating of an account before a Master, pursuant to the customary practice of this Court.

3. That the said defendants, and each of them, have such other and further relief as may be just and equitable.

FREDERIC R. KELLOGG,
FRANK J. HOGAN,
CHARLES WELLBORN,
OLIN WELLBORN,
DEAN EMERY,
JOSEPH J. COTTER and
HAROLD WALKER,

Solicitors for the Above-named Defendants.

[69]

(Name of Court and Title of Case.)

**CERTIFICATE OF NAMES AND ADDRESSES
OF ALL WITNESSES SERVED WITH
SUBPOENAS ISSUED UPON ORDERS
OF PLAINTIFF AND DEFENDANTS,
SHOWING DATE OF SERVICE IN EACH
INSTANCE IN THE ABOVE-ENTITLED
CAUSE.**

I, Charles N. Williams, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that accord-

ing to the records in my office subpoenas were issued and served, by order of the parties in this cause, to the following persons, at the addresses and upon the dates hereinafter set forth, to appear as witnesses upon the trial of this cause:

WITNESSES SUBPOENAED ON BEHALF OF PLAINTIFF AND BY ORDER OF
PLAINTIFF'S SOLICITORS.

Name of Witness.	Address of Witness.	Date Subpoena Issued.	Date Subpoena Served.
Ambrose, A. W.	Empire Gas & Fuel Co., Bar- tlesville, Okla.	Aug. 9, 1924	Sep. 25, 1924
Bain, H. Foster	Director of the Bureau of Mines, Department of Interior, Washington, D. C.	Aug. 9, 1924	Aug. 18, 1924
Benton, J. E.	Vice-President, First National Bank of El Paso, Texas.	Oct. 7, 1924	Oct. 10, 1924
Black, Charles N.	C/o Ford, Bacon & Davis, 58 Sutter St., San Francisco, Cal.	Sep. 2, 1924	Sep. 10, 1924
Bradner, B. J.	911 Wright Callender Build- ing, Los Angeles, California.	Sep. 2, 1924	Sep. 16, 1924
Brownfield, A. D.	Carrizozo or White Mountain, New Mexico.	Oct. 14, 1924	Oct. 15, 1924

Name of Witness.	Address of Witness.	Date Subpoena Issued.	Date Subpoena Served.
Denby, Hon. Edwin	Former Secretary of the Navy, Detroit, Michigan.	Aug. 9, 1924	Aug. 18, 1924
Dyer, B. T.	1105 Bank of Italy Building, 649 S. Olive St., Los Angeles, California. [70]	Sep. 2, 1924	Sep. 3, 1924
Ewart, Matthew H.	Care of Blair & Co., 24 Broad Street, New York.	Sep. 27, 1924	Oct. 3, 1924
Finney, E. C.	Assistant Secretary of the In- terior, Interior Department, Washington, D. C.	Aug. 9, 1924	Aug. 18, 1924
Flory, George D.	Vice-President, State National Bank, El Paso, Texas.	Oct. 7, 1924	Oct. 10, 1924
Folsom, D. M.	C/o General Petroleum Cor- poration, Alaska-Commercial Building, San Francisco, Cali- fornia.	Sep. 2, 1924	Sep. 10, 1924

Name of Witness.	Address of Witness.	Date Subpoena Issued.	Date Subpoena Served.
Gregory, Admiral L. E.	Navy Department, Washington, D. C.	Aug. 11, 1924	Aug. 18, 1924
Harris, Will Ed.	Albuquerque or White Mountain, New Mexico.	Oct. 14, 1924	Oct. 16, 1924
Herrin, W. F.	Southern Pacific Building, 65 Market Street, San Francisco, California.	Sep. 2, 1924	Sep. 19, 1924
Hill, Ernest K.	C/o Hon. Irvine L. Lenroot, Sen- ate Office Bldg., Washington, D. C.	Oct. 7, 1924	Oct. 13, 1924
Johnson, J. T.	Three Rivers, New Mexico.	Oct. 14, 1924	Oct. 15, 1924
Kent, W. A.	C/o Bureau of Mines, Depart- ment of the Interior, Wash- ington, D. C.	Oct. 7, 1924	Oct. 13, 1924
Lacy, Wm.	President, Lacy Manufacturing Co., Washington Building, Los Angeles, California.	Nov. 11, 1924	Nov. 12, 1924

Name of Witness.	Address of Witness.	Date Subpoena Issued.	Date Subpoena Served.
Little, Charles	Care of Blair & Co., 24 Broad Street, New York.	Sep. 27, 1924	Oct. 3, 1924
Mack, Theodore	Department of the Interior, 18th and F St., Washington, D. C.	Oct. 7, 1924	Oct. 13, 1924
McInnis, W. J.	Receiver, Citizens National Bank, Roswell, New Mexico.	Oct. 14, 1924	Oct. 16, 1924
McLaughlin, A. C.	79 New Montgomery St., San Francisco, California.	Sep. 2, 1924	Sep. 10, 1924
Robinson, Admiral John K.	Navy Department, Washington, D. C.	Aug. 9, 1924	Aug. 18, 1924
St. Clair, L. T.	Union Oil Building, 617 West 7th St., Los Angeles, California.	Sep. 2, 1924	Sep. 3, 1924
Storey, H. M.	Standard Oil Company Build-	Sep. 2, 1924	Sep. 10, 1924

Name of Witness.	Address of Witness.	Date Subpoena Issued.	Date Subpoena Served.
Sutro, Oscar	ing, 225 Bush St., San Francisco, Calif.	Sep. 2, 1924	Sep. 26, 1924
Weill, A. L.	Attorney at Law, San Francisco, California.	Sep. 2, 1924	Sep. 10, 1924
Young, Graham	Care of Blair & Co., 24 Broad Street, New York.	Sep. 27, 1924	Oct. 3, 1924

WITNESSES SUBPOENAED ON BEHALF OF DEFENDANTS AND BY ORDER
OF DEFENDANTS' SOLICITORS.

Name of Witness.	Address of Witness.	Date Subpoena Issued.	Date Subpoena Served.
Wilbur, Hon. Curtis D.	Secretary of the Navy, Washington, D. C.	Oct. 9, 1924	Oct. 14, 1924

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this — day of July, in the year of our Lord one thousand nine hundred and twenty-five, and of our Independence the one hundred and fiftieth.

[Seal]

CHAS. N. WILLIAMS,

Clerk of the District Court of the United States of America, in and for the Southern District of California, Northern Division.

By B. B. Hansen,
Deputy Clerk. [72]

(Name of Court and Title of Case.)

**NOTICE OF THE LODGING IN THE CLERK'S
OFFICE BY DEFENDANTS-APPEL-
LANTS OF STATEMENT OF THE EVI-
DENCE.**

To Atlee Pomerene and Owen J. Roberts, Esquires, Special Counsel for the United States; and S. W. McNabb, Esquire, United States Attorney, Southern District of California, Solicitors for the United States of America, Plaintiff-Appellee, in the Above-Entitled Cause:

Take notice that there has on this 15th day of July, A. D. 1925, been lodged in the office of the Clerk of the United States District Court for the Southern District of California statement of the

evidence in this cause, prepared complaint to Rule 75 (b) of the Equity Rules prescribed by the Supreme Court of the United States, and that on the 27th day of July, 1925, in the said District Court at the City of Los Angeles, State of California, the said statement of the evidence will be presented to the Honorable Paul J. McCormick, Judge of said Court, at which time and place the undersigned will ask the said Judge to approve the said statement.

Dated at Los Angeles, California, July 15, 1925.

CHARLES WELLBORN,

OLIN WELLBORN, Jr.,

C. W.

JOS. J. COTTER,

HAROLD WALKER,

DEAN EMERY,

HENRY W. O'MELVENY,

WALTER K. TULLER,

FREDERIC R. KELLOGG,

FRANK J. HOGAN,

Solicitors for Pan American Petroleum Company
and Pan American Petroleum & Transport
Company, Defendants-Appellants. [73]

ACKNOWLEDGMENT AND WAIVER.

The solicitors for the United States in the above-entitled cause hereby acknowledge service of the foregoing notice and, having been furnished by solicitors for defendants with copies of said statement of the evidence prior to the time of the lodg-

110 *Pan American Petroleum Company et al.*

ment thereof in the Clerk's office, and having examined said statement and found the same to be true and complete, the ten days' notice of the time and place when the defendants will ask the United States District Judge to approve said statement, given in the foregoing, is hereby waived, and the plaintiff hereby consents to the approval of said statement of the evidence forthwith.

Dated at Los Angeles, California, this 15th day of July, 1925.

ATLEE POMERENE,
OWEN J. ROBERTS,
S. W. McNAB,

Solicitors for the Plaintiff-Appellee, United States
of America. [74]

(Name of Court and Title of Case.)

STATEMENT OF TESTIMONY UNDER FED-
ERAL EQUITY RULE 75 (b).

The following is defendants-appellants' condensed statement in narrative form of the testimony introduced upon the trial of the above-entitled suit, made in pursuance of Equity Rule 75 (b) and lodged in the Clerk's office for the examination of plaintiff as provided by said rule:

It was stipulated that all of the shares of the capital stock of the defendant Pan American Petroleum Company at the time of the occurrences referred to in the plaintiff's bill of complaint and

defendants' answers were owned by the defendant Pan American Petroleum & Transport Company, and that the said shares of stock at the time of the trial of this suit were still thus owned; that the capital stock of the defendant Pan American Petroleum & Transport Company is divided into two classes known as Class A and Class B of which Class A is the voting stock, the two classes being identical in all other respects; the total stock of this defendant issued and outstanding amounts to 2,726,630 shares, of which 1,100,556 shares are Class A and 1,626,074 are Class B; there are a total of 11,850 separate shareholders owning these two classes of stock, among them being E. L. Doheny, who is the owner of 2417 shares of A stock; Carrie Estelle Doheny, wife of E. L. Doheny, who is the owner of 837 shares of A stock and 50 shares of B stock; E. L. Doheny, Jr., who is the owner of 708 shares of A stock and 3706 shares of B stock; Lucy Smith Doheny, wife of E. L. Doheny, Jr., who is the owner of 77 shares of A stock and 49 shares of B stock; and the Petroleum Securities Company, a corporation incorporated under the laws of the State of California in the year 1908, which is the owner of [75—1] 525,438 shares of A stock. It was further stipulated that of the total outstanding stock of the said Petroleum Securities Company (with the exception of a few qualifying shares) one-third is owned by E. L. Doheny, Sr., one-third by Carrie Estelle Doheny and one-sixth each by E. L. Doheny, Jr., and Lucy Smith Doheny.

Plaintiff called to the attention of the Court for judicial notice the following documents: Executive Order issued September 2, 1912, by William H. Taft, President of the United States, by the provisions of which it was declared that public lands situate in the County of Kern, State of California, described in paragraph 5 of the Amended Bill of Complaint shall hereafter constitute Naval Petroleum Reserve No. 1 and shall be held for the exclusive use or benefit of the United States Navy. Executive Order issued December 13, 1912, by William H. Taft, President of the United States, constituting certain lands therein described as Naval Reserve No. 2 for the exclusive use or benefit of the United States Navy. Copies of these two Executive Orders were marked Plaintiff's Exhibit Nos. 1 and 2, respectively. Executive Order issued by Warren G. Harding, President of the United States, dated May 31, 1921, a true copy of which is annexed to the Amended Bill of Complaint as Exhibit "A," the same being marked Plaintiff's Exhibit 3.

Testimony of H. A. Stuart, for Plaintiff.

H. A. STUART, Commander, U. S. Navy, inspector of naval petroleum and oil shale reserves, Caspar, Wyoming, a witness called by plaintiff, identified letter dated April 30, 1920, signed Josephus Daniels, and the same was offered in evidence as Plaintiff's Exhibit No. 4. Defendants objected to the receipt of said letter in evidence on the ground that it is not

(Testimony of H. A. Stuart.)

in any way connected with the defendants, has no reference to the issues presented by the pleadings in the case, is incompetent, irrelevant and immaterial, but the Court overruled the objection and admitted said letter in evidence to which action and ruling of the Court an exception was duly reserved by defendants. Subsequently at the close of all of the testimony defendants ruled to strike said letter from the records of the evidence in the case on the grounds stated to the Court in support of the objection to its submission, but said motion to strike was overruled and an exception duly noted. Plaintiff's Exhibit No. 4 is a memorandum, dated April 30, 1920, from the Secretary of the Navy to Chief of Naval Operations; General Board; Bureau of Navigation; Bureau of Yards and Docks; Bureau of Construction and Repair; Bureau of Steam Engineering; and Bureau of Supplies and [76—2] Accounts, on the subject of "Establishment of Oil Fuel Office under Secretary's Office. Detail of Commander H. A. Stuart, U. S. N.," and in the body thereof, over the signature of Josephus Daniels, Secretary of the Navy, it is stated, in substance, that Commander H. A. Stuart has been detailed for special duty under the Secretary of the Navy in connection with oil fuel matters; that this office has been established for the purpose of compiling data relative to the fuel oil and gasoline situation within the United States and in foreign countries, and for furnishing a clearing house for the various activities and policies

(Testimony of H. A. Stuart.)

of the Navy Department; that all papers affecting policy relative to oil fuel and its use, storage facilities, floating equipment for handling oil, etc., shall be sent to this office; that the oil situation is certain to involve intra-departmental matters within a short time, and may involve international questions, and it is therefore necessary that the Navy's requirements, facilities, and policies should be outlined and coordinated without delay if they are to carry proper weight; if Congress should pass pending legislation it is proposed to employ technical experts in this office and, if so, their services will be available to the various bureaus. The witness retained the said office until October 1921 and there was, subject to the same objection, ruling, and exception as above noted with regard to Plaintiff's Exhibit No. 4, offered and received in evidence as Plaintiff's Exhibit No. 5 paper dated October 18, 1921, from the Secretary of the Navy to the same addressees as those named in Exhibit No. 4 on the subject of "Fuel Oil Office under the Secretary's office" which, after referring to said Exhibit 4, ordered that the Fuel Oil Office established thereby "is hereby transferred to the Bureau of Engineering, which will have charge of all the activities performed under this office." Said exhibit is signed Edwin Denby. Witness next identified and there was offered and received in evidence as Plaintiff's Exhibit No. 6 communication dated April 14, 1921, signed Edwin Denby, Secretary of the Navy, directing Lieut-Comdr. I. F. Landis, U. S. Navy,

(Testimony of H. A. Stuart.)

San Francisco, California, to publish in at least two San Francisco papers invitations for sealed proposals to be opened April 25, 1921, in San Francisco and Washington, D. C., for a lease on a strip of land within Naval Petroleum Reserve No. 1 along the north side of Section 1-31-24 M. D. M., and along the east side of the northeast quarter of said section 900 feet wide and to have drilled thereon twenty-two wells in two rows as rapidly as men, material and supplies therefor [77-3] could be obtained. Said document contained directions as to the conditions and terms under which bids were to be submitted and considered.

Witness testified that, in his presence, bids received in response to said invitation were opened in the office of Judge Finney (Assistant Secretary of the Interior) and that among the bids submitted in response to the foregoing invitation were two from defendant Pan American Petroleum Company, which were offered and received in evidence as Plaintiff's Exhibits 7 and 8, and in substance are as follows:

Plaintiff's Exhibit No. 7 is dated Washington, D. C., April 25, 1921, addressed to the Secretary of the Navy, and advises that Pan American Petroleum Company proposes to lease, in accordance with the terms of the call for bids, the land therein described and to pay a royalty of 55½ per cent of the oil produced from said lease, to be delivered in crude oil on the lease, or, at the option of the Secretary of the Navy, the equivalent in fuel oil

(Testimony of H. A. Stuart.)

delivered at tidewater; bidder agrees to commence within two days after execution of lease and to complete the twenty-two wells within eight months; bond is submitted with bids.

Plaintiff's Exhibit No. 8 is dated April 25, 1921, addressed to the Secretary of the Navy, and, referring to Exhibit No. 7, states, in substance, that in connection therewith, if the lease bid for is awarded Pan American Company, it will be willing to complete the twenty-two wells in six months, provided the royalty be fixed at 50 per cent, in eight months as stated in the bid, in twelve months if the royalty be fixed at $57\frac{1}{2}$ per cent; basis of exchanging royalty oil for fuel oil delivered by the company at various ports named is stated.

Witness, continuing, testified that after it had been decided to award the above referred to lease to Pan American Company, Admiral Griffin and he called on Secretary Fall and told him that they had heard that the United Midway Oil Company was to be given a lease to part of Section 1 just south of the 900-foot strip and they objected to this because they did not think it necessary to have that drilled at the time, they considered two rows of offset wells then sufficient. Mr. Fall said that he had already taken that matter up with the President and the President had approved giving to the United Midway Oil Company lease as referred to and that in order to change this it would be necessary [78—4] to go to the President and have his decision revoked. Stuart and Griffin had heard

(Testimony of H. A. Stuart.)

that the President had approved such a lease to the United Midway Oil Company and so informed Secretary Fall who said he would send out and get the approval of the President and he did so but the paper could not at the time be found; the naval officers told the Secretary that they took his word for it, that they had heard that the President had approved it; shortly thereafter Secretary Fall sent word that he wished to see Stuart and Griffin and when they returned to his office he showed them some approval which they did not read carefully; shortly after that time the lease was divided and the Pan American was given fourteen wells and the United Midway eight wells at the same royalty, namely 55½ per cent.

When the witness' office, in charge of the Fuel Oil Office, was abolished he reported to the Bureau of Engineering, the chief of which at that time was Admiral J. K. Robison. Witness stated that he received from Admiral Robison verbal orders with regard to his activity in connection with the Interior Department and was asked by counsel for the plaintiff to state them. This question defendants by their counsel objected to on the ground that the question called for hearsay evidence and was unaccompanied by any offer to show any connection between the defendants and the orders referred to or any knowledge of the defendants thereof. This objection was overruled by the Court, to which ruling an exception was duly noted and allowed. Wit-

(Testimony of H. A. Stuart.)

ness thereupon over said objection and subject to said exception testified that Admiral Robison ordered him to have no communication whatever with the Interior Department and not to enter the Interior Department Building officially. After October 18, 1921, witness remained attached to the Bureau of Engineering in Washington until April 5, 1922, on which date he was detached and left Washington April 10, 1922. Between October 18, 1921, and April 10, 1922, there was no matter taken up with him so far as contracts in connection with the naval oil reserve were concerned; he was consulted from time to time in connection with building storage tanks at Pearl Harbor, the first million and a half barrels, and was requested to take up with the General Board the question of a relocation of the tanks there; formerly the tanks had been constructed of concrete, and under this scheme they wished to build steel tanks and that involved rearrangement of them. As to whether it was communicated to him that those tanks were to be paid for with [79—5] royalty oil, witness does not think anything had been decided definitely at that time, there may have been some talk in regard to the question. He knows nothing whatever about the execution of the contract of April 25, 1922, or any negotiations leading up to it.

(Testimony of H. A. Stuart.)

Cross-examination.

On cross-examination Commander Stuart testified that the General Board, to which he referred in his direct, consists of a number of Rear-Admirals, who are what might be called the elder statesmen of the Navy, officers near the retiring age, and who constitute the Board which goes over the general plans of the Navy, being the high court on all questions of plans and operations under which the Navy acts, and an advisory board to the Secretary of the Navy, composed of experienced naval experts who tell the civilian Navy Secretary concerning naval matters he ought to be informed on. It was this General Board to which, subsequent to October 18, 1921, and prior to his detachment April 5, 1922, in one particular and at only one time witness presented the matter relating to the relocation of tanks at Pearl Harbor. The Bureau of Engineering wanted steel tanks instead of concrete tanks. Prior to April 5, 1922, witness knew that there was on foot the Pearl Harbor project for the first million and one-half barrels, there was some talk about that, and he knew that early in 1922 the Interior Department was making preliminary investigation in order to inform prospective bidders what was required. January 14, 1922, a memorandum signed by witness was addressed to Admiral Robison; it was offered and received in evidence as Defendants' Exhibit "A" and reads as follows:

DEFENDANTS' EXHIBIT "A."

"14 January, 1922.

MEMORANDUM FOR ADMIRAL ROBISON:

The Assistant Secretary of the Interior, Judge E. C. Finney, called me up this afternoon about 3:30 and stated he had received the following telegram from Mr. Bain, Director of the Bureau of Mines, who is in California looking out for the details of making a contract for constructing the fuel oil storage for the Navy at Pearl Harbor:

'Can you wire me any results from cable information requested by Navy relative to character of material and whether disposed at sea or on land. It will facilitate matters.'

I took the matter up with the Bureau of Yards and Docks obtaining the information as follows:

'Character of material, soft mud and coral generally. Close to piers there may be some hard coral which may require blasting before hydraulic dredge will handle. Hydraulic dredging contemplated for this work. Disposition of dredged material to be on shore through pipe line.' [80—6]

This information was furnished Judge Finney on the morning of 16 January, 1922.

X/S/ H. A. STUART."

Witness was thoroughly familiar with the organization of the different bureaus of the Navy Department and when Judge Finney called him up on January 14, 1922, and asked for the information

referred to in the above exhibit, this had been going on—had been simmering—for some time prior to the 14th of January and he knew, naturally, the Bureau of Yards and Docks was interested in the specifications as it was part of the duty of that Bureau to draw all of the specifications and plans for a plant of that kind if the Navy was going to do the work. Witness was not a member of the Secretary of the Navy's Council and never attended any of its meetings. He was not in Washington April 25, 1922, the date of the first contract in question in this case, being at that time at his new station in Charleston. From April, 1920, until the Fuel Office was abolished October 18, 1921, witness' desk was in the Bureau of Engineering and he was discharging duties that ran along parallel, that is, duties pertaining to the Fuel Office as well as those pertaining to the Bureau, all of his time not having been taken up with naval petroleum matters. During that period in respect to such part of his work as related to the Naval Fuel Office he reported directly to the Secretary of the Navy and in relation to the rest of his work, which he did as an engineering officer of the Bureau, he reported to the Chief of the Bureau of Engineering. He was an officer of the Engineering Corps of the Navy and subordinate to the chief of that bureau. Admiral Robison became chief of the Bureau of Engineering upon the retirement of Admiral Griffin about the first of October, 1921. A "tour of duty" means the term or period a naval officer serves at a given station or place, the normal tour of duty of an officer is two

(Testimony of H. A. Stuart.)

or three years. Witness came to duty in Washington August 21, 1918, and remained on duty there until April 5, 1922. In October, 1921, Admiral Robison asked to have witness retained in the Bureau of Engineering on duties connected with oil reserves, in practically the same capacity in which he had been serving, with a different head; that is, Admiral Robison recommended that he be retained on the same duty, reporting to him rather than directly to the Secretary, and Admiral Robison told witness that he wanted him to stay there. The Bureau of Navigation is the personnel bureau of the Navy Department [81—7] which issues orders with relation to stations of naval officers.

Thereupon there was offered and received in evidence as Defendants' Exhibit "B," communication dated October 8, 1921, from the Bureau of Engineering to the Bureau of Navigation, which reads:

DEFENDANTS' EXHIBIT "B."

"1. Commander H. A. Stuart, U. S. N., has been in charge of matters pertaining to the Naval Petroleum Reserves in the Bureau of Engineering since he reported for duty in the Bureau. During the last eighteen months he has devoted his time exclusively to this duty. He is thoroughly familiar with the laws pertaining to the establishment of the Reserves and with the many legal suits in connection therewith.

"2. While the administration of these Reserves has recently been turned over to the Department of the Interior, the Bureau believes that it highly necessary for the interest of the Navy to retain, at least temporarily, an officer for duty in connection with these Reserves. It is believed there is no one in the Navy with as comprehensive a grasp of the situation as Commander Stuart and the Bureau therefore recommends that for the present he be retained on this duty.

J. K. ROBISON,
Chief of Bureau."

Thereupon as Defendants' Exhibit "C" the following extract from minutes of a meeting of the Navy Council held in Washington, October 18, 1921, was offered and received in evidence:

DEFENDANTS' EXHIBIT "C."

"No. 2. The Secretary stated that unless there was objection he would sign an order transferring all the Fuel Oil Activities heretofore carried on under the Secretary's office over to the Bureau of Engineering. There was also short discussion about our supply of oil on hand, contracted for, etc. The question of leases would be handled by the Department of the Interior."

There was then offered and received in evidence as Defendants' Exhibit "D" order issued by the Secretary of the Navy to Commander Stuart, reading as follows:

DEFENDANTS' EXHIBIT "D."

"24 October, 1921.

Subject: Change of Duty.

1. You are hereby detached from duty in the office of the Secretary of the Navy, Navy Department, and from such other duty as may have been assigned you; will report to the Chief of the Bureau of Engineering, Navy Department, for such duty as he may assign you.

2. This employment on shore duty is required by the public interests.

EDWIN DENBY."

The decision to award lease for strip in Section 1 under above-mentioned bids received April 25, 1921, was made by the interior Department, witness was present when bids were gone over, and while he thought that the United Oil Company bid was perhaps the best he did acquiesce in the agreement [82—8] that the lease be awarded Pan American Company; there were also present at the time Dr. Mendenhall, Chief Geologist of the United States Geological Survey, Interior Department; Mr. Cutler, an official of the Bureau of Mines, who was at that time on duty in the Internal Revenue Department, Petroleum appraisals section; and Mr. Ambrose, Chief Petroleum Technologist of the Bureau of Mines; witness does not remember who else was present; the matter was discussed and all agreed upon the awarding of the lease to Pan American Company on the basis of one of its bids; witness

(Testimony of H. A. Stuart.)

thinks that after that recommendation went in perhaps Secretary Fall himself decided to give the lease to Pan American, and it was after this that Admiral Griffin and witness called on Secretary Fall as testified on direct; witness cannot fix the exact time of that call but it was subsequent to June 2, 1921; it is five or ten minutes walk from the Navy Department to the Interior Department in Washington. On the occasion regarding which witness testified before Admiral Griffin and witness called on Secretary Fall they had heard that the President had approved the giving of a lease to the United Midway Oil Company and on their second visit to Mr. Fall's office on the same day they were shown the approval of the President on a basis of settlement with the United Midway; the paper shown the witness, as he recalls it, bore the signature of Warren G. Harding. Bids received April 25, 1921, for strip lease in Section 1 were sent from the Navy to the Interior Department June 2, 1921, and some time thereafter witness attended a conference with Mendenhall, Cutler and Ambrose regarding which he has testified.

In December, 1923, as testified before the Public Lands Committee of the Senate, there was exhibited to witness the approval of President Harding, dated July 8, 1921, of the recommendation of the Secretary of the Interior for settlement of a claim of the United Midway Oil Company; witness is inclined to think that there must have been more than one approval of President Harding's on that subject for

(Testimony of H. A. Stuart.)

as he understands it the one date of July 8, 1921, was the President's final approval of the lease as the United Midway got it. Witness identified paper dated "Department of the Interior, Washington, July 8, 1921," addressed "My dear Mr. President," signed by Albert B. Fall, "Approved, Warren G. Harding, at the White House, July 8, 1921," as the paper seen by him when he testified before the Senate Committee but he does not think that that was the same paper which he saw in Secretary Fall's office when he called with Admiral [83—9] Griffin, he is sure it was not this one, if he and Admiral Griffin read it at all they merely glanced at it because they had no reason whatever at the time to doubt Mr. Fall's word; they had heard it had been approved and knew that the United Midway people had been around Washington for some time trying to get the lease; his recollection is that President Harding approved the settlement with the United Midway under which that Company would get land in addition to the twenty-two well strip which was to be leased to the Pan American, the strip to the south of that which would make practically all of the north half of Section 1; that that action of the Secretary of the Interior, approved by the President, was at variance with what witness would have recommended in the matter; and he knows that subsequent to the time he talked with Mr. Fall there was approved by the President final disposition of the United Midway claim, on July 8, 1921, under which that claim was settled by a lease of a strip for

(Testimony of H. A. Stuart.)

eight wells, so that together two leases of the United Midway and the Pan American represented leases which witness had acquiesced in at the Mendenhall-Cutler-Ambrose conference, as far as the land was concerned.

The witness Stuart having been excused plaintiff offered, and there was received in evidence as Plaintiff's Exhibit No. 9, a lease from the United States to United Midway Oil Land Company, dated July 8, 1921, headed "Lease of Oil and Gas Lands Under the Act of February 25, 1920, Section 18a," by which there was leased a strip of land 2,550 feet long, 900 feet wide, along the north line of Section 1, Naval Reserve No. 1, for a period of twenty years, with the preferential right in the lessee to renew for successive periods of ten years, on such reasonable terms and conditions as lessor prescribes, unless otherwise provided by law at the time of the expiration of such period, in consideration of a royalty of $55\frac{1}{2}$ per cent of all oil produced; $12\frac{1}{2}$ per cent on gas where the average production per day for the calendar month is less than 3,000,000 cubic feet, and $16\frac{2}{3}$ per cent where the average is 3,000,000 cubic feet or over; $16\frac{2}{3}$ per cent on casing-head gasoline extracted from the gas produced. Lease requires lessee to begin drilling operations within thirty days and complete the eight wells within eight months. All other clauses, terms, and conditions of the lease are the same as provided in Exhibit "F" to Plaintiff's Amended Bill. It is signed: "The United

(Testimony of H. A. Stuart.)

States of America, by Albert B. Fall, Secretary of the Interior. United Midway Oil Land Co., by J. W. Staygers, its [84—10] attorney in fact."

Thereupon there was offered and received in evidence, as Plaintiff's Exhibit No. 10, a lease dated July 12, 1921, between the United States and Pan American Petroleum Company, headed "Lease of Oil and Gas Lands Under the Act of June 4, 1920," which in substance is the same as Exhibit 9 (and Exhibit "F" to Plaintiff's Amended Bill), except that it covers a 900-foot strip along the north line of so much of Section 1 as not leased to the United Midway Company and a strip 900 feet long by 900 feet wide along the east boundary of said section. This lease is signed "United States of America, by Albert B. Fall, Secretary of the Interior. Pan American Petroleum Co., by E. L. Doheny, President," the latter signature being witnessed by Joseph J. Cotter.

Testimony of Irwin F. Landis, for Plaintiff.

IRWIN F. LANDIS was thereupon called as a witness by the plaintiff and testified that he is an officer of the Navy and since March 20, 1924, has been on duty as an inspector of naval petroleum reserves in California, having held a similar position between July 28, 1915, and June 30, 1922, at that time having his office in San Francisco; compliant

(Testimony of Irwin F. Landis.)

to instructions received by him from the Navy Department (Plaintiff's Exhibit 6) witness advertised invitations for bids in two papers in San Francisco and one in Bakersfield, and in response to that advertisement eleven bids came to his office and he forwarded them to the Navy Department in Washington. Subsequent to the issuance of the President's Executive Order dated May 31, 1921 (Plaintiff's Exhibit No. 3), Commander Stuart advised him thereof. Under date of August 4, 1921, witness received the following communication (Plaintiff's Exhibit No. 11):

PLAINTIFF'S EXHIBIT No. 11.

"My dear Mr. Commander:

I arrived here this afternoon and will be here all day Friday, at the St. Francis Hotel.

I shall be very glad indeed to have you telephone me upon receipt of this note, that I may make an appointment to see you at some hour Friday to suit your convenience.

Very truly yours,

ALBERT B. FALL."

Pursuant to the foregoing witness called on Secretary Fall August 5, 1921, and there was discussed the naval reserve situation in general and the question of necessary offset wells in particular, and whether or not additional offset wells should be drilled in Naval Reserve No. 2; witness told Secretary [85—11] Fall that in his opinion Naval Re-

(Testimony of Irwin F. Landis.)

serve No. 2 was then pretty well taken care of from a protective point of view and that possibly four or five wells might later be drilled on some of the holdings of the Associated Oil Company but no other; as regards Naval Reserve No. 1 that he thought the so-called strip lease in Section 1 sufficiently protected the naval reserve from the operations of the Pacific Oil Company and Standard Oil Company in Sections 35 and 36. Secretary Fall said he was particularly anxious to carry out the Navy Department's views with regard to the conservation of the reserves, and that his idea was only to drill such wells as in the opinion of the Navy Department and the Interior Department were necessary for proper protection. As regards the leases made in the previous July with United Midway and Pan American Companies (Plaintiff's Exhibits 9 and 10), as originally advertised, one lease was to be made of the land covered by those two leases, and Mr. Fall explained how it happened that two leases had been made; he also stated in that connection that Mr. Doheny had been in Washington complaining that in his judgment the royalties provided in Exhibit 10 were too high for that lease, and Secretary Fall thought that probably they were. There was discussed the proposition of the Pacific Oil Company concerning the exchange of lands or a nondrilling agreement, and witness told Secretary Fall that that Company had interests very much similar to those of the Navy Department in that they had a larger

(Testimony of Irwin F. Landis.)

number of sections and the protected drilling was all that they could take care of, and they believed in conserving the lands in very much the same way that the Navy Department did, and suggested that some agreement might be entered into with the Pacific Oil Company for an exchange of lands whereby the Navy Department might acquire Sections 29, 31 and 33 in Naval Reserve No. 1, lying between the two sections 35 and 36, and Secretary Fall requested witness to take that matter up with officials of the Pacific Oil Company; witness did so, had a conversation with Mr. D'Heur and Mr. Lombardi with reference to it; as a result of those conversations nothing was done. Previous to that witness had received a letter from Mr. D'Heur which in June 1921 he had transmitted to the Navy Department in Washington; witness informed Secretary Fall that he had transmitted such a letter to the Navy Department and the Secretary indicated that he wanted the matter taken up as already testified. Secretary Fall said that he wished full co-operation between the departments and between the office of witness and the Interior Department and stated that on his [86—12] return to Washington he would suggest to Secretary Denby that witness be authorized to communicate directly to Secretary Fall as well as directly to the Navy Department in order to expedite matters between the Interior Department and the office of witness, but witness does not know whether that was done, he never had any official communica-

(Testimony of Irwin F. Landis.)

tion from any official in Washington connected with the Interior Department after that and continued to report from time to time to the Navy Department.

Commander Landis saw Dr. H. Foster Bain, Director of the United States Bureau of Mines, and Mr. A. W. Ambrose, Chief Petroleum Technologist of that Bureau, in San Francisco, January, 1922, at which time a general discussion was had with regard to the naval reserves and drainage and drilling, and the question of trading or transferring with the Pacific Oil Company along the same lines as had previously been discussed with Secretary Fall. In the course of the conversation (in January, 1922) witness mentioned Commander Stuart, and having written him about some matter pertaining to the Navy reserves, Dr. Bain stated that he now pays no attention to Commander Stuart but went over his head to Admiral Robison.

In November, 1921, Frank Hall, President of the Boston Pacific Oil Company, requested of witness information regarding a telegram he had received from the Interior Department; telegram in effect was this: "Are you willing to drill up all of your holdings to the extent of one well to ten acres? If so, how soon can you begin operations?" Witness had no previous knowledge of any such purpose on the part of the Navy or Interior Department and he made inquiries of the Associated, Union, General

(Testimony of Irwin F. Landis.)

Petroleum, and Murvale Oil Companies, and found that they had similar telegrams.

From the time when witness saw Secretary Fall in the summer of 1921 he was not consulted with regard to any policy of drilling in naval reserves by Secretary Denby or Admiral Robinson or Secretary Fall nor did he have any communication with those gentlemen on the subject.

He was relieved from duty as officer in charge of Naval Petroleum Reserves on June 30, 1922. From 1915 onward he was on that duty with headquarters in San Francisco with instructions to map the naval reserves and get information regarding the physical characteristics of them, which duty included a study of production and of matters connected therewith; he had production figures of [87—13] most of the companies in the naval reserves.

The witness was not cross-examined.

Plaintiff's Exhibit No. 12 was offered and received in evidence, the same being a letter addressed to Colonel E. L. Doheny, reading as follows:

PLAINTIFF'S EXHIBIT No. 12.

"July 8, 1921.

My dear Colonel:

I desire to express to you my very sincere appreciation of your generosity and patriotism in surrendering a portion of your lease-bid in naval reserve No. 1.

I have settled the matter to-day and have signed your leases, sending them over to you by Mr. Cotter.

I filed with the President a letter explaining this entire situation and the conclusions reached and action which I had taken. In this letter to the President among other things, I said:

‘Thus my position is that of a trustee for the reclamation fund and for the State in one instance, and a trustee for the Navy for the public lands upon which there is no private claim within the naval reserve.

‘Holding the view which I did hold, as to the Midway Co. having some equity, but being desirous of adjudicating the matter if possible, to the end that the Navy might have no possible objection, I called upon Colonel Doheny, head of the Pan American Co., by telegram, stating the facts to him and that he was entitled to his lease and would have it executed under one of his bids, but asking if it were possible for him to assist me in an adjustment of the Midway claims, by agreeing to surrender 8 wells out of the 22 which were advertised by the Navy and allotted to him under his bid; he retaining the lease upon the other 14.

‘I thought that I was imposing upon Mr. Doheny and even at the instance of the Navy officials was not justified in doing so except through a personal appeal based upon our long-time acquaintance and my knowledge of the patriotism and sense of justice.

'I received an immediate favorable response and I have had the leases drawn to himself for the 14 wells, and to the Midway Co. for 8 wells which he surrenders.'

I desire the President's file to show my appreciation of your action in this matter, which, however, I had explained to him verbally.

I shall not forget your assistance in this case.

There will be no possibility of any further conflict with the Navy officials and this Department, as I have notified Secretary Denby that I should conduct the matter of naval leases under the direction of the President, without calling any of his force in consultation unless I conferred with himself personally upon a matter of policy. He understands the situation and that I shall handle matters exactly as I think best and will not consult with any officials of any bureau in his department, but only with himself and such consultation will be confined strictly and entirely to matters of general policy.

Very sincerely yours,

ALBERT B. FALL.

Col. E. L. Doheny,

Suite 2805, 120 Broadway,

New York City." [88—14]

Thereupon was offered and received in evidence Plaintiff's Exhibit No. 13, being a letter addressed to Hon. Edwin Denby, Secretary of the Navy, dated July 23, 1921, reading as follows:

PLAINTIFF'S EXHIBIT No. 13.

“Dear Mr. Secretary:

In connection with the recent authorization to the Pan American Petroleum Company and the United Midway Oil Company to drill 22 offset wells in naval petroleum reserve No. 1, California, I would like to be advised, as promptly as possible, what arrangements the Navy desires to be made for the handling and disposition of its royalty oil from said wells as well as from any other wells in naval reserves, to which the Navy is entitled to royalty in kind.

As the lease provides that purchasers will take care of the oil only for a limited period, it is important that provision be made to dispose of same promptly. I suggest the desirability of effecting an exchange of the crude oil received as royalty for an equivalent value of fuel oil, to be stored without expense to the United States by the other party to the exchange. Preferably the exchange should be not only of crude oil for fuel oil in storage but for the tanks containing the Navy's stored oil. In other words, my suggestion is that the crude oil be exchanged for tanks and fuel oil, the title to both to be vested in the Navy as a result of the exchange.

If this plan meets with your approval, and you desire me to undertake to consummate the arrangement, I shall be glad to do so. In any event, I

should like to hear from you on the subject as soon as possible.

Sincerely,

ALBERT B. FALL,
Secretary."

Plaintiff's Exhibit No. 14 was then offered and received in evidence, and is a letter addressed to the Secretary of the Interior, dated July 29, 1921, and reading as follows:

PLAINTIFF'S EXHIBIT No. 14.

"My dear Mr. Secretary:

Replying to your letter of the 23rd of July, I am glad to acquiesce in the suggestion made by you.

It will be of great benefit to the Navy to have the royalty crude oil from wells on the naval reserves (both those already in operation and those to be drilled by the Pan American Petroleum Co. and the United Midway Oil Co.) exchanged for fuel oil at tidewater to be stored if practicable without expense to the Government, and if possible for tanks in which such fuel oil can be stored. As the Navy has no appropriation to pay for the cost of construction of tank storage, the acquisition of tanks by exchange for crude oil from Naval Reserve wells will be most acceptable.

While these tanks could be readily utilized at any point at tidewater, the usefulness to the Navy would be increased if they could be located at any one of the following points: San Diego, San Pedro, San Francisco Bay, Puget Sound, Honolulu or Pearl Harbor, Hawaii.

In view of the greatly reduced amount available under the appropriation 'Fuel and transportation' for the present fiscal year, it would be of special benefit to the Navy to obtain royalty fuel oil at this time as such oil would not involve a charge against this appropriation.

EDWIN DENBY." [89—15]

Thereupon plaintiff offered in evidence letter dated June 13, 1921, from A. D'Heur, Vice-President of the Pacific Oil Company to Lieutenant Commander Landis, to the admission of which letter in evidence the defendants objected on the ground that the contents of said letter were irrelevant to any issue in this case, that the same were immaterial and incompetent; that said letter as to defendants constituted hearsay; that no proper foundation for its receipt in evidence had been laid and that it was not shown, or offered to be shown, that the defendants had any knowledge of it or were in any way connected with it. Counsel for plaintiff stated that plaintiff proposed thereafter to show that said letter was forwarded by Commander Landis to the Navy Department and was by that Department forwarded to Secretary Fall in the Interior Department, after which statement defendants' objection, on the grounds above stated, was renewed. The Court overruled said objection, and admitted said letter in evidence, to which ruling and action of the Court defendants duly noted an exception. Said letter was marked Plaintiff's Exhibit No. 15 and in substance stated that as the Navy Department and the Pacific Oil Company each had con-

siderable holdings within the boundaries of Naval Reserve No. 1, and it was desirable to hold the oil in the ground and to prevent cut-throat drilling, and as the best way to reserve oil in the ground is to consolidate holdings in as large blocks of land as possible, and it would be a great advantage to the Navy to hold several sections together, rather than alternate sections, it was proposed by the Company, first, that certain sections in the area be traded between the Navy and the Company so as to throw the holdings of each into a single block; second, as an alternative, if the suggested trading does not meet with the approval of the Navy, that negotiations be entered into with the Pacific Oil Company looking toward an agreement to prevent cut-throat drilling, such an agreement to provide that each owner shall not drill any more wells within 900 feet of their boundary lines, and will contain a clause for cancellation upon, say, three months notice; third, that the Navy lease to the Company, under a suitable royalty to be determined later, a strip of land along the border line between sections held by the Navy and that Company; the Company will then drill this strip on a schedule which will insure the Navy a steady supply of fuel oil through royalty at low cost to the Navy. Negotiations and discussions were suggested. [90—16]

Thereupon there were severally offered and received in evidence correspondence based upon and resulting from this last exhibit, each of the exhibits in said correspondence being made the subject of the same objection, ruling, and exception as related

to the above Exhibit 15; said documents as received were numbered Plaintiff's Exhibits 16 to 22 inclusive and were, in substance, as follows:

Plaintiff's Exhibit No. 16 was a letter dated June 22, 1921, from Commander Landis to the Secretary of the Navy through Chief of Bureau of Engineering and transmitted the foregoing D'Heur letter with the following statements, in substance, made by the writer (Landis): The Pacific Oil Company is in sympathy with the Navy Department's policy to restrict drilling in the naval reserves to the minimum consistent with the proper protection of its interests; reference is made to the alternating Government and Pacific Oil Company's ownership of sections in Naval Reserve No. 1 (which is shown elsewhere in this record on map of said reserve); Sections 31 and 33 of 30-24 are undeveloped; he is informed that the Company does not contemplate immediate operations thereon; on 31-30-24 there are five producing wells of a very light gravity of oil; in 35-30-24, just north of the naval reserves, the Pacific Oil Company has nine wells, producing at this time an average of 1075 barrels per well per day, two being first line wells, the others being more than 900 feet from the south line of the section. On May 25, 1921, there was forwarded to the Navy letter signed by R. J. White and H. P. Coffin making application for a lease to a strip in Section 2-31-23, enclosed with which was a map of Elk Hills showing development as of April 1, 1921; the application of White and Coffin, if approved, would provide for offset-

ting the wells already drilled in Section 35-30-24; the Pacific Oil does not intend to drill any more wells in that section less than 900 feet from the edge; the suggestions of Mr. D'Heur are worthy of consideration.

Plaintiff's Exhibit 17 is letter from Secretary Denby to Secretary Fall dated June 28, 1921, transmitting the aforementioned Landis and D'Heur letters and stating that in view of the fact that it is highly desirable to have the lands in this reserve consolidated in as large a block as possible, it appears advisable that an effort be made to come to an agreement of some character with the Pacific Oil Company; writer (Denby) therefore of opinion advisable to open negotiations with this Company, and in view of its general attitude, both in past and [91-17] present, it is believed a satisfactory agreement can be concluded between this Company and the two departments concerned.

Plaintiff's Exhibit No. 18 is a letter dated July 1, 1921, to Secretary Denby from Secretary Fall acknowledging receipt of the last mentioned and stating that early opportunity will be taken to look thoroughly into the matter and advise in the premises.

Plaintiff's Exhibit No. 19 consists of a "Memorandum for Mr. Safford" (who it is stipulated was at the time Administrative Assistant to the Secretary of the Interior), dated July 7, 1921, from George Otis Smith, Director of the Geological Survey, stating that the above correspondence (Exhibits 15 to 18) has been forwarded by Safford to the Sur-

vey and that the result of studying of the matter was embodied in the enclosed draft of letter to D'Heur which was transmitted for Secretary's consideration.

Plaintiff's Exhibit No. 20 bore a pencil notation, made April, 1924, reading: "This letter evidently not sent but replaced by letter of July 18 as written in Secretary's office," and consists of a draft of letter to Mr. D'Heur prepared by Mr. Smith for the signature of Secretary Fall, and is in substance the same as letter dated July 18th (Exhibit 21, *infra*), with the exception of the following two paragraphs omitted from the letter as sent: [92—18]

PLAINTIFF'S EXHIBIT No. 20.

"From the Government's point of view the first proposal seems to me best, because while the Navy of course needs a certain amount of oil for immediate peacetime purposes, the value to it and to the country, of the reserves is not to supply current needs but to insure us against that future emergency when the oil supplies of the United States and perhaps of the world are depleted or exhausted and when that nation with an assured domestic reserve may be able to avoid war because of that reserve or be victorious if war can not be avoided. This is the basic purpose of the naval reserves, and that purpose is defeated by any plan which provides for early development.

I should therefore greatly prefer to enter upon negotiations with your company upon the basis of your first proposal."

Plaintiff's Exhibit No. 21 consists of a letter dated July 18, 1921, copy of which was transmitted to the Navy Department for its information, which is addressed to Mr. A. D'Heur, Vice President, Pacific Oil Company, and reads:

PLAINTIFF'S EXHIBIT No. 21.

"Dear Mr. D'Heur:

Your letter of June 13, 1921, addressed to Lieutenant Commander Landis, U. S. Navy, has been forwarded to me for consideration by Secretary Denby in pursuance of the administrative order of May 31, 1921, placing the administration of naval reserves in the Department of the Interior.

In your letter you suggest the desirability both from the point of view of the Navy Department and of the Pacific Oil Company of an attempt to reach an agreement mutually satisfactory to the Government and to the company, by which the primary purpose of the naval reserves—namely, the retention in the ground of a supply of oil ample for the needs of the Navy in the future—may be accomplished and at the same time the interests of your company, through its private holdings, in the reserve duly protected.

Your suggestion and the spirit which prompts it are appreciated, and I join with you in the belief that negotiations be had if possible to accomplish this end. I have noted the three suggestions which are contained in your letter, and which I agree should be used as a basis for preliminary discussion. I am informed that there

does not now exist in any administrative officer authority to effect an exchange of properties, and that it will be necessary to obtain additional legislation before any final agreement can be consummated. This, however, does not preclude preliminary consideration being given the problem, and I am of the opinion that negotiations should be entered into and after determination of a tentative agreement the necessary legislation, either specific or general, may be secured through Congressional action.

Meanwhile it seems to me wise that both the company and the Government should maintain the status quo, so far as possible, in Naval Reserve No. 1. I should be glad if your company will do no other than necessary defensive drilling in the reserve pending the outcome of negotiations. Meanwhile it is my intention to grant no drilling rights on Government lands within the reserve other than such rights as it may prove necessary to grant in the settlement of pending claims or to offset wells already drilled or to be drilled on private lands and so situated as to draw oil from the Government reserves. [921½—19]

I assure you that if this be agreeable to you, I will be pleased to arrange for a preliminary meeting between representative of your company and representatives of the Department here in Washington, or if you prefer to consider your proposals through Commander Landis in San Francisco. However, I am of the opinion that better results are obtainable by conference where the details can

be discussed more freely than if the proposals are submitted in writing.

Thanking you for the spirit which prompts the proposals on your part, and awaiting your reply in this matter, I am

Respectfully,

ALBERT B. FALL,
Secretary."

Plaintiff's Exhibit No. 22 is letter to Secretary Fall dated July 26, 1921, reading:

PLAINTIFF'S EXHIBIT No. 22.

"Dear Mr. Fall:

I acknowledge receipt of your favor of July 18th, in answer to mine of June 13th, and would assure you that in the very near future I will answer the different matters brought up therein seriatim.

In the meantime in accordance with your suggestion, I have already stopped work on the two wells which we were starting to drill on the lines of the Naval Reserve land in the Elk Hills.

Thanking you for your interesting reply to mine of June 13th, I remain

Respectfully yours,

A. D'HEUR."

Thereupon plaintiff introduced and there was received in evidence letter dated October 6, 1921, from Admiral J. K. Robison to Mr. E. L. Doheny, reading:

"My dear Mr. Doheny:

I have wanted to write to tell you of the good fortune that has come to me. Because of the many

ways in which you have indicated your friendship for me, I am sure that you will be glad. The President has nominated, I have been confirmed, and am now serving as Engineer-in-Chief of the Navy.

It is a pretty good billet. As you know, it gives me control of large activities, rank while holding the office of Rear Admiral, and in particular it gives me responsibilities and authority in connection with the maintenance and unbuilding of our Navy that I am glad to assume. To have been selected from my fellows for this position is grateful,—the principal joy that I get, of course, comes from the satisfaction of my family and friends.

With best wishes for your future and with affectionate remembrance of Mrs. Robison and myself to your family, I am

Most cordially yours

J. K. ROBISON,

Engineer-in-Chief, U. S. Navy."

Thereupon there was received in evidence Plaintiff's Exhibit No. 24, letter dated October 25, 1921, from the Secretary of the Navy to the Secretary of the Interior, reading: [93—20]

PLAINTIFF'S EXHIBIT No. 24.

"My dear Mr. Secretary:

Rear Admiral J. K. Robison reported to me that as a result of his interview with you on Saturday, October 22, the following general agreement in connection with the naval petroleum reserves was reached:

1. That arrangements will be made by the Interior Department to have naval petroleum reserves Nos. 1 and 2 drilled with offset wells in every case where adjacent property is drilled.

2. That the amount of drilling with consequent exhaustion of the reserves shall be kept as low as practicable without risking the depletion of the reserves by other parties.

3. That the equivalent of all royalty oil shall be delivered to the Navy in the form of fuel oil at such points on the Pacific Coast as may be found necessary for naval use, and that this exchange of crude oil for fuel oil will be affected on as favorable terms as it is possible to obtain. It is presumed that under favorable circumstances and terms arrangements may be made for including points on the Atlantic Coast for the delivery of an equivalent supply of fuel oil to the Navy.

4. That the equivalent of so much of the royalty oil as is not used by the Navy is to be devoted to the construction of oil storage at Pearl Harbor, Hawaii, and at other points to be hereafter designated by the Navy Department, the cost of the tanks to be credited to the royalty due the Navy.

5. That the Interior Department will exercise its best efforts to obtain for the Navy as large royalties and as favorable terms as practicable by public competition or otherwise.

6. That the terms for conversion of the crude oil at the well to fuel oil at tidewater or in tanks to be provided by the lessor will be submitted to

the Navy Department for approval of the qualities, deliveries, engineering, and other features involved.

7. That all leases and contracts, except as provided in paragraph 6, will be arranged and consummated by the Interior Department, copies of same being furnished to the Navy Department as a matter of information and record only.

8. That every effort will be made by the Interior Department to expedite the solution of this problem so that fuel oil at Pacific tidewater in exchange for royalty crude oil may be delivered as soon as possible to naval vessels and so that the erection of suitable storage facilities for 1,500,000 barrels of fuel oil at Pearl Harbor may be undertaken and expedited.

9. That the development of naval petroleum reserve No. 3 is not to be undertaken except to protect the government against depletion of the reserve by other parties.

10. The general intent of this agreement is to transform royalty oil into either (a) fuel oil for current naval use, or (b) fuel oil stored where required by the Navy as a reserve, the storage, of course, to be naval property and to accord with naval requirements.

In accordance with the foregoing understanding there is returned herewith letter from the Interior Department concerning leases that it is proposed to enter into with certain parties in naval petroleum reserve No. 1. Such details are, under the foregoing announced policies, to be left entirely to the Department of the Interior.

Information is requested as to whether the foregoing policies are in all respects agreeable to the Department of the Interior, and also when it may be expected that the Navy Department will begin to receive fuel oil as part of its royalties.

EDWIN DENBY." [94—21]

In the following order there were introduced and received in evidence exhibits numbered, dated, and consisting of the following:

No. 24-A, letter of October 30, 1921, from Secretary Fall to the Secretary of the Navy, reading:

PLAINTIFF'S EXHIBIT No. 24-A.

"My dear Mr. Secretary:

I have your letter of October 25 and have just consulted Admiral Robison about the subject matter.

Responding to your request for information as to whether the policies set forth in the letter are agreeable to the Department of the Interior, I can say without hesitation that they are entirely agreeable and will be carried out to the very best of my ability.

Of course, should any new matter come up at any time I will unhesitatingly and immediately consult you personally or through Admiral Robison.

As to the definite date when you expect fuel oil as payment of your royalties, I can give you accurate information within a very few days.

Several of your wells are coming in, one or two are in, and we can exchange immediately for fuel

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oil certificates through which you can draw fuel oil as needed at Pacific ports.

Very sincerely yours,

ALBERT B. FALL."

No. 25, dated November 8, 1921, from the Secretary of the Interior to the Secretary of the Navy, reading:

PLAINTIFF'S EXHIBIT No. 25.

"Dear Mr. Secretary:

Referring again to paragraph 3 of your letter of October 25, 1921, regarding an exchange of royalty oil produced on Naval Petroleum Reserves in California for an equivalent amount of fuel oil to be delivered to the Navy at Pacific Coast ports:

I am planning to consider bids made by several oil companies in California relative to this exchange and in order to do this I would like to have from your department specifications for fuel oil that will be acceptable to the Pacific Coast fleet. Owing to the urgency of this matter I would appreciate a prompt reply.

Respectfully,

ALBERT B. FALL,

Secretary.

No final action upon bids will be taken until after conference as to amts., points of delivery, etc.

FALL."

No. 26 is letter dated November 10, 1921 from the Secretary of the Navy to the Secretary of the Interior, signed "Edwin Denby," containing Navy fuel oil specifications requested in Exhibit 25.

No. 27 consists of nine separate telegrams addressed by Secretary Fall, under date of November 14, 1921, to sundry lessees who had leases under [95—22] the Act of February 25, 1920, in Naval Reserve No. 2, there being two forms of said telegrams, one of which forms was sent to the Murvale and Union Oil Companies, reading as follows:

PLAINTIFF'S EXHIBIT No. 27.

"Advise if you can and will proceed promptly to drill the necessary wells to fully develop all the area you relinquished in section thirty-four, township thirty-one, range twenty-three, and the sixty acres relinquished by your predecessor Buena Vista Oil Company in Section thirty-two, township thirty-one, range twenty-four in second naval reserve in event preference right well permits or area leases are awarded you. If so wire royalty bid.

FALL,
Secretary."

The other form of telegrams constituting said exhibit was sent to Lillie M. Jones, Wilkes Brothers, Caribou, Consolidated Mutual, Record, and General Petroleum companies, and, with a mere change of figures and sections referred to, reads as follows:

"Advise if you can and will proceed promptly to drill the necessary wells to fully develop all the area you relinquished in section thirty-two, township thirty-one, range twenty-four in second naval reserve in event preference right well permits or

area leases are awarded you. If so wire royalty bids.

FALL,
Secretary."

No. 28 is letter dated November 15, 1921, addressed to the Secretary of the Interior, reading as follows:

PLAINTIFF'S EXHIBIT No. 28.

"Dear Mr. Secretary:

Captain Hepburn, the Acting Chief of the Bureau of Engineering, informs me that as a result of his interview with you on Saturday, 12 November, it is his understanding that the Department of the Interior expects to be able to furnish the Navy Department within a few days a certain quantity of fuel oil in exchange for royalty crude oil from the Naval Petroleum Reserves, provided the quantities required and the points of delivery are known.

I would, therefore, inform you that the Navy Department requires for current use for the period 1 December 1921 to 3 June 1922, the end of the fiscal year, a total quantity of 1,500,000 barrels of fuel oil. The delivery of this oil should be made in approximately equal monthly installments at any pipe line terminal at which Navy tankers can load. The maximum draft of the Navy tankers is 28 feet.

As a part of the above 1,500,000 barrels it is desired to obtain tanker deliveries at other than pipe line terminals as follows:

San Diego.....	200,000	barrels
Pearl Harbor.....	125,000	“
Cavite	150,000	“
Puget Sound.....	80,000	“

These deliveries can be made at practically any time during the period of the contract.

It is further desired, as a part of the above 1,500,000 barrels, to obtain barge deliveries—barges being property of the contractor—in approximately equal monthly installments as follows: [96—23]

Seattle, Washington.....	25,000	barrels
Point Wells “	15,000	“
Portland, Oregon.....		
Willbridge, “	15,000	“
Astoria “	10,000	“
Eureka, California.....	15,000	“
Mare Island Navy Yard and		
San Francisco Bay points....	180,000	“
San Diego, California.....	200,000	“

this delivery being an alternative to the tanker delivery mentioned in preceding paragraph.

It should be noted that these deliveries cover only a period of seven months. Owing to the uncertainty of the requirements after 30 June, 1922, it is deemed desirable to make a contract covering only seven months. It is anticipated that by next April or May definite requirements for the fiscal year 1923 will be known and a contract covering this period can then be made.

While it is not expected that the quantity of royalty crude oil will be sufficient to meet the full requirements of the Navy for fuel oil on the West

Coast and to build also a large amount of storage, I have endeavored to furnish you with a complete schedule of the Navy's needs with respect to fuel oil in Pacific waters. With the data herewith furnished, together with the information already at your disposal, I trust that you will be able to enter into a satisfactory contract with one, or several, of the various oil companies on the West Coast.

It would be appreciated if early information could be furnished as to the approximate quantity of fuel oil that is expected the Navy will obtain in order that additional contracts may be made to purchase the fuel oil necessary over and above that obtained from an exchange of royalty crude oil for fuel oil.

Sincerely yours,

EDWIN DENBY."

No. 29 is letter dated November 18, 1921, addressed to the Secretary of the Navy, as follows:

PLAINTIFF'S EXHIBIT No. 29.

"Dear Mr. Secy:

I have your letter of November 15, 1921, setting out in detail the fuel oil needed by the Navy Department, on the Pacific Coast between the period of December 1, 1921, and June 30, 1922.

In order to provide the Navy with as much of this fuel oil as possible, without cost by exchange of royalty oil on Naval Reserves No. 1 and 2 for fuel oil, I am taking immediate steps for the exchange of royalty oil from present producing wells and am planning to grant additional leases to be

drilled as rapidly as possible. This Department can carry on the preliminary work with its present force but the supervision of drilling, production and gaging of oil together with the computation of royalties on new wells will add a burden which cannot be carried with the present force.

At the time the leases were granted to the Pan American Petroleum Company and the United Midway Oil Company on Naval Reserve No. 1, your Department transferred to the credit of the Bureau of mines \$5500 for the supervision of the field work. It is my understanding that the Navy Department has certain additional funds which can be transferred to the account of the Bureau of Mines for the drilling now proposed, if this is true, I request the Navy Department transfer to the Bureau of Mines the sum of \$10,000 for the employment of field engineers, gagers, and clerks to supervise the drilling, production, gaging of oil and computation of royalties of the new work. [97—24]

You may be interested to know that this program should provide to the Navy during the calendar year 1922 at least \$3,000,000 worth of fuel oil in exchange for royalty oil and at a cost to the Navy Department, if the \$10,000 requested is transferred, at a yearly rate of \$25,000. I am very anxious that this additional drilling be started as soon as possible and I would appreciate any effort your Department makes to provide the immediate transfer

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of \$10,000 from the Navy Department to the account of the Bureau of Mines.

Respectfully,
(S.) ALBERT B. FALL,
Secretary."

No. 30 is letter addressed to Secretary Fall, signed Edwin Denby, dated November 21, 1921, acknowledging receipt of Exhibit 29 dated November 18, 1921, and stating that necessary steps were being taken to have transferred the sum of \$10,000 as requested.

No. 31 is letter dated November 22, 1921, addressed to the Secretary of the Interior, reading:

PLAINTIFF'S EXHIBIT No. 31.

"Dear Mr. Secretary:

Pursuant to our bid of April 25, 1921, the Department on July 12, 1921, issued to us Oil and Gas Lease for a 900 foot strip of land in Section 1, T. 31 S., R. 24 E., M. D. B. & M., Kern County, California, within Naval Petroleum Reserve No. 1. This lease contained provision for payment to the Government of a royalty of 55½ per cent, and a further provision that we should drill to completion fourteen (14) wells within eight (8) months.

We have drilled upon this land two (2) wells which are producing by pumping 225 barrels each per day; we *have* drilling six (6) additional wells, several of which are nearing completion; and we have several more rigs up ready to commence work. Our expenditures on this land up to October 1st have been \$540,000.00.

At the time this lease was issued, everyone concerned, including the Geological Survey and ourselves, expected that this would be large producing territory. The confident expectation, which was practically accepted as a fact, that large flowing wells would be obtained on this land, was the only justification for the unprecedented royalty fixed in the lease. As justifying this expectation it may be stated that nine wells drilled by the Standard Oil Company along the south line of Section 36, and adjoining our strip of land on the north, had an average initial production of 3,234 barrels per day, whereas these same nine wells now have an average production of 711 barrels per day, and five of them are producing from 240 to 330 barrels each per day; and another string of nine Standard wells to the north of the row just mentioned had an average initial production of 2,511 barrels per day, which has now decreased to an average daily production of 465 barrels.

The gas pressure in this land is gone, and instead of getting large flowing wells, the wells come in as moderate pumpers.

The cost of pumping in this deep field is high, and this in connection with the royalty of 55½ per cent exacted by the Government, renders it impossible for us to operate these small wells except at a loss, not to mention the fact that since the date of our bid (April 25, 1921), the price of this oil has declined fifty cents per barrel, from \$1.63 to \$1.13.

In view of these facts, it seems no more than just that the Government should afford us some relief. Had the territory proven up as was expected by all of us, no relief would have been asked [98—25] for by reason of the drop in the price of oil, but in view of the fact that instead of large production from these lands, we now cannot look even for flowing wells and will get only moderate pumping wells, we respectfully request that our royalty be revised so that the present rate will not apply to these small pumping wells, and we suggest that as equitable readjustment would be to fix the royalty on a sliding scale basis such as follows:

Wells producing over 1,500 barrels—55½ per cent.

Wells producing over 1,000 and not over 1,500 barrels—40 per cent.

Wells producing over 500 and not over 1,000 barrels—30 per cent.

Wells producing over 250 and not over 500 barrels—20 per cent.

Wells producing 250 barrels and under—12½ per cent.

I enclose copy of letter of our General Manager in this connection.

Respectfully yours,

PAN AMERICAN PETROLEUM COMPANY,

By J. J. COTTER."

Thereupon the fact was stipulated that lease between the Government and the United Midway Oil Land Company dated July 8, 1921 (Exhibit No. 9,

supra), has been assigned by that lessee to W. R. Ramsey, and plaintiff read in evidence Exhibit No. 32 dated November 23, 1921, addressed to the Secretary of the Interior, as follows:

PLAINTIFF'S EXHIBIT No. 32.

"Dear Mr. Secretary:

Our Company accepted as a compromise from your department an oil and gas lease, dated July 12, 1921, on a 52 acre tract of land in Section 1, Township 31, Range 24, East, Kern County, California. This lease required that we drill eight wells to be completed within eight months and that we pay the Government a royalty of 55½ per cent of all oil taken from the lease. We immediately started an active drilling campaign and notwithstanding the many difficulties in grading, road building, and labor troubles, we have up to this time completed three of the wells and have two in the course of drilling and have finished the grading and the preliminary work on the remaining three.

Reports from the geological department and government officials and actual results accomplished on adjoining leases apparently justified the unusually heavy royalty exacted from us by your department. Thus far we have expended the following sums of money:

Wells Nos. 1, 2, 3, 4, and 8.....	\$151,443.00
Ten inch casing.....	62,879.00
Six inch casing.....	49,841.00
Tankage	9,472.00
Fittings and machinery.....	1,700.00

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Boilers	18,485.00
Grading and roads.....	13,121.00
Buildings	6,260.00
Pipe Lines.....	9,473.00

Total expenditures.....	\$322,674.00
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[99—26] and when you take into consideration the amount previously expended by us as shown by the records, our total expenditures exceed \$500,000.00.

We now find that the gas pressure is off and that we are not on the crest of the structure as we all believed we were at the time of making this lease. Of the three wells we have completed, one is practically a dry hole. Our No. 2 well pumped 200 barrels when it came in ten days ago and then sand trouble occurred. We have been constantly working on it ever since but have been unable to get it pumping again. Our third well initial production is slightly over 200 barrels and will settle down to very much less than that.

Our lifting cost on a lease of this kind, located in an isolated place, and in such a deep field and with such heavy gravity oil, is so great that we cannot commercially operate the lease and pump the oil at the existing royalty, much less can we ever hope to recover any of the large sum of money which we have expended in developing and drilling this property and we earnestly petition your department for a prompt revision of our contract based on equitable royalties. We have certainly manifested our good faith in pursuing the development work and had the

wells come in anything like what we all figured on, we would be perfectly content with the present scale of royalty.

Three of the four wells of the Standard Oil Company offsetting our lease on the north, came in in excess of 6,000 barrels initial production. We believe a fair basis of royalty would be to start at one half of this or 3,000 barrel and to scale the royalties as follows:

Wells of 500 bbls or less.....	12-1/2 % royalty.
Excess oil over 500 bbls. up to 1000 bbls.	15 "
" " " 1000 " " 1500 "	20 "
" " " 1500 " " 2000 "	35 "
" " " 2000 " " 2500 "	40 "
" " " 2500 " " 3000 "	55-1/2 "
" " " 3000	55-1/2 "

We desire to call your attention to some of the facts in connection with the negotiations which led to our acceptance of the present lease with the royalties as specified. Our company had what we believed to be a just and equitable claim under the Placer Mining Law to 473 acres in this same section on which a large sum of money had been expended for prospecting and developing. The department, recognizing the justice of our claim and believing that this small strip of land offsetting these big wells, if drilled and developed, would not only compensate us for the new development expense but would ultimately repay the original expenditures. Results have proved otherwise and we

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ask that you readjust our contract along lines which are more equitable.

Respectfully submitted,
UNITED MIDWAY OIL LAND COMPANY,

Assigned to W. R. RAMSEY,
By J. W. STAYGERS, Attorney."

Whereupon there was received in evidence Plaintiff's Exhibit No. 33 as follows: [100—27]

PLAINTIFF'S EXHIBIT No. 33.

"PAN AMERICAN PETROLEUM & TRANSPORT CO.

Office of the President.

New York, November 28, 1921.

The Honorable the Secretary of the Interior,
Washington, D. C.

Dear Mr. Secretary:

Along the lines of your suggestion, I have made some inquiries regarding the cost of constructing tanks for the storage of one and one-half million barrels of fuel oil at Pearl Harbor. I find that the best price obtainable for these tanks, the Government to stand the cost of transporting the material from the ship's side to the tank site, and the cost of grading and otherwise preparing the tank site, is \$19,960 per tank, or \$0.363 per barrel of storage capacity.

The present price of crude oil in the field in California is \$1.13 per barrel. The present cost of fuel oil delivered at Pearl Harbor is \$1.90 per barrel.

The cost of 1,485,000 barrels of fuel oil delivered at Pearl Harbor at present rates would be \$2,821,500, which, added to the cost of constructing the 27 tanks necessary to store this amount of oil, which is \$538,920, makes a total of \$3,360,420.

Therefore, were we to construct the tanks and furnish the oil on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserve and to be leased to us, it would require a return to us in royalty crude valued at \$3,360,420, or 2,973,823 barrels, figured at to-day's price. Of course, interest on the money invested should also be figured until final adjustment is made through the payment of royalty oil.

I suppose you will turn this matter over to First Assistant Secretary Finney, who, with Rear Admiral Robison, may arrange the details of it during your absence, and as I also expect to be absent, I am confidentially furnishing Mr. Cotter with the information so that he can intelligently discuss the matter with Mr. Finney.

Cordially yours,

E. L. DOHENY."

Plaintiff's Exhibit No. 34 is letter dated November 29, 1921, addressed to Rear-Admiral John K. Robison, Engineer in Chief, Navy Department, reading:

PLAINTIFF'S EXHIBIT No. 34.

"My dear Admiral:

Mr. Cotter will wait upon you with data, etc., with

relation to oil tanks and royalty oils in connection with Pearl Harbor demands.

I have asked him also to hand you, for your inspection, the original of a letter from Colonel Doheny addressed to myself, containing a resume of the data.

Should you think best to accept this proposition then of course it would be necessary, in my judgment, to turn over to Col. Doheny, if we can do so, leases upon further wells or area in the naval reserve in which he is now drilling. If this is done it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan American.

The gas pressure is lessening to such a degree that the output of the wells of the two latter companies, as well as of other companies drilling in this neighborhood, is decreasing and is very disappointing. The two companies named are pumping their wells and of course they are not making any money but will experience a loss in [101—28] the payment of the fifty-five per cent royalty to the Government.

If you approve the proposition, will you kindly indicate to me such approval by simple endorsement upon Col. Doheny's letter to myself, signed by yourself. Your simple O. K. will be sufficient.

Very sincerely yours,
ALBERT B. FALL." [102—29]

Testimony of Graham Youngs, for Plaintiff.

Thereupon GRAHAM YOUNGS, called as a witness on behalf of plaintiff, testified that he is Treasurer of Blair & Co., Inc., Bankers, in the city of New York; he knows Messrs. E. L. Doheny, Sr., and Jr., and had a transaction with E. L. Doheny, Jr., in the office of Blair & Co., New York, in the latter part of November, 1921; witness had heard respecting his coming there later in the day and was asked by plaintiff's counsel "What information did you have regarding it?" Defendants objected to the question as calling for what some undisclosed person told the witness at a banking-house in New York, to which objection counsel for the plaintiff responded: "We will connect the matter up"; whereupon counsel for defendant repeated the objection on the ground that connecting up does not make hearsay evidence competent when it is hearsay; that if plaintiff's counsel will say he undertakes to show that either one of the defendants had some connection with the statement witness was asked to testify regarding, his position might be different, but the mere statement that counsel is going to ask witness to testify to what some unnamed and undisclosed person told him and will connect it up does not make competent as evidence that which is obviously hearsay. To this objection plaintiff's counsel responded that "The testimony thus far shows that the Dohenys were very substantial stockholders and officers of the Pan American Company, one of the de-

(Testimony of Graham Youngs.)

fendants here, and my question has to do with these men"; whereupon the Court ruled that in view of the statement of plaintiff's counsel that the evidence would be connected up the objection was overruled and the testimony would be received subject to being subsequently connected with the defendants and the issues; to which ruling defendants duly noted an exception and further, with the Court's permission, then granted, reserved the right thereafter before the close of the trial to move to strike this testimony from the record on the grounds, first, that it is incompetent, and, secondly, that it is not connected with the issues or the defendants. The question having been read, witness testified that he learned that Mr. Doheny, Jr., required a certain amount and would come in and get it later in the day, the amount being \$100,000. Thereupon, over the objections of the defendants based on the ground that the evidence was immaterial and incompetent, irrelevant to any issues in the case, and not admissible against the corporate defendants or either of them, but related to matters with which neither nor both of said defendants were connected, and under exception duly reserved to the ruling of the Court overruling said objection, [103—30] the witness Youngs testified that Mr. Doheny, Sr., and also Mr. Doheny, Jr., had accounts at his bank at that time; that when he received the information that Doheny, Jr., would want \$100,000 he procured it from the First National Bank of New York where Blair &

(Testimony of Graham Youngs.)

Co. kept current funds upon Blair & Co.'s check dated November 30, 1921, for the sum of \$100,000, cashed that date, drawn on the First National Bank of the City of New York, which check was offered in evidence, to which offer defendants objected on the ground that a document representing an inter-bank transaction between two New York banking-houses, not shown to be in any way connected with any transaction of the corporate defendants, was incompetent as against them and irrelevant to any issues in this case, which said objection was disposed of as follows: "The Court: I presume it will be connected up. Mr. Pomerene: Yes, it will be. The Court: The objection is overruled." To which ruling of the Court defendants duly noted an exception. Said check was received as Plaintiff's Exhibit No. 35. Over the objections and exceptions as already stated witness continued that later on the same day he saw Mr. Doheny, Jr., at the office of Blair & Co. where he delivered to Mr. Doheny, Jr., the sum of \$100,000 in currency the denominations of which he does not remember but which he would say were large; this delivery was made in the conference room, immediately adjoining the main office; Mr. Doheny verified the amount, which was delivered in a package about four inches thick by the width and length of the bills, which package witness believes Mr. Doheny put in a small satchel; this occurred about 2 o'clock in the afternoon; no one accompanied Mr. Doheny who, after receiving

(Testimony of Graham Youngs.)

the money, left the bank; there was no talk between witness and Doheny, Jr., regarding this transaction.

Cross-examination.

With the stipulation, approved by the Court, that the objections made to the foregoing testimony of the witness Youngs were not waived by cross-examination, the witness on cross-examination testified that at the time referred to in his direct, November 30, 1921, there was a personal banking deposit account kept with Blair & Co. by and in the name of Mr. and/or Mrs. E. L. Doheny, Sr., against which either had the right to check and in which they periodically made deposits, and there was also a personal deposit and checking account in the name of Mr. and/or Mrs. E. L. Doheny, Jr.; that about 2 o'clock in the afternoon of November 30, 1921, Mr. Doheny, Jr., at the banking-house of Blair & Co. presented a check drawn on the latter account, which was a personal bank [104—31] account, for \$100,000, which sum he received in currency, put in a receptacle, and left the bank.

Testimony of Charles L. Little, for Plaintiff.

Thereupon CHARLES L. LITTLE, was called as a witness on behalf of plaintiff and over objections, and under exceptions, the same as those interposed and allowed as regards the testimony of the witness Youngs (except as to the objection on the ground of hearsay), the said Little testified that he is, and in November 1921 was, assistant paying

(Testimony of Charles L. Little.)

teller of Blair & Co. in New York; that he knows E. L. Doheny, Sr., and Jr., by sight; that they have and in November, 1921, had bank accounts with Blair & Co. the ledger sheets of which the witness produced; that the account of Mr. and Mrs. E. L. Doheny, Sr., either one or both, on November 29, 1921, had a balance of \$8,633.72; that on the same day the account of Mr. and Mrs. E. L. Doheny, Jr., either one or both, had a balance of \$111,011.65; that several checks were drawn against this last-mentioned account on November 29th and 30th, one on the latter date being for \$100,000; that on December 5th the balance to the credit of the Doheny, Jr., account was \$7367.61; to which credit there was deposited December 6, 1921, \$40,000, the proceeds of check of E. L. Doheny on Security Trust & Savings Bank, Los Angeles, California; that on January 23, 1922, there was credited to that account the sum of \$116,002.29, the proceeds of two checks of E. L. Doheny on Security Trust & Savings Bank, Los Angeles, one for \$60,000 and one for \$56,002.29; these last referred to checks were transmitted to Blair & Co. by a letter dated January 11, 1922, Plaintiff's Exhibit No. 38, which plaintiff's counsel requested be copied into the record in its entirety, including the letterhead, and which is as follows:

PLAINTIFF'S EXHIBIT No. 38.

"PAN AMERICAN PETROLEUM & TRANSPORT COMPANY.

Security Building.
Los Angeles, California.

Edward L. Doheny, President.	General Offices:
J. M. Danziger, Vice-President.	Security Building,
Herbert G. Wylie, Vice-President.	Los Angeles.
Charles E. Harwood, Vice-President.	
J. S. Wood, Vice-President.	Other Offices:
P. H. Harwood, Vice-President.	New York.
Norman Bridge, Vice-President.	New Orleans.
Edward L. Doheny, Jr., Vice-Pres. & Treas. Tampico.	
Oscar D. Bennett, Secretary.	
A. R. Pointer, Comptroller.	

Office of the Secretary. Jan. 11, 1922.

Blair & Company,
24 Broad Street,
New York City. [105—32]

Gentlemen:

We hand you herewith two checks drawn by Mr. E. L. Doheny on the Security Trust & Savings Bank, of Los Angeles, in favor of E. L. Doheny, Jr.,—the one for \$60,000.00 and the other for \$56,002.29, duly endorsed, which kindly place on deposit with yourselves to the credit of 'Mr. and/or Mrs. E. L. Doheny, Jr.' advising me when so done.

Yours very truly,

O. D. BENNETT."

(Testimony of Charles L. Little.)

As Plaintiff's Exhibits 36 and 37 there were received credit memos showing the deposits in the Doheny, Jr., account with Blair & Co. made December 6, 1921, and January 23, 1922, as testified to by the witness above. On cross-examination witness testified that the ledger sheets produced by him showed that in the said Doheny, Jr., account, in addition to the deposit testified to by him other deposits were made, as follows: July 11, 1921, \$6,166; July 14, 1921, \$16,666.60; October 11, 1921, \$17,500.50; October 29, 1921, \$395,333.30; that the balance to the credit of that account October 31, 1921, was \$488,556.60; that there was withdrawn November 2, 1921, the sum of \$362,000, leaving a balance of \$121,751.17; that from December 1, 1921, to and including January 23, 1922, there was credited to the said Doheny, Jr., account by check from Doheny, Sr., a total of \$156,002.29; June 23, 1922, the sum of \$75,000, a collection item, that is, something drawn on an out-of-town bank, was credited to the said Doheny, Jr., account; none of the entries about which witness has testified on direct or cross was made by him nor has he any knowledge of them but simply speaks from what he finds in the books, which are records kept in the regular course of business and under his supervision.

Testimony of Ernest K. Hill, for Plaintiff.

ERNEST K. HILL, a witness called by plaintiff, testified that on February 1, 1924, he was acting

(Testimony of Ernest K. Hill.)

clerk of the public lands committee of the United States Senate and that at a session of that committee on that date Mr. E. L. Doheny produced a paper which was marked by the official reporter and given by the witness into the possession of the clerk of the Senate for safekeeping, which paper witness produced.

Testimony of Theodore Mack, for Plaintiff.

THEODORE MACK, a witness for plaintiff, testified that he is, and during 1921 was, employed as principal clerk and stenographer in the immediate office of the Secretary of the Interior and served in that capacity when Albert B. Fall was Secretary of the Interior; he is familiar with Mr. Fall's handwriting and identifies the paper produced by the witness Hill as [106—33] being in that handwriting. Witness also identifies Interior Department travel voucher, signed by Albert B. Fall, as in his handwriting, hereinafter referred to as Exhibit 40.

Thereupon there was offered in evidence paper produced by the witness Hill the handwriting of which was identified by witness Mack and, the same having been submitted for the examination of Court and counsel for defendants, its admission in evidence was objected to by defendants on the ground that it is incompetent, irrelevant and immaterial to any issues of the case and not connected up in any way with those issues or with the defendants or either of them; on statement of

(Testimony of Theodore Mack.)

plaintiff's counsel to the Court that they undertook to thereafter connect said paper with the issues and defendants, the objection was overruled by the Court, to which action exception was duly reserved, the Court also ordering that the right be reserved to the defendants to thereafter present a motion to strike said documentary evidence from the record. Said paper was thereupon, over said objection, subject to said exception and to said reserved right to move to strike, received in evidence as Plaintiff's Exhibit No. 39, and is in the words and figures following:

PLAINTIFF'S EXHIBIT No. 39.

"\$100,000 Washington, D. C., Nov. 30, 1921.

On demand after date I promise to pay to the order of E. L. Doheny One hundred thousand and no/100 Dollars at New York City or Los Angeles, Calif. Value received with interest at — per cent."

Said paper was on a printed promissory note form and was without signature, the lower right-hand corner of the same, containing a place on the form for signature, having been torn therefrom.

Plaintiff thereupon offered in evidence and there was received as Exhibit 40 travel voucher with the signature of Albert B. Fall, as identified by the witness Mack, said document being offered and received for the limited purpose of showing that it was certified over Secretary Fall's signature that he left Washington December 1, 1921, A. M., pro-

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(Testimony of Theodore Mack.)

ceeded from Washington, D. C., to El Paso, Texas, and arrived again at Washington January 27, 1922, A. M., which facts are stated on the face of said voucher. Said exhibit, prior to being received in evidence, was objected to by defendants on the ground that it is not in any way connected up with or brought home to the defendants in this case, or either of them, and is incompetent, irrelevant and immaterial. The [107—34] objection was overruled and the exhibit was admitted for the limited purpose above stated, to which ruling and action of the Court defendants duly excepted.

Testimony of J. E. Benton, for Plaintiff.

J. E. BENTON, a witness on behalf of the plaintiff, testified that he is vice-president and cashier, First National Bank, El Paso, Texas, and produced ledger sheets of checking account of Albert B. Fall with that bank; thereupon the following testimony was given by the witness after objections thereto had been made by defendants on the ground that the said testimony, and each and every part thereof, was irrelevant, to any of the issues in this case, incompetent as against the corporate defendants, that in so far as it related to the private bank account or private transaction of the said Albert B. Fall, not brought home to and not connected with the business transactions of, the corporate defendants, the said testimony was utterly irrelevant and immaterial to the issues; that furthermore, irrespective of what the entries in the bank account of Mr. Fall

(Testimony of J. E. Benton.)

had shown, unless the same were directly and specifically shown to relate to money charged to have been received for, on account of, or in connection with, the transaction which was the subject of this suit, or some part thereof, testimony regarding the same was entirely inadmissible and no inference relating to this case would be properly drawn from such testimony; that testimony is as to these defendants hearsay; that no proper foundation for the receipt of said testimony had been laid. These objections, on all the grounds stated, were made as to all of the testimony regarding the bank account of A. B. Fall, and objections on the same ground, specifically made and called to the Court's attention, were presented as to testimony relating to actions of C. C. Chase. The Court overruled each of defendants' objections, and admitted the testimony set forth in the next succeeding paragraph, to which action and ruling of the Court defendants duly noted exceptions. The court further allowed defendants to reserve the right to move hereafter, at the close of the evidence in the case, to strike said testimony from the record.

The witness Benton testified that on December 7, 1921, C. C. Chase, son-in-law to Albert B. Fall, made a deposit to Fall's credit of \$7500 in currency. Slip showing said deposit was received in evidence as Plaintiff's Exhibit No. 41; the balance on October 26, 1921, which is the date preceding the date of that deposit, was \$665.72; the last prior deposits were, in 1920: March [108—35] 4, \$1680.22;

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(Testimony of J. E. Benton.)

March 5, \$2500; March 25, \$4000; April 8, \$250; April 17, \$20,000; deposits subsequent to December 7, 1921, were made in 1922, as follows: June 1, \$2209; October 1, \$5085.25; November 22, \$15,150.

Testimony of Will Ed Harris, for Plaintiff.

WILL ED HARRIS, a witness on behalf of the plaintiff, testified that he resides in Carrizozo, New Mexico; he is acquainted with Albert B. Fall and met him at Three Rivers, N. M., December 4, 1921, and again met him in the office of C. C. Chase, El Paso, Texas, December 5, 1921, where a paper was drawn up and signed by witness and Fall, which paper witness was subpoenaed to produce but had not been able to find and therefore did not produce. To the question what was the paper defendants objected on the ground that neither that paper nor its contents, nor the transaction of which it was a part, was competent evidence against these defendants, and the same was irrelevant to any issues in the case, and constituted hearsay, and that no proper foundation had been laid for the introduction thereof in evidence; the evidence was not objected to on the ground that foundation for secondary evidence of the contents of a paper the original of which was not produced had not been laid. The Court overruled the objection of the defendants and defendants duly reserved an exception. Thereupon the witness testified that the paper was a contract for the sale to Mr. Fall of the Harris Ranch located at Three Rivers, N. M., adjoining a ranch

(Testimony of Will Ed Harris.)

theretofore owned by Mr. Fall on the east; that under that contract land and cattle were sold for a total price of \$91,500 on account of which on said date Mr. Fall paid the sum of \$10,000 in \$100 bills, in two packages, \$5000 each, which he took from a little handbag. Each package was bound with a small strip of paper and witness does not remember anything indicating any name on these paper binders; witness deposited the money in the First National Bank of El Paso. December 28, 1921, Fall made two further payments on account of said purchase by cashiers check on the State National Bank of El Paso, one to the order of witness in the sum of \$16,000 and one to the order of A. D. Brownfield in the sum of \$29,000, which checks were offered in evidence as Exhibits 42 and 43. Early in January, 1922, Fall made a further payment on account of said purchase of \$20,000 by check and later in the same month a still further payment of \$13,500 by check, which left a balance of \$3000 which was not paid until some time later. A. D. Brownfield is witness' brother-in-law and a partner with witness in the transaction. [109—36]

All of the foregoing testimony of the witness Harris was received after objections of the defendants thereto (on grounds substantially as hereinbefore set forth that the testimony regarding personal transactions of Mr. Fall or other persons was not brought home to the defendants) were overruled by the Court and exceptions had been duly reserved by the defendants.

Testimony of George D. Flory, for Plaintiff.

GEORGE D. FLORY testified (over similar objections and the additional objection that accounts of C. C. Chase, or of a person named Chase, or of the firm of Fall and Chase, are, for the reasons hereinbefore stated, irrelevant, inadmissible and incompetent, which objections were overruled by the Court and exceptions duly reserved by defendants) that he was vice-president of the State National Bank at El Paso, Texas; that that bank had no account with Albert B. Fall but had one in the name of C. C. Chase and one in the name of Fall and Chase; the Chase named in both of these accounts is son-in-law to Albert B. Fall; on December 7, 1921, there was deposited in the account of C. C. Chase the sum of \$13,500 in currency, a deposit slip in the said Chase's handwriting being read in evidence as Exhibit 44; on December 28, 1921, an account in the name of Fall and Chase was opened with an initial deposit of \$36,200, of which \$22,700 was in currency and \$13,500 was transferred from the C. C. Chase account. Deposit slip covering this deposit was introduced as Exhibit No. 45; December 28, 1921, witness' bank issued Cashiers check for \$29,000 to the order of A. D. Brownfield, which was not charged against anybody's account but was purchased for cash, and on the same date a Cashiers check to the order of Will Ed Harris for \$16,000 was purchased; the account of Fall and Chase shows that subsequent to December 28th there was

(Testimony of George D. Flory.)

debited to it on January 6, 1922, a check drawn for \$20,000 and on January 21, 1922, a check drawn for \$13,500.

Cross-examination.

On cross-examination witness stated that the account of Fall and Chase was carried like the account of a firm in that name and that either Albert B. Fall or C. C. Chase had a right to draw checks against that account; that checks drawn thereon by C. C. Chase were honored at the bank; that subsequent to the time covered by the direct examination the account shows withdrawals dated March 3, 1922, of \$500; May 6th of \$1374.80; and May 13th, \$235.08, leaving a balance of \$590.12 which is the state of the account now, the same [110—37] being unclosed.

Testimony of W. J. McInness, for Plaintiff.

W. J. McINNESS, a witness on behalf of plaintiff, testified (under objections and exceptions on grounds substantially the same as those stated with respect to the previous witness) that he is receiver of the Citizens National Bank of Roswell, New Mexico, and that prior to December 1, 1921, was cashier thereof; under subpoena he produces the ledger of the account of Harris and Brownfield with his bank which was opened on December 6, 1921, with a deposit of \$10,000 transmitted from the First National Bank of El Paso, Texas; that witness' bank also had an account in the name of

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(Testimony of W. J. McInness.)

Will Ed Harris, Executor, in which there was deposited December 30, 1921, the sum of \$23,000, the deposit slip, Exhibit 46, reading:

PLAINTIFF'S EXHIBIT No. 46.

"Deposited by Will Ed Harris. Roswell, New Mexico.

	Dec. 30, 1921.	
	Dollars	Cents
Fall	23000	00

On the same day \$22,000 was deposited to the credit of Brownfield; January 4, 1922, there was deposited in the Will Ed Harris account the sum of \$20,000, the deposit slip being read as Exhibit 47; January 19, 1922, the sum of \$13,500 was deposited in the Harris account; the Brownfield account is in the name of A. D. Brownfield and Mrs. Brownfield and in it \$22,000 was deposited as shown by the ledger and by deposit slip (Exhibit 48) December 30, 1921, this deposit being part of a total of \$45,000 received by the bank, \$23,000 of which, as already testified, was credited to the Will Ed Harris account.

Testimony of A. D. Brownfield, for Plaintiff.

A. D. BROWNFIELD, a witness on behalf plaintiff, testified (over substantially the same objections and under the same rulings and exceptions reserved as above set forth regarding the four previous witnesses) that he is a brother-in-law of the witness Harris and was present in El Paso on December 15, 1921,

(Testimony of A. D. Brownfield.)

at the time of the transaction testified to by Harris, which testimony he corroborated; witness met Mr. Fall at the railroad station in Three Rivers, on Train No. 3 which was westbound from Chicago to San Diego via El Paso; the Cashiers checks, the subject of the testimony above, were delivered in the presence of witness at the home of Mr. Fall in Three Rivers.

Testimony of Carrie Estelle Doheny, for Plaintiff.

CARRIE ESTELLE DOHENY, a witness on behalf of the plaintiff, was called and having testified that she is the wife of E. L. Doheny, Sr., residing in Los Angeles, and was with her husband in New York City in November and December [111—38] 1921, where they at that time had an apartment, and that she made a trip with her husband from New York to Los Angeles in December of that year, she was then asked regarding a paper shown her by her husband, and thereupon, the husband of the witness in open court having waived this witness' incompetency, if the same exists, under the provisions of Section 1881 of the Code of Civil Procedure of the State of California, as made applicable to trials in Federal courts by Section 858, R. S. U. S., and the Court having overruled defendants' objection to the competency, relevancy, materiality and admissibility of the testimony of the witness upon grounds substantially as stated as regards the testimony of five previous witnesses, to which rulings exceptions were duly reserved by

180 *Pan American Petroleum Company et al.*

(Testimony of W. J. McInness.)

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Testimony of A. D. Brownfield, for Plaintiff.

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(Testimony of A. D. Brownfield.)

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Testimony of Carrie Estelle Doheny, for Plaintiff.

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(Testimony of Carrie Estelle Doheny.)

defendants, the witness testified that on December 20, 1921, in the apartment occupied by her husband and herself in New York, her husband showed her Plaintiff's Exhibit 39, which was not then in the condition it is in now as it then had the signature of Albert B. Fall on it; she is not familiar with his signature but testifies that the name signed to the note was A. B. Fall; that that signature was torn from the note by her husband prior to their leaving the hotel for the station, the only persons then present being witness and her husband; the signature was then given to witness by her husband and is now in court in the possession of one of defendants' counsel; that after arrival in Los Angeles witness placed the signature in a safe deposit box in the Security Trust & Savings Bank in that city where it remained from a day or two after Christmas, 1921, until April 30, 1924; the last time she saw the signature was last night; it has been in her possession all the while until she delivered it to counsel; that she first learned about the note (Exhibit 39) in a conversation with her husband regarding it the day they left New York in December, 1921, at which time he said "I have made Mr. Fall this loan of \$100,000, and 'if on our way home anything should happen that you and I would be killed in a wreck and our executors found this note and would present it and press him for it, he would be worse off now than he was before I loaned him this money.'" Her husband then looked at the note and said "In case such

(Testimony of Carrie Estelle Doheny.)

a thing happens, I will just take the signature off, and I will keep the note and you keep the signature, and if we are killed the note will be found on me and the signature on you." [112—39]

Cross-examination.

On cross-examination the witness testified that she has been the wife of E. L. Doheny, Sr., for nearly twenty-five years; that they reside in Los Angeles, had rooms in the Plaza Hotel, New York City, in which city her husband had an office; that it was their custom to come back home to Los Angeles for the Christmas holidays and that about December 20, 1921, she was first shown Exhibit 39, which then had the signature on it, and which her husband took from his pocket and showed to her, saying in substance: "I loaned my friend Mr. Fall \$100,000 and I have his promissory note for it. We are about to start home, and there is always a chance of some disaster overtaking us; this was a loan to help Mr. Fall out of financial difficulties, and if we should be killed en route home and this note is found complete this way it would be the duty of my executor or our executors to enforce it according to its terms against Mr. Fall. As he borrowed this money to purchase a ranch at this time, if this note was enforced immediately against him he would be in a worse position financially and personally than he was before I made the loan. And therefore I am going to put this in two parts, I am going to take the signature off," which he thereupon did in the

(Testimony of Carrie Estelle Doheny.)

witness' presence and handed it to her, telling her to take care of it, saying, in substance, "If it is found this way if anything happens to us it will be Ned and the members of the family who will have possession of our personal effects and Ned will understand it." Her husband further said to her that he wanted her to take care of this signature carefully so that the whole note could be put together again when Mr. Fall was able to pay it, and he told her to take care of it until such time as he called for it and put the two parts together; she put the piece of the note on which the signature was in a bag or jewelry box that she carried and after Christmas in 1921 she put it with other securities and valuable papers in a safety deposit box in the name of her husband and herself in Los Angeles where it remained from that time until April 30, 1924. In January, 1924, her husband asked her to get this signature for him and at that time she was not sure just where she had placed it and she looked in places where she kept valuables at home and also made an examination of the contents of her safety deposit box and did not at that time find it; she was then in a hurry to go east, and did go east, and while there she looked in her safety deposit box in New York, [113—40] thinking she would find the signature there; failing in that and having returned to Los Angeles about the middle of March 1924, she went to the above-mentioned Los Angeles safety deposit box on April 30, 1924,

(Testimony of Carrie Estelle Doheny.)

accompanied by Judge Charles Wellborn, one of counsel, and found the signature in a small envelope held to a package of bonds by a rubber band, from which place she took it to be kept in her possession until she personally delivered it to defendants counsel; she does not know the handwriting of Albert B. Fall, never saw him write and cannot identify the handwriting of the paper as his.

Thereupon paper identified by the witness was offered in evidence by plaintiff and marked Defendants' Exhibit "E."

Testimony of E. L. Doheny, Jr., for Plaintiff.

E. L. DOHENY, Jr. was thereupon called as a witness by plaintiff and having testified that he is the son of E. J. Doheny, Sr., and lives in Los Angeles, he was asked: "Were you in New York in the latter part of November and early in December, 1921?" to which question he responded, addressing the Court: "Your Honor, as your Honor knows, there are pending in Washington indictments against me in connection with the very transactions which are now before you. Those indictments are entirely unfounded. Nevertheless, until they are disposed of I must decline to testify regarding those transactions on the ground that if I testify
√ that testimony may tend to incriminate me. I stand upon my constitutional rights under the Constitution of the United States."

Thereupon the following occurred: "The Court: I think there are matters that probably may come within the constitutional rights of the witness, and

(Testimony of E. L. Doheny, Jr.)

while there is nothing in the record to indicate the nature of the charges I am inclined to require the Government to produce evidence to justify the presentation of this witness and the requirement of his testimony.

“Mr. POMERENE.—If the Court please, it is true that there is pending in the Supreme Court of the District of Columbia an indictment charging this witness, with others, with the criminal offense of conspiracy to defraud, and there is also a further indictment charging him and E. L. Doheny, Sr., with the criminal offense of giving a bribe, I think that frankly states the situation so far as the criminal proceedings are concerned.

“Mr. HOGAN.—The charge of conspiracy relates to the same facts.

“Mr. POMERENE.—Oh, yes; the charge of conspiracy contained in [114—41] that indictment relates to the same state of facts which are contained in the bill of complaint now pending before your Honor. We recognize fully the constitutional privilege if it is claimed in good faith. I think that is the only question, and I am perfectly frank in stating that to your Honor. I think that is the only question your Honor has to pass upon.

“The COURT.—It is conceded by the Government that the witness is about to be interrogated concerning matters which are necessarily contained within the allegations of an indictment pending in the Supreme Court of the District of Columbia. I feel, unless the Government has some authority to

(Testimony of E. L. Doheny, Jr.)

substantiate its position, that the mere assertion of the right to the protection is sufficient to guarantee to the witness the constitutional protection sought."

The witness was then asked whether he was an officer or stockholder of the Pan American Petroleum & Transport Company or the Pan American Petroleum Company, and having responded that he stood upon his constitutional rights and referred to his previous statement to the Court, was excused.

Testimony of E. L. Doheny, Sr., for Plaintiff.

E. L. DOHENY, Sr., was then called as a witness by plaintiff and testified that he is an officer and stockholder in the Pan American Petroleum & Transport Company, being Chairman of the Board of Directors; that in Nov. and December, 1921, he was President of that Company; that he has been a stockholder for a good many years. Counsel for the plaintiff then handed to the witness Plaintiff's Exhibit 39 and asked him to state whether the same came into his possession and if so under what circumstances, and in response the witness addressed the Court as follows:

"May it please your Honor, since this case was filed two indictments have been filed against me personally in the District Court of the District of Columbia charging offenses based upon the exact transactions which are involved in this suit. These indictments are now pending. I desired to meet the charges at Washington before this case was

(Testimony of E. L. Doheny, Sr.)

tried, but counsel for the Government objected and it was decided otherwise. In view of the pendency of these indictments, and although I assert that I am not conscious of having violated any law or transgressed any moral principle, and that I am confident of being vindicated when I get my day in court in Washington, upon the advice [115—42] of counsel I decline to testify in this case, on the ground that any evidence I may give as to the transaction here involved may be used against me at Washington and might tend to incriminate me. I have been advised by my counsel that the Constitution of the United States will prohibit the attorneys for the Government from doing in the trial at Washington what has been done here today, namely, calling me to the witness-stand, and that my being called here by the attorneys for the Government is an attempt to violate my constitutional rights and to do by indirection that which the highest law of this country would not permit to be done directly."

The witness having, in response to a question by the Court, stated that aside from the advice of counsel he asserted his constitutional rights, and counsel for the Government having stated that the situation as to this witness was the same as with respect to the previous one, the witness was excused from testifying.

There was presented to the Court a stipulation duly entered into between counsel for plaintiff and defendants by which it was agreed, *inter alia*, that

(Testimony of E. L. Doheny, Sr.)

should any of the testimony given by witnesses before the Committee on Public Lands and Surveys, United States, Sixty-Eighth Congress, First Session, at hearings contained in officially printed reports conducted by that committee. "be admissible as evidence on behalf of any party to this cause, on any ground, said reports may be used as evidence of such testimony, with the same force and effect, but no other, as if the said reporters or any person who heard the said testimony before the Senate Committee had been called and sworn as witnesses in this cause, and had testified to the accuracy of the transcript of such testimony as contained in said printed record." Counsel for the Government producing said report, the authenticity of which was conceded by counsel for the defendants, offered to show thereby that Mr. E. L. Doheny voluntarily appeared before the committee on January 24, 1924, and made a statement and proposition to the committee; and that in his presence and by his consent Mr. Gavin McNabb, his attorney, made a statement to the committee proffering certain things to the United States and proposing certain action in certain events to be taken by the defendant Pan American Petroleum & Transport Company, and that in connection with that statement and that proffer Mr. Doheny made certain statements to the committee touching that transaction which has been the subject of testimony already received by the Court; the counsel for the plaintiff stated he proposed to offer as admissions binding said defendant [116—

(Testimony of E. L. Doheny, Sr.)

43] under the circumstances in which they were made by Mr. Doheny as an officer of the defendant. To said evidence counsel for the defendants objected on the ground that so far as plaintiff offers to read in evidence as an admission the testimony of Edward L. Doheny before a Senate committee of the United States on January 24, 1924, it is hearsay as to these defendants; the alleged admissions are not shown to have been made as any part of the transactions of the corporate defendants, or either of them, at that time; they are no part of the *res gestae* of any corporate transaction; they are the individual statements made by an individual himself; there is no testimony in this record showing that Edward L. Doheny at that time had any express or implied authority to appear before the Senate Committee, and, speaking for the corporation, to make any statement, admission, or otherwise; there is no testimony in this record as regards any official position held by Mr. Doheny from which it could be implied that the making of statements by him before a Senate committee was within the scope of the authority which such official position carried with it; that statements made by an officer of the corporation, or any agent or employee of the corporation, not part of the *res gestae* of a corporate transaction, accompanying it and being contemporaneous with it, but being mere narrative of past events and actions in the past, are inadmissible. Defendants further objected to the evidence offered in so far as it involved the proposal

(Testimony of E. L. Doheny, Sr.)

to put in evidence in this case an offer or tender made by an attorney acting for Mr. Doheny, personally, as stated in the plaintiff's proffer, on the ground above stated, which are repeated, and the further objection was made that evidence of an offer of settlement or compromise, if the said offer which it was proposed to put in evidence may be regarded as one from the defendants to the plaintiff, is incompetent and inadvisable; the offer which plaintiff's counsel refers to was not only the individual action of Mr. Doheny, not then and not now binding upon the corporate defendants, nor admissible against them or either of them, but in addition its reception in evidence would be violative of the settled rule of law that unaccepted offers of compromise are never to be received against even those who make them. Thereupon the Court heard arguments on the questions thus preseted by plaintiff's proffer and defendants' objection, and upon the conclusion thereof orally rendered the following opinion: [117—44]

"The COURT.— * * * It seems to me the question is whether, at the time it is claimed these declarations were made, the declarant was acting within the scope of his authority as an agent of the defendant corporation. Among the authorities that have been called to the Court's attention in the argument is the one in 119 U.S., and it is my conviction from a previous reading of it that that portion of the opinion from which the excerpt

(Testimony of E. L. Doheny, Sr.)

is taken was in the nature of obiter dictum. The other two authorities which have been cited seem to hold to the contrary. No discussion was had of the Federal case which was cited, and which I think is quite illuminating, wherein a fire commissioner, some time after an event, had made statements concerning the quality of the fire-hose that had been purchased and for which an action was being prosecuted to recover the purchase price. The Supreme Court of the United States in that case expressly held that declarations of one of the fire commissioners was a proper declaration against the interest of the municipal body, of which he was an official and as to which he was the managing agent. Now I think that in this matter the Court cannot ignore the record that is thus far made, and the stipulation—I am not speaking entirely from the evidence that has been elicited from the stand and from the documentary proof submitted but also from the stipulation of counsel—that the leases in question were negotiated on behalf of the defendant companies by Mr. Doheny, Sr., that he was the agent of these bodies that had to do with the negotiations and with the culmination of these negotiations in which the agreements became binding contracts upon the parties thereto. The subject matter of the investigation before the Senate Committee of Congress was the very matters as to which Mr. Doheny, Sr., had been the agent of the defendant companies. The subject matter of the inquiry was the execution and making of those

(Testimony of E. L. Doheny, Sr.)

contracts. There were other questions subsidiary thereto, but in so far as these defendants are concerned, and in so far as the appearance of any of the persons connected officially with these defendants at that investigation is concerned, the subject matter of the investigation was the contracts which are now under consideration here. The proof shows that most, if not all, of the transactions [118—45] leading up to the execution of these leases by the defendant corporations were, as I have said before, carried on, or at least in large part carried on, by Mr. Doheny, Sr. I think the only question is whether, under that state of facts, the declaration made by Mr. Doheny, Sr., in reference to the matters involved in the contracts under consideration was and can be said to be within the *res gestae* of the subject matter of his suit. I am inclined to think that it is. The corporate body could act only through its human agencies, its human instrumentalities. It is true that it is a legal entity functioning *sui juris*, but functioning only through the human agencies that make up its management, and therefore whenever one of those agencies acts within the apparent scope of his authority and makes a statement concerning a matter with which the record shows him to have been a dominant factor, I think under these Federal decisions that have been cited that that is a proper matter to be introduced in a case wherein the property right of the corporate body is in issue.

(Testimony of E. L. Doheny, Sr.)

I think these cases involving torts are clearly distinguishable, especially those that establish the rule that declarations of engineers or trainmen made some time after an occurrence which results in an action for personal injury are not admissible. I think the better reasoned authorities, even in my own State, upon that subject, are to the effect that if the declaration is made simultaneously with the occurrence that is the subject matter of the investigation, then the rule that the spontaneous expression of opinion upon the part of an actor whose act is in question has some solemnity. That is the reason why courts have held that such expressions are part of the *res gestae* and are properly introducible against the corporate body. Now the same thing is true in principle in so far as the question here is concerned, and that question may be summarized and stated succinctly as follows: Was the declarant who appeared before the senatorial investigation committee acting within the apparent scope of his authority as an officer, an agent, of these defendant companies or of one of them? As I say, the evidence already in the record indicates that it was he who undertook to consummate the contracts for the companies, and it was he more than any other agency of the corporate body who would know the facts relative [119—46] to the making of these contracts, and that it was the making of the contracts that was the very matter under consideration and investiga-

(Testimony of E. L. Doheny, Sr.)

tion by the senatorial body that the declarant is alleged to have appeared before.

I think that brings it within the rule of res gestae and under the rule of these Federal decisions which have been cited.

For those reasons that * * * if the foundation as to the medium of proof is not in question here I am inclined to feel at this time that this evidence is admissible as against the defendants, and * * * the objection will be overruled." [120—47]

It was thereupon stipulated that no objection was made as to the medium or vehicle of proof, that counsel for the parties agreed that if the proffered evidence was admissible the official report of the Senate Hearings which counsel for the Government offered to use for the introduction of that evidence here could be accepted with the same force and effect as if verified by the testimony on the witness-stand of the reporters who made the same.

Thereupon the Court overruled the above-stated objection of the defendants and admitted so much of the report of the aforementioned Senate Hearings as is quoted below in evidence, to which ruling and action of the Court defendants duly noted an exception.

Thereupon counsel for the plaintiff having stated to the Court that there would be read from the record of the Hearings before the said Senate Committee the matter therein contained "touching the transaction of the \$100,000 matter," and the Court

(Testimony of E. L. Doheny, Sr.)

having been in substance informed as regards the contents of said record, the defendants by their counsel objected to the introduction thereof in evidence on the ground, in addition to those heretofore stated, that the subject matter was irrelevant to the issues in this case, and repeated all the grounds of the several objections heretofore made to there being received against the corporate defendants testimony relating to the \$100,000 transaction" between E. L. Doheny and A. B. Fall, and it was agreed by counsel for the plaintiff, with the approval of the Court, that it was understood that to each and every part of the proffered evidence the objections of the defendants on all of the grounds heretofore made known to the Court applied; but the Court overruled said objections and ordered said evidence admitted, to which ruling and action of the Court the defendants duly reserved exceptions.

There was thereupon read to the Court from two parts of the official report of said Hearings (which were marked Exhibits 49 and 50) the following: [121—48]

PLAINTIFF'S EXHIBIT Nos. 49-50.

"Hearings Before the Committee on Public Lands and Surveys, United States Senate, 67th Congress, Fourth Session, Pursuant to Senate Resolutions 282, 294 and 434 Providing for an Investigation on the Subject of Leases upon Naval Oil Reserves.

Thursday, January 24, 1924.

United States Senate, Committee on Public Lands and Surveys, Washington, D. C.

The committee met, pursuant to call of the chairman, at 2 o'clock P. M., in Room 210 Senate Building, Hon. Irvine L. Lenroot presiding.

Present.—Senators Lenroot (chairman), Smoot Ladd, Stanfield, Norbeck, Bursum, Cameron, Walsh of Montana, Adams, Dill, and Pittman. (Since that time Ladd has died, Bursum, Adams and Pittman have been defeated.)

The CHAIRMAN.—The committee will come to order.

Senator WALSH of Montana.—Mr. Chairman, I asked the committee to meet this afternoon because I was informed that Mr. Doheny desired to come before the committee to make a statement. If he is present we would like to have him now.

The CHAIRMAN.—Will Mr. Doheny please come around if he is in the room?

Mr. DOHENY.—All right.

Senator WALSH of Montana.—Were you sworn when you were here before, Mr. Doheny?

Mr. DOHENY.—Yes, sir. Do you wish me to proceed?

Senator WALSH of Montana.—We understood that you had a statement to make, and we would be very glad to hear you.

Mr. DOHENY.—Mr. Chairman, I have a statement I wish to make to the committee, and in order to have it intelligible and to have my mind clear as

to the order in which I present it I have reduced it to writing, and, with your permission, I will read it to the committee.

The CHAIRMAN.—Very well, you may do so.
[122—49]

“Mr. DOHENY.—I have been following the reports of the proceedings before your committee and have concluded that notwithstanding my authorization to ex-Secretary Fall early in December to state the full and complete facts in connection with a personal transaction had in 1921 between Mr. Fall and myself, Mr. Fall has been making an effort to keep my name out of the discussions for the reason that a full statement might be misunderstood. Whether there is a possibility of such misunderstanding or not, I wish to state to the committee and to the public the full facts, and I may say here that I regret that when I was before your committee I did not tell you what I am now telling you. I did not do so for the reason that such statement was not pertinent in answer to any of the questions asked me by the members of the committee, and to have done so would have been volunteering something in no way connected with the contracts made with the Pan American Petroleum & Transport Company. When asked by your chairman whether Mr. Fall had profited by the contract, directly or indirectly, I answered in the negative. That answer I now reiterate.

I wish first to inform the committee that on the 30th day of November, 1921, I loaned to Albert B.

Fall \$100,000 upon his promissory note to enable him to purchase a ranch in New Mexico. This sum was loaned to Mr. Fall by me personally. It was my own money and did not belong in whole or in part to any oil company with which I am or have been connected. In connection with this loan there was no discussion between Mr. Fall and myself as to any contract whatever. This loan had no relation to any of the subsequent transactions. The transactions themselves, in the order in which they occurred, dispose of any contention that they were influenced by my making a personal loan to a life-long friend.

The reason for my making and Mr. Fall's accepting the loan was that we had been friends for more than 30 years. He had invested his savings for those years in his home ranch in New Mexico, which I understood was all that remained to him after his failure of mining investments in Mexico and nine years of public service in Washington, during which he could not properly attend to the management of his ranch. His troubles had been increased in 1918 by the death of his daughter and his son, who up to then had taken his place in the management of his ranch. In our frequent talks it was clear that the acquisition of a neighboring property controlling the water that flows through his home ranch was a hope of his amounting to an obsession. His failure to raise the necessary funds by realizing on his extensive and once valuable Mexican mine holdings had made him feel that he was a

victim of an untoward fate. In one of these talks I indicated to him that I would be willing to make him a loan, and this seemed to relieve his mind greatly. In the autumn of 1921 he told me that the purchase had become possible by reason of the willingness of the then owners of the Harris ranch to sell and that the time had arrived when he was ready to take advantage of my offer to make the loan.

The lease on the naval reserve No. 1 was the direct outgrowth of the contract which the Pan American Petroleum & Transport Co. made with the Navy as a result of competitive bids, in which that company was the lowest bidder, for the construction of certain storage facilities and the furnishing of fuel oil at Pearl Harbor, Hawaii, and in the absence of that contract the lease would never have been executed. The Navy Department, through its representative, took up with us the question of constructing the improvements and facilities at Pearl Harbor, and of paying for them with the royalty oil which the Navy was then obtaining from the various leases in naval reserves Nos. 1 and 2, and of filling the tankage constructed with a large quantity of fuel oil. I was entirely in sympathy with the purpose of the Navy, the reasons for which have perhaps been better explained to your committee by the Navy's representative, Armiral Robison, than I could hope to do. I promised Admiral Robison that our company would at least submit a bid to perform the work under those conditions; that is, furnish the money to pay for the work of construction at the harbor and

of filling the tanks with oil and receive in return royalty oil at the posted field price to the value of the money so expended. The incidents up to the date of the contract, and the fact that the contract was let on competitive bidding eliminate any possibility of favor to the company by either the Navy Department or the Interior Department.

The negotiations for this contract between the Navy Department and the company were conducted by our local Washington attorney who was assisted in determining the necessary calculations by our California general manager, who is president of the California company. As a result of their exchange of ideas, our California [123—50] general manager decided that the terms of the proposed contract were not such as to be of any advantage to the company and that the company could not afford to take the risks attached to the performance of the contract for the conjectural profit that might result therefrom, and he stated in a letter which he wrote to our Washington attorney.

Neither our Washington attorney nor our California general manager nor any other officer or attorney of the company had any knowledge of the loan which I made to Mr. Fall, that being an entirely private matter, involving in no way the company's funds.

When the bids were opened, it was found that the bid of the Pan American Petroleum & Transport Co. was the lowest. The Washington attorney of the company had conceived the idea of mak-

ing, in accordance with the provisions of the call for bids, in addition to an unqualified bid, an alternative bid showing a considerable saving to the Government in the actual cost of the construction under the contract, and a recompense to the Pan American Petroleum & Transport Co. for such waiver of profits by giving it an opportunity later on to extend its petroleum business in California through the acquisition of additional oil territory whenever the Navy might be disposed to make additional contracts for the development of its reserves.

The alternative bid was considered the most favorable by the representatives of the Government, as is shown by the following letter addressed to the Washington attorney of the company under date of April 25, 1922, and signed in the absence of Mr. Fall from Washington by the Acting Secretary of the Interior and the Secretary of the Navy."

(The witness then read to the committee paper dated April 25, 1922, which is Exhibit "E" to Plaintiff's Amended Bill of Complaint.)

"These facts conclusively demonstrate that there could not have been any collusion between the Pan American Petroleum & Transport Co. and anybody whomsoever.

The original contract provided for an expenditure by the company of \$6,466,795.50, which amount was reduced through economies made by the company in its construction work and its purchase of fuel oil

by about \$525,000, which together with the sum of \$235,000, the difference between the company's unqualified bid and its alternative bid, amounts to \$760,000. To this might fairly be added the sum of \$120,000 by which sum the company's unqualified bid was lower than its competitor's bid, thus making the contract an extremely advantageous one for the Government, and as before stated, uncertain in its benefits to the company.

In addition, the Government has received under a provision of the contract, the benefit of a decline of 50 cents per barrel in the price of fuel oil furnished it, amounting to about \$725,000. The construction work under this contract is practically completed, and the fuel oil has been delivered into the tanks at Pearl Harbor.

Later in the year 1922, and nearly a year after I had made the loan to Mr. Fall, the Navy Department, desiring additional storage facilities and petroleum products at Pearl Harbor, requested that the original contract of the Pan American Petroleum Transport Co. be supplemented or that a new contract be made providing for the additional work and supplies, as is shown by the letter of the Secretary of the Navy dated November 29, 1922. That letter I think is already in your record. For some time negotiations were carried on in which the president of our California company, who came on to Washington for that purpose, together with our Washington attorney, discussed all phases of the pro-

posed supplemental agreement with the representatives of the Navy and the Interior Department.

On the last day before the contract was signed, the president of the California company absolutely turned down the contract, stating that he believed there were not adequate benefits commensurate with the great risks assumed by the advancement on the part of the company of the necessary millions to pay the contractors who were to perform the construction work at Pearl Harbor and to furnish the petroleum products required. The estimated expenditure to be made under this supplemental contract for tankage facilities and petroleum products is \$9,017,000, about one-half for petroleum supplies and one-half for storage facilities. The work is well under way and about \$1,000,000 has been expended by the company on it.

This contract gave to the Navy just that service from the naval reserves that the Navy Department through its active engineering head desired, which was immediate [124—51] availability of its anticipated production, delivered where the Navy wanted it, in such quantities as were needed, and of the character and quality which the Navy's requirements called for.

In addition, a burden, the advantage of which to the Navy can scarcely be measured, was assumed by the company; that of providing for the Navy in southern California 1,000,000 barrels of free oil storage, and of devoting 3,000,000 barrels of the company's Atlantic seaboard storage to the holding

of that quantity of fuel oil subject to the Navy's call at any time for a period of 15 years.

The contract also gave the option to the Navy of purchasing at the company's terminal station at San Pedro such petroleum supplies as the Navy may require at 10 per cent below the market price.

I want to say right here that is in answer to an article I saw in a newspaper this morning to the effect that there was no chance for the Navy to get petroleum supplies. Our contract provided that the Navy could get anything it wanted at 10 per cent below the market price.

In closing, I wish to state that I left Los Angeles on January 19 to come to Washington to present a statement of all the facts to the committee, and having been informed that Mr. Fall was in New Orleans, took that route in order to apprise him of my intention and found him already in entire accord with my purpose.

Mr. McNAB.—Mr. Chairman, I would like with the permission of the honorable Senators to read an authorized statement, occupying less than a page, to this committee which I think will be beneficial in the cross-examination of Mr. Doheny to follow, if I may be so permitted.

The CHAIRMAN.—What is your name?

Mr. McNAB.—My name is Gavin McNab.

The CHAIRMAN.—What bearing would it have upon the cross-examination?

Mr. McNAB.—It will have an important bearing, I think.

The CHAIRMAN.—You say upon the cross-examination of Mr. Doheny?

Mr. McNAB.—I say it is an authorized statement by Mr. Doheny.

Mr. DOHENY.—It is not exactly a statement, Mr. Chairman, but an additional proposal which I wish to make to the committee at this time.

The CHAIRMAN.—Is it something that you request be made to the committee, Mr. Doheny?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—Then there is no objection, I take it?

Senator WALSH of Montana.—Certainly not.

Mr. McNAB.—Am I now permitted to read it?

The CHAIRMAN.—Yes.

Mr. McNAB.—I now read the following statement:

Washington, D. C., January 24, 1924.

The Committee on Public Lands and Surveys,
United States Senate, Washington, D. C.

Gentlemen: On behalf of Mr. E. L. Doheny, I am authorized and instructed to make to you the following statement and offer:

While all the things stated in Mr. Doheny's testimony were innocent in all intentions, Mr. Doheny does not wish to have his company appear as dealing unfairly with or taking advantage in any way of the Government. He has always contended and now insists that his company's leases in naval oil reserve No. 1 are not only in strict agreement and

accord with the plans of the Department of the Navy for the use of said reserve but are, in his opinion, most advantageous to the Government. Nevertheless, in order to remove any basis for criticism of the transactions, Mr. Doheny suggests that your honorable committee request the President of the United States to appoint a board of experts to examine all the facts regarding these contracts. Should such board of experts report that at the time of the making of the contracts, they were not wise, desirable, and advantageous for the Government to make and the very best that the Government could have obtained, Mr. Doheny will cause the board of directors of the Pan American Petroleum & Transport Co. to reconvey to the Government all interest in such contracts, receiving in return only just compensation to his company for the actual expenditures which have been made by the company under the contracts, without profit.

Respectfully submitted,

GAVIN McNAB,

Attorney for Mr. Doheny. [125—52]

* * * * *

Senator WALSH of Montana.—I was going to inquire about who was the Washington counsel to whom you referred, and who was the manager of your subordinate company?

Mr. DOHENY.—Mr. J. C. Anderson is the manager of our California Company, and the California counsel was Mr. J. J. Cotter. * * *

Senator WALSH of Montana.—The loan was made on November 30, 1921?

Mr. DOHENY.—Yes, sir; that is the date I have here. That is the date that I remember that I made the loan.

Senator WALSH of Montana.—How do you fix that date?

Mr. DOHENY.—Well, I have the note at home, the note that former Senator Fall gave me for the money, and I remember it by the note.

Senator WALSH of Montana.—Where is the note now?

Mr. DOHENY.—It is at home. I looked for it the day I started over here, but it was impossible to locate it on that date, and there was a question between my wife and myself whether it was in New York, in my private box, or in Los Angeles. We came to the conclusion that it was in New York, so we gave up looking for it at home, and I decided to look for it in New York, when I get there to-morrow or next day.

Senator WALSH of Montana.—Will you send it to us as soon as you get there?

Mr. DOHENY.—Yes, sir.

Senator WALSH of Montana.—Where were you when the loan was made?

Mr. DOHENY.—I was in New York.

Senator WALSH of Montana.—And where was former Senator Fall?

Mr. DOHENY.—Former Senator Fall was in Washington.

Senator WALSH of Montana.—How were the negotiations carried on?

Mr. DOHENY.—By telephone. He telephoned me he was ready to receive that loan if I was still prepared to make it, as I had proposed to do some time earlier than that.

Senator WALSH of Montana.—And apparently, then, the matter had been considered between you at some earlier date?

Mr. DOHENY.—Oh, yes, sir. I think it was—oh, probably three or four weeks before, but I don't just remember exactly, because there was no reason for fixing it in my mind.

I did not come prepared to make any statement other than the statement I have here, but if you will bear with me, I will tell you something about the conditions that led up to the making of that proposal.

Senator WALSH of Montana.—We will be glad to hear you.

Mr. DOHENY.—I had known Senator Fall for about 30 years or more. We had been old-time friends. We both worked in the same mining district in New Mexico in 1885. In those days the Indian troubles were still on the country, and we were bound together by the same ties that men usually are, especially after they leave camp where they have lived under trying circumstances and conditions. Sometimes when men are in camp where their conditions are hard, and where the struggle for a living is precarious and the danger from the

Indians is bad, they do not have such a very great feeling for each other; but after they leave there they become warmer friends by reason of having associated under the same conditions.

Furthermore, I studied law at the same time that Senator Fall did. I practiced for a short time in the same district that he did. I watched his career all through the development of it, as district attorney, United States judge, and United States Senator. I was very much interested in him on account of our old associations. I myself, followed prospecting. I was fortunate and accumulated a large amount of money. Senator Fall was unfortunate, and when he was telling me about his misfortunes, and at a time when it was coupled with his misfortune of having to bear the loss of his two children—two grown children—I felt greatly in sympathy with him. He was telling me about his hope of acquiring this ranch, and being of an impulsive nature I said to him, "Whenever you need some money to pay for that ranch I will lend it to you."

He spoke to me at that time about possibly borrowing it from Ned McLean. And he said something at that time about giving the ranch as security. I said, "I will lend it to you on your note. You do not need to give the ranch as security."

That relieved Senator Fall greatly. Later on he telephoned to me that the time had come when the ranch could be purchased. When he telephoned to me about it I sent him the money. Whether he asked for the money in the form that I sent it, or

whether I sent it in that form of my own election, I do not know. But I sent it in cash.

Senator WALSH of Montana.—This conversation was some three or four weeks before that? [126—53]

Mr. DOHENY.—Yes, sir; I think so; at least three or four weeks prior to that time. It may not have been quite that long before, but it was about that time.

Senator WALSH of Montana.—How soon after the telephone talk in which it was agreed between you that you should loan him the money did you actually send it to him?

Mr. DOHENY.—I sent it to him right away, I think the next day, or within a couple of days.

Senator WALSH of Montana.—From New York to Washington?

Mr. DOHENY.—Yes, sir.

Senator WALSH of Montana.—And the note then went back to you?

Mr. DOHENY.—Yes, sir; the note was brought back to me.

Senator WALSH of Montana.—How did you transmit the money to him?

Mr. DOHENY.—In cash.

Senator WALSH of Montana.—How did you transport the cash?

Mr. DOHENY.—In a satchel. The cash was put up in a regular bank bundle, and taken over and delivered to him.

Senator WALSH of Montana.—Who acted as your messenger in the matter?

Mr. DOHENY.—My son.

Senator WALSH of Montana.—Where did you get the cash?

Mr. DOHENY.—I got the cash from the bank, from Blair & Co.'s bank in New York.

Senator WALSH of Montana.—And how did you get it from the bank.

Mr. DOHENY.—I cashed a check.

Senator WALSH of Montana.—Have you got the check?

Mr. DOHENY.—The check I can also send you. I saw the check just before I left.

Senator WALSH of Montana.—Will you send that to the committee also?

Mr. DOHENY.—Yes, sir. And I can also, if you like, bring over the individuals in the bank who paid over the money to my son.

Senator WALSH of Montana.—How did you come to make this remittance to Senator Fall in cash?

Mr. DOHENY.—That is just what I said a moment ago. I do not remember whether it was the result of his request or whether it was my own idea of sending it to him in cash to pay for the property. But he was going to use it down in New Mexico, and I thought perhaps—well, I do not know exactly how that was, as my memory is not good on that point.

Senator WALSH of Montana.—You are a man of very large affairs, and of great business transactions, so that it was not unusual for you to have large money transactions, perhaps, but it was, was it not, an extraordinary way of remitting money?

Mr. DOHENY.—I do not know about that. But if you wish to ask me on that score, while they relate to a good many things that have no connection with this at all, I will say I think I have remitted more than a million dollars in that way in the last five years. It was not an unusual thing, due to the fact that we were doing business on a large scale in Mexico, and there we are held up by every band of robbers in Mexico that we meet up with, and in fact we are now being held up by a band of Huerta's forces.

Senator WALSH of Montana.—I was not speaking of Mexico. I dare say that a remittance to Mexico would require that it be made in essentially a different way than in this country. But I am speaking of a remittance from New York to Washington.

Mr. DOHENY.—Well, it was not unusual in my business, Senator Walsh, to make a remittance in that way. And I might say here that in making the decision to lend this money to Mr. Fall, I was greatly affected by his extreme pecuniary circumstances, which resulted, of course, from a long period, a lifetime of futile efforts. I realized that the amount of money I was loaning him was a bagatelle to me; that it was no more than \$25 or \$50

perhaps to the ordinary individual. Certainly a loan of \$25 or \$50 from one individual to another would not be considered at all extraordinary, and a loan of \$100,000 from me to Mr. Fall is no more extraordinary.

Senator WALSH of Montana.—I can appreciate that on your side, but looking at it from Senator Fall's side it was quite a loan.

Mr. DOHENY.—It was, indeed; there is no question about that. And I am perfectly willing to admit that it probably caused him to have such a feeling that he [127—54] would have been willing to favor me, but under the circumstances he did not have a chance to favor me. He did not carry on these negotiations. That is the point I would like for you to understand; that Senator Fall, in my opinion, was not influenced in any way by this loan, because the negotiations were carried on by men who were not under his control.

Senator WALSH of Montana.—When did the negotiations commence which eventuated in the contract of April 25, 1922?

Mr. DOHENY.—I do not know. I think they commenced along in February. I was not so familiar with them. It was when we were requested to make a bid. It might have been as late as March, 1922.

Senator WALSH of Montana.—There is some evidence here to the effect that the negotiations for that contract and the negotiations for the Sinclair contract ran along together.

Mr. DOHANY.—Well, that is not true. I do not think they did, Senator, notwithstanding the testimony here, as I remember the situation.

Senator WALSH of Montana.—If I remember correctly, Senator Fall gave testimony substantially to that effect.

Mr. DOHENY.—I am still of the opinion that there were no negotiations on our part, that we simply put in our bids when the request for bids came out.

Senator WALSH of Montana.—Wait a minute. The request for bids, in the first place, resulted in your contract of June, 1921, for the drilling of 22 offset wells?

Mr. DOHENY.—Yes, sir.

Senator WALSH of Montana.—And you were operating under that contract during the month of June or July, 1921, and from that time on, were you not?

Mr. DOHENY.—Yes, sir.

Senator WALSH of Montana.—So that the time these negotiations were carried on resulting in the loan, you were operating under that contract?

Mr. DOHENY.—Under the contract of June?

Senator WALSH of Montana.—Yes.

Mr. DOHENY.—Yes, sir.

Senator WALSH of Montana.—And that was made upon competitive bids?

Mr. DOHENY.—Yes, sir; and so was the contract of April 25, 1922.

Senator WALSH of Montana.—Now, then, the

Department again called for bids for the construction of storage tanks at Pearl Harbor?

Mr. DOHENY.—Yes, sir.

Senator WALSH of Montana.—And with respect to that you submitted two bids, as I understand from your statement?

Mr. DOHENY.—Yes, sir; simultaneously.

Senator WALSH of Montana.—One of which conformed to the proposals.

Mr. DOHENY.—Yes, sir.

Senator WALSH of Montana. And the other conforming to the proposal, but offering a reduction in the amount and a compensatory feature giving you the preference right to the lease if the Department should conclude to lease?

Mr. DOHENY.—Yes.

Senator WALSH of Montana.—Well, of course, it was open to the department to accept either one of those bids it saw fit, you having tendered them, was it not?

Mr. DOHENY.—I think so. In fact, Senator, I do not wish to interpolate anything here, but I would like to insist—

Senator WALSH of Montana.—Mr. Doheny, I want to give you a perfect opportunity to make any statement in connection with the matter you wish to make.

Mr. DOHENY.—I still want to insist that I did not know anything at all about this Pearl Harbor contract until sometime along in January, Febru-

ary, or March, 1922—that is, as to the Pearl Harbor contract I am speaking of now.

Senator WALSH of Montana.—Yes; I am speaking about that contract. But when you speak, Mr. Doheny, about it being impossible to favor you in connection with the matter, the department was at liberty to take either one of your proposals.

Mr. DOHENY.—Yes; and Mr. Finney decided that this was the proposal to take.

Senator WALSH of Montana.—Was the one he would like to take?

Mr. DOHENY.—Yes, sir. And the Secretary of the Navy agreed with him in accordance with the letter he sent to us deciding upon the second proposal. [128—55]

Senator WALSH of Montana.—What was the conversation had with Senator Fall anterior to your making the loan concerning his efforts to raise money?

Mr. DOHENY.—He was not making any efforts to raise money. He was just telling me of his hopes, that he wanted to buy this ranch, and how he had expected to borrow the money or get to Ned McLean, I think it is Ned McLean, to advance the money and take the ranch as security, or something of that sort. I thought to myself that was a hint to me if I wanted to so take it, and I took it very gladly, and said to him that I would loan him the money.

Senator WALSH of Montana.—Yes; but, Mr. Doheny, I understood your statement to contain the

assertion that Senator Fall had failed to raise the money on his Mexican properties.

Mr. DOHENY.—Well, now—

Senator WALSH of Montana.—(Interposing.) I wish you would tell us about that. What did he tell you about it?

Mr. DOHENY.—Well, not that he had failed to raise it on his Mexican properties. I do not think I said it just in that way. I think what I said was, that having failed in his efforts—I think the language of the statement would be best.

Senator WALSH of Montana.—Will you turn to the statement and read what it does say on that point?

Mr. DOHENY.—Yes, sir.

(The witness began looking through the statement he had just read.)

Mr. DOHENY.—(Reading from his statement:)

The reason for my making and Mr. Fall's accepting the loan was that we had been friends for more than 30 years. He had invested his savings for those years in his home ranch in New Mexico, which I understood was all that remained to him after the failure of mining investments in Mexico and nine years of public service in Washington, during which he could not properly attend to the management of his ranch.

Oh, yes; here is the statement you referred to (reading):

In our frequent talks it was clear that the acquisition of a neighboring property controlling the water that flows through his home ranch was a hope of his, amounting to an obsession. His failure to raise the necessary funds by realizing on his extensive and once valuable Mexican mine holdings had made him feel he was a victim of an untoward fate.

Senator WALSH of Montana.—That is what I referred to.

Mr. DOHENY.—Yes; that was just a casual talk that men make when they tell about their being in poor circumstances. Nearly all of us can blame fate or something else other than ourselves for our lack of having money, and Fall had been struggling like I had for money all his life, and he had had large properties in Mexico, he was interested there with W. C. Green who had discovered the Cananea mines, who was his partner and attorney for a great many years, and he had had holdings that were supposed to be very valuable. Now, those holdings were made less valuable by the disturbances that commenced in 1910, and are continuing up to the present time, because, regardless of what the American people may think about it, the Mexican affairs are not settled yet, and Senator Fall failed to make the fortune which he hoped to be able to use in establishing his home in New Mexico out of the sale of those mines. Those mines had become a defunct proposition so far as making any money out of them was concerned. Now, the revolutions in

Mexico have not hurt the mines, but they have hurt his opportunity to make money out of the mines.

He had an associate down there whom I understood was very friendly to him, and from whom he might possibly borrow some money, but that associate, I don't believe had the money convenient. That was Price McKinney, of Cleveland. So it pointed to me as Fall's only friend who had money in plenty in the form of cash that could be spared.

Senator WALSH of Montana.—Well, perhaps, I misinterpreted your statement then, Mr. Doheny. [129—56]

Mr. DOHENY.—It is in the middle of that page, there, Senator.

Senator WALSH of Montana.—Your statement is:

His failure to raise the necessary funds by realizing on his extensive and once valuable Mexican mine holdings had made him feel he was the victim of an untoward fate.

I understood that to mean that Senator Fall had told you that he had attempted to raise the money in order to purchase the ranch in some way on his Mexican holdings. Is that the case?

Mr. DOHENY.—I don't remember, although it might well have been, because he had a friend who was interested with him in the mines, and he was a very wealthy man, and he might well have told me that he had expected that he might be able to raise the money from Price McKinney.

Senator WALSH of Montana.—That is what I

want to know. Did you have such a conversation with him?

Mr. DOHENY.—I don't really know whether I did or not, because I met Mr. McKinney at Mr. Fall's house in Washington, D. C., that is, at his apartment, once or twice. I have been there many a time. We have talked over these things. We were always talking about the old-time days in which Price McKinney himself shared, and it may very well have been that he did speak to me about that, but I knew that he had failed to raise money. Not that he had failed to raise this particular money, because at this particular time he was depending upon raising the money by getting Ed McLean to buy the ranch and hold it or something of that sort, and when it came up to me I made up my mind that I would offer the money, and I did.

Senator WALSH of Montana.—Well, the only person that Senator *Walsh* talked to you about from whom he might get the money was Ed McLean?

Mr. DOHENY.—Well, I think that he might very well have mentioned Price McKinney too, because McKinney was his partner.

Senator WALSH of Montana.—Would you say that he did?

Mr. DOHENY.—I would not swear that he did, no.

Senator WALSH of Montana.—Or that he did not?

Mr. DOHENY.—No, I would not swear that he

did or that he did not; but I say that he might very well have done it.

Senator WALSH of Montana.—Do you know whether Mr. McKinney is in such circumstances as to enable him to make a loan of that sort?

Mr. DOHENY.—I understood that he was. I don't know much about Mr. McKinney's circumstances.

Senator WALSH of Montana.—He lives at Cleveland?

Mr. DOHENY.—Yes, sir. He is in the steel and iron business over there. Of course, I realize that there are very few men who have \$100,000, or any large amount of cash that they can spare out of their business, and I am willing to make the concession right here that I have, and I have had for a long while, and if I wanted to make a loan to Senator Fall of \$100,000 that it did not interfere at all with ordinary affairs of my business, or if I wanted to make a loan to him of a million dollars. I am not saying that boastingly; I am saying it in excuse of the transaction, because the loan was a *bona fide* loan for the purpose of accommodating an old friend, on his note, which I insisted on his paying and will insist on his paying if his health remains good—re-pay, I mean.

Senator WALSH of Montana.—Mr. Doheny, you knew at that time, of course, that Senator Fall was charged with the administration of all of the oil lands of this country in the public domain?

Mr. DOHENY.—Yes.

Senator WALSH of Montana.—At least outside of the naval reserves?

Mr. DOHENY.—Yes, sir.

Senator WALSH of Montana.—And that the power of disposing of the naval reserves had practically been assigned to him by the Executive order?

Mr. DOHENY.—Well, I don't believe I knew about that, though I may have known about it. I do not disclaim any knowledge of it.

Senator WALSH of Montana.—Now, did your company hold at that time any leases on the public domain outside of the naval reserves?

Mr. DOHENY.—Yes, sir; we held the lease on section 6 adjoining the naval reserve that we got from the Interior Department. [130—57]

Senator WALSH of Montana.—When did you get that lease?

Mr. DOHENY.—We got that lease—I got that from John Barton Payne. Mr. McNab, my attorney, assisted us in getting it. And with regard to that, I don't know anything, Senator, because I want to say to you that the remark you made a while ago is perfectly true. There is nothing extraordinary about me. I am just an ordinary, old-time, impulsive, irresponsible, improvident sort of a prospector, and I do not pretend to keep track of the detail of our business. This particular business—I don't even know the Secretary from whom we got section 6, and I never saw the documents through which we got it. They were arranged by Mr. Anderson in conjunction with Mr. McNab. Mr.

Anderson is my brother-in-law and general manager of my property in California, a very astute man, the best judge of oil lands that I know of in the State of California; and the reason I am telling you that particular thing is that the fact that he was disgusted with these two contracts and found fault in my agreeing to them, showed that there could not have been any collusion, because he wouldn't have given a 5-cent piece for them. That is only corroborative evidence. In this section 6 Mr. Anderson assisted Mr. McNab in acquiring it.

Senator WALSH of Montana.—I would rather have your judgment about an oil proposition than anyone else's.

Mr. DOHENY.—I would rather have my own.

Senator WALSH of Montana.—Getting back, do you recall how your attention was first attracted to the matter of the construction of the tanks at Pearl Harbor?

Mr. DOHENY.—The matter of the construction of the tanks, no; but the matter of the carrying out of that plan, that was first called to my attention by Admiral Robison. Admiral Robison came to me and asked me about the plan, whether or not I believed that he could get somebody to bid or see that they could get a bid by some responsible oil company and construct those tanks and take the pay in the form in which it is given in that contract, and I promised him that there would be at least one bid. I said, "I don't know what other companies will do, but we will give you at least one bid," and there

were really three bids given on that, too. While we talk about two, there were really three. The Standard Oil made a bid to fill the tanks, but they made no bid to construct them.

Senator WALSH of Montana.—Well, that is, as I understand you then, Mr. Doheny, that before the plan for constructing the tanks had actually been determined upon you had been consulted about the matter by Admiral Robison?

Mr. DOHENY.—Whether or not he could get a bid by some company to take it in oil; yes, sir.

Senator WALSH of Montana.—On this?

Mr. DOHENY.—Yes, to take the pay for the construction in oil.

Senator WALSH of Montana.—Well, of course, that must have been at some time antecedent to the public proposal for the bids?

Mr. DOHENY.—Yes, sir; probably was."

(At this point in the Senate Hearings Senator Walsh read to Mr. Doheny extracts from minutes of meeting of the Navy Council held October 18, 1921, set forth elsewhere herein as Exhibit "C"; letter of October 25, 1921, to the Secretary of the Interior from the Secretary of the Navy, Exhibit 24 in this case, and letter dated October 30, 1921, from Secretary Fall to the Secretary of the Navy, acknowledging the last mentioned, Exhibit 24-A herein. The examination then proceeded as follows:)

Mr. DOHENY.—Well, pardon me, Senator, but neither one of those letters refer to or involve any-

thing which concerned our company. I did not have any knowledge at the time of the discussion that was going on in the Navy other than—well, I didn't have any knowledge at all, but I had talked it over with Admiral Robison at some time prior to our bid on that lease, and I told him that we would certainly make one bid. I think that was when they were talking about making bids. [131—58]

The CHAIRMAN.—Lease or contract?

Mr. DOHENY.—Well, contract—the Pearl Harbor Contract. * * *

Senator ADAMS.—Mr. Doheny, I wanted to ask you one question. As I understand, your conversation with Mr. Fall leading up to the loan was a telephone conversation from Washington to New York?

Mr. DOHENY.—No; the last conversation which culminated in the loan, yes, sir.

Senator ADAMS.—Well, at that time, at the time of that conversation did Mr. Fall advise you that he had already received checks from McLean covering a loan?

Mr. DOHENY.—No, sir.

Senator WALSH of Montana.—Oh, Mr. Doheny, I omitted another matter I wanted to ask you about. How was the note transmitted to you?

Mr. DOHENY.—By my son. He brought it right back to me and handed it to me.

Senator WALSH of Montana.—That is all.

The CHAIRMAN.—Mr. Doheny, you had long been of the opinion that these naval reserves should be leased by the Government, had you not?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—On account of the loss by drainage?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—And you received your first leases in June, 1921?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—Now, with reference to this contract of April 25, Mr. Doheny. First, I will say, you testified, I believe, and your statement says that you think Mr. Fall might have been favorably disposed toward you by reason of the accommodation that you had made, but that the contract in question shows clearly upon its face, and the attendant circumstances, that Secretary Fall had nothing to do with it. Is that true?

Mr. DOHENY.—That he had nothing to do with the terms of it is absolutely true.

The CHAIRMAN.—With the terms of it?

Mr. DOHENY.—Yes, sir; except the signing of it.

The CHAIRMAN.—And also that your associates were opposed to that contract?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—That is the contract of April 25, 1922?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—Now, as a matter of fact, Mr. Doheny, that contract was entered into by you not with the idea of profit at all, was it?

Mr. DOHENY.—It was entered into by me with the idea that we could handle the oil in such a way

as to make possibly some profit *out the* exchange, because we were getting crude oil and delivering fuel oil in lieu of it.

The CHAIRMAN.—Did you not testify before, Mr. Doheny, just to refresh your recollection, that the profit that you expected to make on it was by the carriage from San Francisco, or whatever the point of shipment was, to Pearl Harbor?

Mr. DOHENY.—That was true.

The CHAIRMAN.—And that you did not expect to make any other profit out of that contract?

Mr. DOHENY.—That is true; yes, sir.

The CHAIRMAN.—So that this is not the contract out of which you will make any profit, if there be profit?

Mr. DOHENY.—No, sir.

The CHAIRMAN.—Out of your connection with the naval reserve No. 1?

Mr. DOHENY.—That is true.

The CHAIRMAN.—Now, so far as naval reserve No. 1 is concerned, in this contract that you now speak of, the only right that you got by that contract was a preferential right to lease certain lands, was it?

Mr. DOHENY.—That was all I got by the contract of April 25, 1922; yes, sir.

The CHAIRMAN.—Yes; and that was merely a right to lease lands upon the same terms that anyone else was willing to lease them?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—So that is the contract that

you refer to as your associate being opposed to—the contract which you had no thought of making any substantial profit out of; am I correct?

Mr. DOHENY.—Yes, sir; but the reason that they were opposed to it is not because [132—59] they did not want us to take a contract on the same terms as anybody else, but because we had to advance approximately \$9,000,000 in order to take advantage of that.

The CHAIRMAN.—Oh, I understand.

Mr. DOHENY.—Yes.

The CHAIRMAN.—But at the same time it was not a contract that you were entering into for profit?

Mr. DOHENY.—No; Mr. Anderson was opposed to both contracts, as his written protest to Mr. Cotter will show.

The CHAIRMAN.—What do you say—to both contracts?

Mr. DOHENY.—The original contract of April 25, 1922, and the supplemental contract of December 12, 1922.

The CHAIRMAN.—And the supplemental contract?

Mr. DOHENY.—Yes; he was opposed to both of them. The latter he was very bitterly opposed to, and he left the room and wouldn't make the agreement at all, and I had to make the agreement and give the admiral assurance that I would go ahead with it.

The CHAIRMAN.—I was coming to the Decem-

ber contract. You make no reference in your letter to the December contract.

Mr. DOHENY.—I make reference to both of them.

The CHAIRMAN.—This letter which was put in evidence is a letter dated April 25, 1922?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—About the time of the first contract. Now, do you make any reference to the December contract here in this statement?

Mr. DOHENY.—I think I do. I am not quite sure. All of these copies have disappeared, so that I can not get hold of one to see just what it was.

The CHAIRMAN.—I will be glad to have you look at it.

Mr. DOHENY.—It is on the bottom of page 6.

The CHAIRMAN.—Yes. But there is no reference to that contract as one that Mr. Fall had no connection with. It is the April contract which you set out was made by the Acting Secretary and the Secretary of the Navy?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—Now, what is the fact with reference to that?

Mr. DOHENY.—The fact with regard to this is that, so far as I know, Mr. Fall had no connection whatever with it.

The CHAIRMAN.—But you do know whether he did or not?

Mr. DOHENY.—Well, I am pretty certain he didn't, because the last few days I was here—I was

here at the time that these negotiations were objected to so strenuously by Mr. Anderson, and I never saw Mr. Fall. I don't remember whether he was in the city or not, but I do know that Admiral Robison was the one who decided upon every point. We had a conference on that—Mr. Ambrose, who used to be with the Navy, and isn't with them now; Mr. Bain, who testified before this committee; Admiral Robison; Mr. Anderson; Mr. Cotter, and myself. I was in the negotiations very little, but they used to call me in every once in a while when they came to a point that they couldn't agree on, and Anderson then ran it down cold and said he wouldn't have anything to do with it. "You have got to make a contract of that sort, Mr. Doheny; I wouldn't touch it." That is the fact, and I think we have got some documentary evidence to prove that. If we haven't, we have got the evidence of those present—Mr. Bain, Ambrose, Admiral Robison, and Mr. Cotter.

The CHAIRMAN.—What was in your mind, Mr. Doheny, in this statement in setting out so in detail the contract of April 25, out of which you expected to make no profit.

Mr. DOHENY.—Yes.

The CHAIRMAN.—(Continuing.) And saying that Mr. Fall had no connection with that contract, but making no mention of Mr. Fall's connection in the December contract, which is the contract out of which you expect to make a profit?

Mr. DOHENY.—Well, but the December contract

is merely a supplemental contract, and would not have been entered into and could not be entered into except as a part of the other contract. Your question, Senator, suggests another answer, and that is, that the object of my testimony, the purpose of this testimony is to show that there was no collusion between Mr. Fall and myself to in any way defeat the Government or to deprive the Government of any of its rights or advantages [133—60] under any of these contracts. The best proof of that is this—and this may not be fair—but if I was in collusion with Senator Fall, if there was any collusion between Senator Fall and myself, there must have been collusion between Mr. Ambrose and Mr. Foster Bain and Admiral Robison and my brother-in-law, Mr. Anderson, my attorney, Mr. Cotter, and Secretary Denby, none of whom knew anything about the loan. Of those people Senator Fall was the only one who knew anything about the loan, and he didn't take any part in the examining of the contracts.

The CHAIRMAN.—I am not asking you about the question of collusion, I am examining you concerning your own statement, that by reason of your accommodation to Mr. Fall you think that had he a discretion to exercise he might have been more likely to exercise it in your favor.

Mr. DOHENY.—Why, I admit that.

The CHAIRMAN.—Very well.

Mr. DOHENY.—I don't think he is more than human.

The CHAIRMAN.—The contract of April 25, which you speak of at length in your statement, did not give you a lease of a foot of ground in this naval reserve.

Mr. DOHENY.—I see.

The CHAIRMAN.—It merely gave you a preferential right to lease the Government lands in this part of the reserve (indicating on the map) whenever the Government chose to lease it, and at the same terms that anybody else was willing to pay.

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—Now, your contract of December 12, as a matter of fact, gave you a lease of the entire reserve?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—At fixed royalties?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—And it is that contract out of which you testified that you expect to make \$100,000,000?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—Now, Mr. Doheny—

Mr. DOHENY.—But pardon me for a moment, Mr. Senator. For fear that that statement may seem to you as wild as it seems to a great many of my friends. If anybody had spoken to the gentleman who invented the telephone, or to Mr. Ford in the early days of his business—if he had said to them, that he expected to make two or three hundred million dollars out of his machine he would have been regarded by his own associates as crazy.

And the oil people of California, the oil men who have a knowledge of the business were satisfied in their own minds that I had gotten a lemon from the Government when I took that contract of April 25, 1922.

The CHAIRMAN.—Yes; the one of April.

Mr. DOHENY.—Yes; and they didn't regard the other one highly; nobody regarded the other one highly. They said that with the responsibility which I assumed for my company, which meant that I had to expend over \$14,000,000, that there was nothing known about the territory that justified advancing that amount of royalty. That is what they all thought. My thoughts about that I gave to you honestly, and I expect to make \$100,000,000 out of that contract.

The CHAIRMAN.—Under your statement on the 25th of April you yourself did not enter into it for profit.

Mr. DOHENY.—Yes; that is right.

The CHAIRMAN.—But the contract of December you certainly did enter into for profit?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—And you testified before this committee that you expected to make \$100,000,000 of profit.

Mr. DOHENY.—Yes, sir.

✓ The CHAIRMAN.—Now, if Secretary Fall did in fact exercise his judgment about the granting of that contract in December, in view of your own statement that you think he might be influenced in

your favor by reason of the loan by you, wouldn't you be willing, Mr. Doheny, in view of those facts, to turn back that contract to the Government.

Mr. DOHENY.—I would be willing to do just what I have offered, Mr. Chairman.

The CHAIRMAN.—You have offered to do it upon a basis of experts examining [134—61] the question. I am asking you now: In view of that situation, of your possibly having secured an advantage, whether you are not willing to turn the contract back to the Government as it stands?

Mr. DOHENY.—If that will clear Mr. Fall of any suspicion of collusion, I will be very glad, indeed, to suggest that to our company. Now, recollect, I am not our company. While I exercise a great deal of influence on it, we have 9,000 stockholders and we have a board of directors.

The CHAIRMAN.—It would clear you of any suspicion of profit, of course, out of the Government.

Mr. DOHENY.—What is that.

The CHAIRMAN.—It would clear you of any suspicion of profit out of the Government. I am not speaking of collusion.

Mr. DOHENY.—Well, if it will clear Senator Fall from any suspicion of being in collusion, I am perfectly willing to do it.

The CHAIRMAN.—Now, Mr. Doheny, you testified before this committee on the 3d of December?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—And two or three days be-

fore that testimony came before the committee regarding the purchase of this ranch by Mr. Fall. And that was a matter of a great deal of comment at the time you were on the stand before, was it not? That was a matter of a great deal of comment at the time you were on the stand before the committee before, the purchase of that ranch by Mr. Fall?

Mr. DOHENY.—Prior to my going on the stand; yes, sir.

The CHAIRMAN.—Prior?

Mr. DOHENY.—Prior to my going on the stand.

The CHAIRMAN.—Yes; prior to your going on the stand, and it pointed the finger of suspicion at Mr. Fall, didn't it?

Mr. DOHENY.—Yes.

The CHAIRMAN.—And you felt very badly about that?

Mr. DOHENY.—Yes.

The CHAIRMAN.—In fact, you testified before the committee, did you not, as follows, repeating practically what you have said to-day (reading):

I have known Secretary Fall since 1886. We mined in the same camp, studied law in the same judicial district, and began practicing at about the same time. I knew him as a judge on the bench and as Senator and as Secretary of the Interior, and I want to tell you gentlemen that I felt very badly when I heard the reflections made upon his integrity in this meeting. I want this record to show that I felt very badly about it. In fact, greatly outraged about it.

Yet at that time, Mr. Doheny, you could have told the committee the facts.

Mr. DOHENY.—I went back to New York from here—I don't know just what date it was that I met Mr. Fall there, and I told him, I advised him, to go before the committee and tell the facts just exactly as they were. I not only told Mr. Fall, but I told another gentleman who was associated with me there, who was one of my attorneys—we have a great many attorneys connected with our legal department—and I told Mr. Harold Walker, who lives now in this city, that I wanted him to tell Fall for me, to urge upon Fall to go and make a clean breast of this entire loan. That was on either the 7th or the 8th of last December. And I think that Walker did. I don't know whether he did or not. I don't know whether he took it upon himself to do that or not. But I told that to Walker, and I told it to Fall at that time. I felt that it was not wise for him to do anything other than to just make a clean breast of the whole business.

The CHAIRMAN.—At the time you made this loan, Mr. Doheny, you had had relations with the Interior Department with reference to this very naval reserve, and had a certain lease?

Mr. DOHENY.—Our company had, Mr. Chairman.

The CHAIRMAN.—I say your company, and you expected to have other relations, did you not?

Mr. DOHENY.—I didn't know whether we would

or not. There was nothing in sight at that time.
[135—62]

The CHAIRMAN.—Well, so far as offset wells were necessary from time to time your company had got into that field, hadn't it?

Mr. DOHENY.—Yes.

The CHAIRMAN.—You expected, of course, did you not, to continue?

Mr. DOHENY.—Well, we expected, of course, to be always in the field to bid on any contracts that the Government had to let.

The CHAIRMAN.—Yes.

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—Well, did it occur to you at all, Mr. Doheny, that to get a contract from the department under those circumstances, other than by competitive bidding, would be a matter of embarrassment?

Mr. DOHENY.—Oh, I don't think we did, Mr. Chairman.

The CHAIRMAN.—You didn't?

Mr. DOHENY.—No, sir.

The CHAIRMAN.—Why, this contract was not by competitive bidding, was it?

Mr. DOHENY.—I think it was.

The CHAIRMAN.—Well, let us see. Bids were called for, were they not?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—And you made two bids?

Mr. DOHENY.—Yes.

The CHAIRMAN.—One of them strictly under the proposal?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—And another in which you made a proposition that no other bidder was permitted to make; that you would make a price—\$235,000, I think was the sum?

Mr. DOHENY.—Yes.

The CHAIRMAN.—Less, provided you could have a preferential right to lease certain lands.

Mr. DOHENY.—Yes.

The CHAIRMAN.—No other bidder had that opportunity?

Mr. DOHENY.—They did. Any bidder that wanted to could have made an alternative bid.

The CHAIRMAN.—You mean they could have made a conditional bid?

Mr. DOHENY.—Yes.

The CHAIRMAN.—But that was not a part of the proposal, was it?

Mr. DOHENY.—No.

The CHAIRMAN.—Certainly.

Mr. DOHENY.—The attorney who made it made it without any authority other than by wiring to me at Los Angeles. It was his own conception, and he afterwards was opposed to taking the bid. If you read carefully that letter of Mr. Finney, you will see that he was opposed to having the bid made that way. That he would rather they would take the straight bid than the alternative bid.

The CHAIRMAN.—Yes; but as a matter of fact

the bid that was accepted was not a bid according to the proposals, was it?

Mr. DOHENY.—No.

The CHAIRMAN.—No. Then when we come to the December contract where you really got your lease in naval reserve No. 1, what bidding was there there?

Mr. DOHENY.—The December contract was a supplemental contract to the other contract, and it was at the suggestion of the Navy to modify our other contract. That suggestion came from Secretary Denby, as I remember. I haven't read these letters, all of them, but I glanced through it this morning for the purpose of getting a little knowledge of this matter in case I was questioned about it.

Senator WALSH of Montana.—Senator, I would like to interrupt there. From Secretary Denby?

Mr. DOHENY.—From Secretary Denby; yes. Secretary Denby was the one who suggested that a modification of our contract be made, and in order to enable us to extend further the port facilities at Pearl Harbor. I think that was according to a suggestion by Secretary Denby to the Secretary of the Interior. * * *

Senator SMOOT.—Mr. Doheny, have you made any estimate as to the amount that you would make on each barrel of oil that would make the \$100,000,000 that you have testified to?

Mr. DOHENY.—Well, that was an offhand estimate, but I think that it is fair to say that in the re-

fining and marketing of oils there that we would make a [136—63] minimum of a dollar a barrel.

Senator SMOOT.—Would this \$100,000,000 that you speak of include the refining of the oil?

Mr. DOHENY.—That included all the profit from the handling of the oil from that reserve in every way—the piping, storing, refining it, and selling it to the consumers, and that was based upon a rapid mental calculation that I made, on this theory, which is not a bad one to go by. The average price of oil has fluctuated greatly in the last 5 or 6 or 10 years—in fact, throughout its entire history—but the amount of oil in the world is of course decreasing with the consumption. The consumption of oil is increasing with the addition of new facilities for using it, and the prices that were paid for oil two years ago were more than a dollar a barrel above the price that obtains now. They paid as high as \$2.50 a barrel—more—and if the market price of oil at \$2.50 a barrel or at \$1.50 a barrel or at \$1 a barrel above the present price could be justified I believe that the market price in the future will justify the expectation that that will be the profit, at least a dollar a barrel difference.

The CHAIRMAN.—How much did you expect to get out of this reserve?

Mr. DOHENY.—I said I expected to make \$100,000,000 out of the drilling of the oil out of this reserve. Of course in doing that we would probably have to invest in the neighborhood of a hundred

to a hundred and fifty million dollars in drilling, probably \$100,000,000, because if this reserve is drilled it will take a well for every 10 acres, that would make 3,200 wells, and at \$30,000 a well that would make \$96,000,000 for the drilling alone, without the pipage, storage, refining, and marketing facilities. I have already spent in preparation for the development of this lease \$32,000,000, and I am prepared to spend more in preparation for the development of this lease. I have got the figures with me to show just what we have spent, if you are interested at all in seeing them. * * *

Senator BERSUM.—Mr. Doheny, you said that you expected to make a profit of \$100,000,000 out of this oil.

Mr. DOHENY.—Yes.

Senator BERSUM.—How long a period would you expect to be covered in recovering that amount?

Mr. DOHENY.—Well, during the lifetime of the lease. I would say that the wells would be hardly worth pumping probably in the course of 30 or 40 years. It would take a long while to do it. But the profits would not come in that proportion. The profits would come in irregular proportion to the production. At times when the production would be highest the price might be so low that you would not get as much money out of it as when the production would be lower. For instance, to-day in California with 400,000 barrels a day less production than obtained two months ago they can get more for the oil than they got

two months ago. The price of oil has changed some. So that the profit on the oil taken from that territory could easily be figured on the basis of \$1 a barrel throughout the entire lifetime of the lease. The lifetime during the term of the lease.

* * *

Senator DILL.—Coming back to this loan to Secretary Fall, have you loaned anyone else in the Interior Department or the Navy Department any money in the last year or two?

Mr. DOHENY.—No, sir.

Senator DILL.—Did you ever make a loan to Secretary Fall previous to this one?

Mr. DOHENY.—No, sir.

Senator DILL.—You never loaned him \$100,000, or any such sum?

Mr. DOHENY.—No, sir.

Senator DILL.—How do you fix the date of this note? You say you have not the note. How do you fix the date of November 30?

Mr. DOHENY.—Because I have got the check I used to draw the money, and I have seen the note several times. I know it is November 30.

Senator DILL.—When is the note due?

Mr. DOHENY.—Due on demand.

Senator DILL.—And is there interest?

Mr. DOHENY.—There is no interest on it.

Senator DILL.—No payments have been made on it?

Mr. DOHENY.—No, sir; no payments have been made on it.

Senator DILL.—Where was it to be paid?
[137—64]

Mr. DOHENY.—To be paid either in New York or Los Angeles.

Senator DILL.—Where was the note made out?

Mr. DOHENY.—I suppose it was made in Washington.

Senator DILL.—And mailed to you?

Mr. DOHENY.—No; it was delivered to my son, to deliver to me.

Senator DILL.—When he brought the money?

Mr. DOHENY.—Yes; when he brought the money.

Senator DILL.—You gave him the money before he sent you the note?

Mr. DOHENY.—Oh, yes.

The CHAIRMAN.—Did you give any directions as to the terms of the note?

Mr. DOHENY.—No, sir; except that it was to be on demand.

The CHAIRMAN.—Do you know in whose handwriting the note is?

Mr. DOHENY.—I think it is in Secretary Fall's handwriting; the signature to the note, and the rest of it.

The CHAIRMAN.—You think it is a note without interest?

Mr. DOHENY.—I think the rate of interest was left for me to fill in; yes, sir. * * *

The CHAIRMAN.—Mr. Doheny, what are your

expectations with reference to the repayment of this loan.

Mr. DOHENY.—Well, I will tell you frankly now,—I don't know whether this has any connection whatever with the investigation—but I expected that if the Senator did not sell or turn over that land that later on I might employ him in connection with our affairs in Mexico, with which he is very conversant, and I would pay him a salary large enough of which he could pay about one-half to apply on the note, and pay it off in five or six years. And that was my expectation.

The CHAIRMAN.—You had that in mind at that time?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—If Mr. Fall does not enter your employ, do you ever expect to press him for payment of the note?

Mr. DOHENY.—Well, I don't know. If Mr. Fall is well enough and in good health, I expect he will enter my employ.

The CHAIRMAN.—You do expect that?

Mr. DOHENY.—Yes, sir. * * *

Senator STANFIELD.—Were you at all concerned as to what application Senator Fall made of the money that he borrowed from you?

Mr. DOHENY.—No, sir; not at all.

Senator STANFIELD.—You just loaned him the money to use as he saw fit?

Mr. DOHENY.—I loaned him the money to use as he saw fit, because he was badly in need of money

and because he was an old friend and seemed to be anxious to have the money to use for some purpose in connection with his ranches. I was an old friend of his and could afford to lend it to him, and I did lend it to him, just exactly as I told you, without any expectation that he would be able to pay it back out of the ranch or as to what source he could pay it back from.

Senator ADAMS.—Did he tell you that he could have gotten that money from his bankers in Colorado?

Mr. DOHENY.—No. * * *

Senator ADAMS.—Well, he did say to you that he was hard pressed and had difficulty in getting the money?

Mr. DOHENY.—I do not think he even said that. He was just telling me about his hopes and ambitions, and about his disappointments, etc., and about his desire to get this ranch, and that he was going to borrow the money to get it. Just what his language was I do not know, but the substance of it was that it made such an impression upon me that I advanced him the money out of the plenty that I had to use for the purpose of that which would relieve his mind.

Senator ADAMS.—And your impression was that it was necessary in order to relieve his mind?

Mr. DOHENY.—Yes, sir.

Senator ADAMS.—It was really befriending a friend in need?

Mr. DOHENY.—That is just what it amounted to.

Senator ADAMS.—And you also understood that the expenditures on his ranch exceeded \$100,000?

Mr. DOHENY.—I did not know a thing at all about that. [138—65]

Senator ADAMS.—Did you not make a statement a few moments ago to the effect that you understood the \$100,000 would not cover the expenditures on the ranch?

Mr. DOHENY.—I made the statement that I understood he made expenditures upon the ranch, and that the \$100,000 would not have bought the ranch and covered the expenditures. I think I made that statement in reply to a question from Senator Walsh.

Senator WALSH of Montana.—That is the way I understood you. That was information you had since acquired?

Mr. DOHENY.—That was information I got from sitting here and hearing the testimony with regard to the improvements made upon the ranch.

Senator PITTMAN.—Mr. Doheny, at the time you discussed the making of this loan to Senator Fall, was there any discussion with regard to repaying you the money?

Mr. DOHENY.—No, sir.

Senator PITTMAN.—He did not say he thought he could ever repay it?

Mr. DOHENY.—No, sir.

Senator PITTMAN.—Was there any discussion as to security?

Mr. DOHENY.—Yes; he offered me the ranch

as security. He offered me the ranch he was going to buy with money as security.

Senator PITTMAN.—Well, did he ever buy those ranches?

Mr. DOHENY.—I understand he did.

Senator PITTMAN.—Did he ever speak to you about giving you the ranches for security after he bought them?

Mr. DOHENY.—No, sir; and I would not have taken it if he had.

Senator PITTMAN.—Did he ever talk to you about the ranches after he bought them?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And he had already given you the notes, had he?

Mr. DOHENY.—Yes, sir—only one note. There was only one note.

Senator PITTMAN.—How much was that note?

Mr. DOHENY.—\$100,000.

Senator PITTMAN.—And was that signed by Senator Fall?

Mr. DOHENY.—Albert B. Fall.

Senator PITTMAN.—Do you know his signature?

Mr. DOHENY.—I think I do, yes.

Senator PITTMAN.—And it was brought to you by your son?

Mr. DOHENY.—By my son; yes, sir.

Senator PITTMAN.—And you have testified that you expected it would be paid, probably, by

your employing Senator Fall and taking it out of his salary?

Mr. DOHENY.—In case he did not find it possible to pay it out of the profits of the property; in case he was not able to repay it in any other way.

Senator PITTMAN.—You did not expect him to go into your employ while he was Secretary of the Interior, did you?

Mr. DOHENY.—No, sir.

Senator PITTMAN.—You were to employ him after he ceased to be Secretary?

Mr. DOHENY.—After he ceased to be Secretary of the Interior.

Senator PITTMAN.—Was there anything said with regard to him resigning as Secretary of the Interior before his term was up?

Mr. DOHENY.—Yes, sir; he often spoke of that. He often said he was not going to remain very long.

Senator PITTMAN.—Then, after these discussions as to the borrowing of the \$100,000, you had in mind that he was to perform only a few more acts of an official nature?

Mr. DOHENY.—I do not know that I had that particularly in mind. I cannot say just what came into my mind at that time.

Senator PITTMAN.—Well, you had in mind employing him and his repaying this note out of his employment?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And he had talked to you

about resigning from the job of Secretary of the Interior?

Mr. DOHENY.—Yes, sir; but I did not know how soon he would retire, whether he would stay his term out or not. We never discussed the length of time that he would remain in the Interior Department. [139—66]

Senator PITTMAN.—But you did expect him to pay this note some day out of his employment, possibly?

Mr. DOHENY.—If he did not pay it any other way—if he found it impossible to pay it any other way.

Senator PITTMAN.—Then you attached some value to his note?

Mr. DOHENY.—Yes, sir; I attached \$100,000 value to it.

Senator PITTMAN.—Where do you keep your notes and properties of that kind?

Mr. DOHENY.—I keep most of them in Los Angeles, except such as are developed in New York. Those are in New York.

Senator PITTMAN.—You have made a search for this note in Los Angeles?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And it is not there?

Mr. DOHENY.—Yes; we made a hurried search in Los Angeles before we started here and did not find it.

Senator PITTMAN.—The transaction started in New York?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And that is where you keep that kind of things, in New York?

Mr. DOHENY.—Some things. We do not keep all of those things there.

Senator PITTMAN.—Have you seen that note since it was delivered to you by your son?

Mr. DOHENY.—Yes.

Senator PITTMAN.—When?

Mr. DOHENY.—Oh, I have seen it more than once, I think.

Senator PITTMAN.—Where were you when you saw it more than once?

Mr. DOHENY.—Well, I saw it in New York.

Senator PITTMAN.—More than once in New York?

Mr. DOHENY.—Yes; more than once in New York.

Senator PITTMAN.—And whereabouts was it being kept when you saw it?

Mr. DOHENY.—It was being kept right in this book. (Exhibiting a pocketbook.)

Senator PITTMAN.—How long did you keep it in that book?

Mr. DOHENY.—I kept it in that book until, I think, we got back to Los Angeles; but then I have an idea now that we may have put it in the Guaranty Trust or one of our safe-deposit boxes in New York.

Senator PITTMAN.—Do you carry many notes that length of time in your pocketbook?

Mr. DOHENY.—Yes; quite a few of them.

Senator PITTMAN.—That length of time?

Mr. DOHENY.—I have not said what length of time.

Senator PITTMAN.—How long did you keep this note of Senator Fall's in your pocketbook?

Mr. DOHENY.—I do not know. I presume I kept it—my thought is that I kept it until we got back to Los Angeles.

Senator PITTMAN.—Have you a safe-deposit box, or more or several, in Los Angeles?

Mr. DOHENY.—Yes.

Senator PITTMAN.—Do you keep your notes in any particular place there?

Mr. DOHENY.—I do not know that we do. Most of my notes are turned over to Mr. Ritter, our private accountant there.

Senator PITTMAN.—Have you lost many notes in the last few years?

Mr. DOHENY.—No, sir.

Senator PITTMAN.—Did you ask Mr. Ritter to assist in searching for those notes in Los Angeles?

Mr. DOHENY.—No, sir.

Senator PITTMAN.—Who else did you ask to help in searching for those notes in Los Angeles?

Mr. DOHENY.—I asked my son and my wife.

Senator PITTMAN.—And did they assist you?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And you did not find it?

Mr. DOHENY.—No, sir.

Senator PITTMAN.—You realized that this committee would like to see that note?

Mr. DOHENY.—Yes, sir. [140—67]

Senator PITTMAN.—And you have made a sincere search for it?

Mr. DOHENY.—Yes, sir; and I am going to produce the note.

Senator PITTMAN.—That is exactly what I am getting at. How long do you think it will be before you produce the note?

Mr. DOHENY.—As soon as I get back to Los Angeles, or if it is in New York, I will get it when I get there. Because the note is not lost; I have not lost any notes.

Senator PITTMAN.—That is the reason I am getting at that. Your evidence so far has indicated that it is not in Los Angeles.

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And it is not very far from here to New York?

Mr. DOHENY.—That is right.

Senator PITTMAN.—And as it is a question that has naturally aroused some suspicion—I do not mean your testimony, but the matter of this note. There have been several notes, you know, flying around before the committee. They would like to see the note.

Mr. DOHENY.—Yes, sir.

SENATOR.—And as one member of the committee, I hope that before the session is over, you

can find it without having to go to Los Angeles for it.

Mr. DOHENY.—I may have to go there; I do not know.

Senator STANFIELD.—Mr. Doheny, did it not occur to you at the time you were making this loan to Mr. Fall, that if the public should become cognizant of the fact that you were making such a loan you might be misjudged, or Mr. Fall might be misjudged? And did not that prompt you to send money to Mr. Fall in cash rather than transmit it through the banks, as in the ordinary course of business?

Mr. DOHENY.—I am not quite certain whether I was prompted by any opinion of my own, or whether I did it at the request of Senator Fall. Of course, I might have been influenced by some such thought.

Senator STANFIELD.—Does it not seem to you that it should occur to a man whose relations to the Government were such as yours were that you would be so discreet that you would not want that to become public, being a friendly act on your part, and a personal act as between you and Mr. Fall and that you would not want to take the chance?

Mr. DOHENY.—Usually I am not very discreet. I do things offhand without thinking of the consequences.

Senator STANFIELD.—Well, it does seem to me, and I dare say it does to many others, that it was an unusual procedure for you to send that in money

rather than transmit it in a draft in the ordinary course of business, and I am trying to get it clear in my mind if you did it that way because it was a matter of discretion and you did not want any reflection on Mr. Fall.

Mr. DOHENY.—I don't know whether I was influenced by any matter of discretion or whether I was influenced by a request from Mr. Fall to send it in cash.

Senator SMOOT.—Mr. Doheny, when Secretary Fall was discussing the question of the amount of the loan, did he tell you the amount of money that he would have to raise to carry out the improvements that he had in contemplation?

Mr. DOHENY.—No. He told me he would have to have about \$100,000 to purchase this ranch and to take care of it. Whether the price was \$100,000 merely I did not gather from him, but that amount of money was going to relieve him of—not of this necessity, but it was going to satisfy his ambition, possibly, to own that land.

Senator SMOOT.—He did not tell you that he had sold a paper for \$45,000, did he?

Mr. DOHENY.—No, sir.

Senator SMOOT.—He never mentioned the fact that he had received the \$45,000 for the paper he sold?

Mr. DOHENY.—No, sir; he did not tell me about that, Senator Smoot.

Senator DILL.—Coming back to this stock transaction, have you had dealings with banks in New

York or Los Angeles in connection with stocks of this company?

Mr. DOHENY.—Well, I occasionally have; not very often, though. We do not speculate in our stocks at all.

Senator DILL.—What brokers in New York handle your business?

Mr. DOHENY.—Blair & Co.—not brokers, just bankers. I have never had any dealings with a broker in my business. [141—68]

Senator DILL.—Not in Los Angeles?

Mr. DOHENY.—Never had any dealings in Los Angeles.

Senator DILL.—And only Blair & Co. in New York?

Mr. DOHENY.—Only Blair & Co. in New York.

The CHAIRMAN.—Do Blair & Co. do anything other than a banking business for you?

Mr. DOHENY.—Yes—no; that is all they do. They handle bonds and stocks for us. They usually undertake to form a syndicate to write up our bond issues, and if we have a block of stock for sale—I don't think we have ever sold any blocks of stock through Blair except just some transaction that I engaged in in the summer of 1921.

The CHAIRMAN.—Then they do represent you both as bankers and in the handling of your securities?

Mr. DOHENY.—Yes; absolutely. They are the only people who handle any of my personal securities or those that I have control over.

The CHAIRMAN.—Now, won't you tell us a little more in detail about the ownership of these contracts? You organized the Pan American Co.?

Mr. DOHENY.—Yes, sir. I organized the Pan American Petroleum & Transport Co., which is the company that owns the stock of the California Co. The Pan American Petroleum Co. of California I also organized.

The CHAIRMAN.—What company did you organize for the purpose of taking over these contracts?

Mr. DOHENY.—None.

The CHAIRMAN.—It was an existing corporation?

Mr. DOHENY.—An existing corporation.

The CHAIRMAN.—And that was which one?

Mr. DOHENY.—The Pan American Petroleum Co. of California.

The CHAIRMAN.—Did the Pan American Petroleum & Transport Co. own all of the stock of the Pan American Petroleum Co. of California?

Mr. DOHENY.—Yes, sir; and still does.

The CHAIRMAN.—Of the Pan American Petroleum & Transport Co. you own or control the majority, and there are about 9,000 stockholders. Is that correct?

Mr. DOHENY.—About 9,000. Yes; I own a controlling interest in the voting stock of the company. I merely control the company through being able to elect a majority of the board of directors. I control that, because my family owns the control of it.

My own interest in the company would probably amount to about 8 or 9 per cent, and my family's interest, all told, to about 27 per cent.

The CHAIRMAN.—One other question. Did it occur to you, Mr. Doheny, that there was any impropriety in loaning money to an officer of the Government with whom you had very large business transactions?

Mr. DOHENY.—No, sir; it did not. And it does not now, Senator, with all due respect to your question. If I were limited in my lendings of money to people with whom I had no connection I would have to hunt up some agent to find objects of charity to give it to. I do not lend any money to anybody except those I am associated with and that I know through old friendship. I have an army of old prospectors, nearly every name on the calendar, that are hunting around in my place to get money from me. They do not get it because they are entitled to it, because they have anything I am after; they get it because of old friendship. And I lend money in quantities that would surprise some of you gentlemen here if you knew it, and that \$100,000 I loaned to Mr. Fall at that time was not an extraordinary thing at all to me.

The CHAIRMAN.—I do not think you get the point I have in mind. Did it occur to you that there was any impropriety—

Mr. DOHENY.—No; I am saying it did not.

The CHAIRMAN.—(Continuing.) In lending money to an officer of the Government with whom

you had large business transactions that might put him under obligations to you?

Mr. DOHENY.—No, sir; for the reason that I never did business directly with him. He dealt with the subordinate officers of our company. And they did not deal with him directly; they dealt with the subordinate officers of his department. And my opinion was, as it is now, that the relation between Mr. Fall and me, or between myself and any other Cabinet officer, or any other man in that position, could be of as close a character as possible without its influencing the result of the negotiations between his subordinates and my subordinates.” [142—69]

(Mr. Doheny having been excused as a witness before the Senate Committee, reappeared before that committee February 1, 1924, whereupon there was read in his presence to the committee letter dated November 28, 1921, Exhibit 33 herein, and the report of the said proceedings as put in evidence at the trial of this case proceeds as follows:)

“The CHAIRMAN.—Mr. Doheny, will you come forward, please. He was sworn before.

Senator WALSH.—Yes, Mr. Doheny has been sworn. Mr. Doheny, do you care to make any further statement?

Mr. DOHENY.—Yes, sir; I came to-day prepared to make a statement with regard to the note which I got from Mr. Fall when I loaned him the \$100,000. I brought with me all of that note that is in my possession at the present time. I had the entire note in my possession in December, 1921, and my wife

and I on the eve of our departure for California were going through some papers, and I found this note in my pocketbook, and I remarked to her that inasmuch as I had made this loan to Mr. Fall to help him out of a difficulty, it would not much help him out of a difficulty if anything happened to us and the note became the property of executors; it would mean that he would be pressed upon for the payment of it, and that the note instead of being a service to him would be an injury, so I divided the note in two parts. I gave her one part to keep, and I have the other part here to present to the committee (handing paper to Senator Walsh).

Senator WALSH of Montana.—Mark this as an exhibit.

(The paper referred to was marked by the Reporter, "Doheny Exhibit February 1, 1924, F. A. C.")

Senator WALSH of Montana.—I will read it.
(Reading:)

\$100,000.

Washington, D. C., November 30, 1921.

On demand after date I promise to pay to the order of E. L. Doheny One Hundred Thousand Dollars, New York City or Los Angeles, California, value received, with interest.

Something else in the blank, but it is torn.

(Senator Walsh started to hand the paper to the Chairman.)

The CHAIRMAN.—Hand it around.

(Senator Walsh handed the paper to Senator

Adams, and it was then examined in turn by each of the committee members present.)

Mr. DOHENY.—The remainder of the note, I believe, is in California, in Los Angeles, and that was what I had in mind when I told the committee that I expected to find it there. I searched for it in New York, as I stated to the committee that I would, but I failed to find it there. I went to the private box that Mrs. Doheny and I have access to, and in which we keep such papers as that, and the fragment was not there.

Senator WALSH of Montana.—Mr. Doheny, the other fragment consists of the signature to the note?

Mr. DOHENY.—Yes, sir.

Senator WALSH of Montana.—And practically only the signature?

Mr. DOHENY.—Only the signature.

Senator WALSH of Montana.—Now, which part did you keep and which part did Mrs. Doheny keep?

Mr. DOHENY.—I kept the piece that you have in your hand. Mrs. Doheny took the signature.

Senator WALSH of Montana.—In whose handwriting is this note?

Mr. DOHENY.—I believe it to be in Secretary Fall's handwriting.

Senator WALSH of Montana.—I understood, Mr. Doheny, that this note was brought back to you by your son?

Mr. DOHENY.—Yes, sir. * * *

Senator WALSH of Montana.—Well, Mr. Doheny, will you just explain how you thought that

transaction would operate with this part of the note in your possession, and the signature to it in the possession of Mrs. Doheny?

Mr. DOHENY.—With the entire note in the possession of my family, whenever we wanted to collect the note we had the note to show that the money was due on [143—70] the note, but if it should happen to go into the hands of our executors, in case something happened to us, they would not be able to press Mr. Fall and make the loan an injury instead of a help to him.

Senator WALSH of Montana.—Yes. And where was it that this conversation took place between you and your wife?

Mr. DOHENY.—This transaction took place in the Plaza Hotel, in our rooms at the Plaza Hotel, just prior to our departure for the Pacific coast.

Senator WALSH of Montana.—And when was that with reference to the date of the note?

Mr. DOHENY.—That was about two weeks or three weeks after the note was made, after I received the note.

Senator WALSH of Montana.—Well, did you or did you not have that circumstance in mind when you were on the stand before, Mr. Doheny?

Mr. DOHENY.—Yes, sir; I had that circumstance in mind when I was on the stand before.

Senator WALSH of Montana.—Was there any reason why you did not disclose it at that time?

Mr. DOHENY.—The reason was because I could not present the note. That is not the note. That

is only a part of the note. And I believed then, as I believe now, that I can produce the entire note, and I undertook to do it in New York. Failing to find the rest of it in New York, I believed that it was a good idea to come and present what I had, and to make—to continue the search in Los Angeles for the remainder of the note, which we now know must be in California, in Los Angeles.

Senator WALSH of Montana.—That is all.

The CHAIRMAN.—Why did you not tell us all that was in your mind at that time, Mr. Doheny? Could you not have just as well told us that fact then as you did now?

Mr. DOHENY.—Well, I believed that I would be able to produce, as I still believe, the entire note.

The CHAIRMAN.—Well, supposing you had, why could you not have told us all the facts that were in your mind at that time?

Mr. DOHENY.—I suppose I was looking at it from a different point of view than you do, Senator.

The CHAIRMAN.—Well, what different point of view?

Mr. DOHENY.—I thought that the wisest thing to do was to produce the entire note, and not produce a part of the note, which might add to the suspicions which you folks already entertain, and which the world entertains, that this is a crooked transaction.

The CHAIRMAN.—But you knew at that time that you could not have produced the note intact; it would have been in two pieces?

Mr. DOHENY.—Yes; but it would have been a note in two pieces just the same as a torn ten dollar bill is a bill, if *torn* in two pieces.

The CHAIRMAN.—But you would have had to make the same explanation of why it was in two pieces, would you not?

Mr. DOHENY.—Yes.

The CHAIRMAN.—Now, Mr. Doheny, your purpose then was if anything happened to you and Mrs. Doheny that this \$100,000 should be a gift to Mr. Fall?

Mr. DOHENY.—No; my purpose was that he should not be pressed for the payment until he was able to pay it.

The CHAIRMAN.—Well, if anything happened to you or Mrs. Doheny how could he ever be pressed for payment after what you had done to the note?

Mr. DOHENY.—If anything happened to us the two fragments of the note would still remain in our possession, wherever we were with our bodies, if we were in a railroad wreck, and our heirs, my son would have gotten hold of the pieces and he would have known what they meant, but executors wouldn't; they would force the payment of the note upon him. My son knew that the note was given for the money, and he knew it was Mr. Fall's intention to pay the note, and we believed that he could get a new note from Mr. Fall by asking for it. That is what is in my mind, that he could have gotten a new note by *saying* to Mr. Fall, "The note that

you gave to my father was lost when they were in that wreck, and we want a new note for it," and we believed that Fall would give him a new note, and in case we were all killed in a wreck, why of course it, would have been a legacy to him.

The CHAIRMAN.—Have you produced the check, Mr. Doheny?

Mr. DOHENY.—I have sent for the check and there is a man on the way with [144—71] it from Los Angeles. I think he will arrive to-morrow. At least, we wired to-day to know who was sent with it. We telephoned them on last Tuesday to send the check, and to send some books, so that we could see what entries were made indicating that this note was in our—was taken account of in our records over there. My wife has some private entries that she makes in her own book. She thinks that there is an entry of this note made in those books, made in 1921.

The CHAIRMAN.—But you say the check is in California.

Mr. DOHENY.—The check is in California, and will be here probably to-morrow.

The CHAIRMAN.—Did we not understand from you that you had searched for both the check and the note in California before you came here?

Mr. DOHENY.—No, sir; you didn't understand that from me; and if you did you misunderstood, because the check I always knew was in existence.

The CHAIRMAN.—Well, why did you not bring that check with you when you came from California?

Mr. DOHENY.—Well, I don't know—I wasn't subpoenaed to bring any check.

The CHAIRMAN.—Why, Mr. Doheny, you came here to tell this committee that you had loaned Mr. Fall \$100,000 two years ago last November.

Mr. DOHENY.—Yes, sir; a year ago—two years ago last November.

The CHAIRMAN.—And you knew at that time that you had the check evidencing the loan, or evidencing your drawing the money with which you made it, in your possession in California before you started east?

Mr. DOHENY.—No; I didn't have it in my possession, Mr. Lenroot. Before we get any further misunderstanding on this let me tell you. First, I borrowed that money from my son. It was his check that was in California.

The CHAIRMAN.—You borrowed the money from your son?

Mr. DOHENY.—I borrowed the money from my son, and I repaid the money to him with two checks. My account wasn't large enough to produce the money that I was going to loan him, so I repaid him with two checks.

The CHAIRMAN.—Did you tell us that the other day?

Mr. DOHENY.—No, sir.

The CHAIRMAN.—Why not?

Mr. DOHENY.—Well, I wasn't asked about it.
The CHAIRMAN.—Wasn't asked about it?

Mr. DOHENY.—No.

The CHAIRMAN.—Did you not come here with a voluntary statement, Mr. Doheny, purporting to tell all the facts in connection with this matter?

Mr. DOHENY.—Mr. Lenroot, I came here and I told you what I have told you. What I have told you is the truth. What I am telling you now is the truth. Why I did not tell you the other day I am not prepared to state now. I don't know just why I didn't tell you more than I did the other day, except that I thought I was telling you all that you asked for the other day.

The CHAIRMAN.—I had supposed that you undertook to give us all the facts, whether questions were asked or not. In view of that I would like to have you, now, Mr. Doheny, begin at the beginning and tell us the whole story as you now remember it, omitting nothing.

Mr. DOHENY.—The whole story with regard to the loan?

The CHAIRMAN.—Yes, sir.

Mr. DOHENY.—Well, some time along in the summer of—or late in the fall of—1921 Mr. Fall let me know, through conversations, that he was desirous of purchasing a certain piece of land adjoining his ranch in California which would complete his land holdings.

The CHAIRMAN.—Where were those conversations held, Mr. Doheny?

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Mr. DOHENY.—In Washington. He told me, I think the amount of the land, the acreage of the land, and the fact that the water from that land, was needed to complete the—to supplement the water on his own land in order to make it a good cattle range or to make it a complete ranch for the purpose that he wanted it. And also he indicated to me at that time that he had been talking to Mr. McLean about the ranch, and that McLean had thought about buying the land, and letting Fall have an option on it, or of putting the money up to buy it and taking a mortgage on it, something of that sort. As a result of that talk, and the talk about his poor condition, and in view of our old friendship, I offered to loan Fall the money on his note. And I loaned him the money; on the 30th day of November I sent him the money.

The CHAIRMAN.—Now, give us all the facts in connection with how you came [145—72] to make it on that particular day.

Mr. DOHENY.—Well, on the 30th of November, I think it was, or the 29th of November, or some other day, Fall called me up by telephone—I was in New York, and he was here—and he said to me that he was prepared now to receive that loan, to make that loan if I was willing to make it. And I talked to him something about how he wanted the money, and the result was that I sent the money to him by my son, who got it from Blair & Co.'s bank on his own check, on his own account, and he brought it over and gave it to Mr. Fall. My son

came back the next day and brought back this note, a part of which you have before you here, and handed it to me. I kept that note in this book that I still have in my pocket, and in which I carry occasionally notes and checks ready for deposit or for safekeeping, and before I went to California I called my wife's attention to it, and severed the note in two parts so that she might have one part and I have the other part in case anything happened to us enroute which might result in the loan being an injury to Mr. Fall rather than a help to him.

* * *

The CHAIRMAN.—Well, now, did you cash the check?

Mr. DOHENY.—I had it cashed, which amounts to the very same thing.

The CHAIRMAN.—I thought *you* son cashed it? It was your son's check?

Mr. DOHENY.—My son did cash it. It was his own check. My son did cash the check.

The CHAIRMAN.—His own check, not yours?

Mr. DOHENY.—His check; yes, sir.

The CHAIRMAN.—Why did you not tell us the other day?

Mr. DOHENY.—You are drawing nicer distinctions in the use of language than I am accustomed to drawing, Mr. Lenroot.

The CHAIRMAN.—Do you think we would understand otherwise than that it was you own check that you got cashed, Mr. Doheny?

Mr. DOHENY.—I propose to bring you the

check and to tell you just exactly what was cashed.

The CHAIRMAN.—Well, now, where is your son's check?

Mr. DOHENY.—My son's check is on the way here from Los Angeles.

The CHAIRMAN.—Your son's check and your two checks that you gave to him?

Mr. DOHENY.—Yes; in repayment of the loan.

The CHAIRMAN.—Why did you not bring your son's check for this \$100,000 when you knew that that was the subject that you were going to testify to?

Mr. DOHENY.—Well, I didn't think it was necessary.

The CHAIRMAN.—Are there any other questions on this branch? I wish to interrogate him on some other matters.

Senator ADAMS.—Mr. Doheny, I wanted to ask you how this note was kept in your safety deposit box. Was it with other notes, other securities?

Mr. DOHENY.—Yes, sir.

Senator ADAMS.—Was it in a separate envelope?

Mr. DOHENY.—I don't remember as to that. I think it was in a separate envelope.

Senator ADAMS.—Any notation on the outside of it?

Mr. DOHENY.—I don't remember as to that.

Senator ADAMS.—And when did you get this fragment?

Mr. DOHENY.—When did I get this fragment?

Senator ADAMS.—Yes.

Mr. DOHENY.—I got this fragment last—out of my safe deposit last October or November.

Senator ADAMS.—Where has it been since that time?

Mr. DOHENY.—It has been in my pocket.

Senator ADAMS.—You did not have it in your pocket when you came before the committee?

Mr. DOHENY.—Yes, I did.

Senator ADAMS.—Oh, you had it with you at that time?

Mr. DOHENY.—Yes, sir.

Senator ADAMS.—And so that when you said to us that the note was in New York, you thought, or possibly in Los Angeles, and that you would get it, you were not quite telling us the fact?

Mr. DOHENY.—I wasn't telling you all the facts, but I was telling you that the thing which completed the note, which made the note—the signature is what makes the note—and I thought it was in New York or in Los Angeles, and that I would produce the note. [146—73]

Senator ADAMS.—You did tell us that you had for a long while carried that note in that pocket-book of yours?

Mr. DOHENY.—Yes, sir.

Senator ADAMS.—And that then you had put it either in your safety deposit box in New York or in Los Angeles.

Mr. DOHENY.—Yes, sir.

Senator ADAMS.—As a matter of fact, the note was not in your safety deposit box in either New York or Los Angeles at the time?

Mr. DOHENY.—The essential part of the note still is in Los Angeles.

Senator ADAMS.—The signature part?

Mr. DOHENY.—The signature part; yes.

Senator ADAMS.—That is the only note you have of Senator Fall's.

Mr. DONENY.—Yes, sir. * * *

Senator ADAMS.—So there was no entry made on your personal accounts at that time in reference to this note or the money that you sent to Secretary Fall?

Mr. DOHENY.—No, sir.

Senator DILL.—I didn't get clearly the date when this note was torn apart, the signature torn off.

Mr. DOHENY.—It was some time about the middle of December.

Senator DILL.—Which year, this year?

Mr. DOHENY.—1921.

Senator DILL.—1921?

Mr. DOHENY.—Yes, sir.

Senator DILL.—That is just a few days after the note was made?

Mr. DOHENY.—Yes, sir.

Senator DILL.—Have you seen that torn-off signature part since that time?

Mr. DOHENY.—Yes, sir.

Senator DILL.—How often have you seen it?

Mr. DOHENY.—Well, I haven't seen it but once since, I think. That was in Los Angeles. That is my impression, that it was in Los Angeles. It might have been, possibly, in New York.

Senator DILL.—Was that immediately after you arrived there, or just before you came here?

Mr. DOHENY.—Well, I haven't any memory as to the exact date when I might see a signature on a note.

Senator DILL.—Is it the custom of you and Mrs. Doheny to tear the signature off the notes that are given to you?

Mr. DOHENY.—No, sir; it is not customary.

Senator DILL.—Have you done that with any other note?

Mr. DOHENY.—No; I don't think we have. I don't think we have ever loaned any other money under just these circumstances when we were afraid that the party to whom we loaned it might be put in an unfortunate or injurious circumstance by the collecting of it.

Senator DILL.—That is all.

Senator PITTMAN.—Mr. Doheny, you had in mind by tearing off the signature of the note, that if it fell in the hands of your executors it could not be identified as an obligation of Senator Fall?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—Was there no other way that you could think of by which you could protect Senator Fall than by destroying this evidence?

Mr. DOHENY.—There was no other way that I adopted, Mr. Pittman.

Senator PITTMAN.—I didn't ask you that, because it is apparent that that is what you adopted.

Mr. DOHENY.—What difference does it make now if I could have thought of any other way of doing it? I did it this way. This thing is done.

Senator PITTMAN.—Could you not have provided in your will that this should be considered as a legacy to Senator Fall?

Mr. DOHENY.—Oh, I might have provided in my will if I had had time to make the will before I went on the train after we prepared to go west.

Senator PITTMAN.—Could you not have taken it to a trust company and arranged a contract by which there would be an extension of this subsequent to your death?

Mr. DOHENY.—It might have been done in a dozen different ways, and every one better than this, but this is the one I adopted, Senator Pittman.
[147—74]

Senator PITTMAN.—Now, you realized when you were on the stand before, Mr. Doheny, did you not, that to avert any suspicion as to whether there was such a thing as a note at all that this committee were very anxious to see the evidence that there was a note? Is not that a fact?

Mr. DOHENY.—I wish you would give me that question again.

Senator PITTMAN.—You were aware of the fact

from the character of the questions asked you at the last examination that the committee were anxious to know whether there ever was a note executed, and they wanted to see the instrument?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—You knew that, did you not?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And you realized, did you not, that you were sworn not only to answer truthfully the questions asked you, but that you were to tell us the whole truth about this note? Did you understand that?

Mr. DOHENY.—In answer to questions, yes.

Senator PITTMAN.—Not alone in answer to questions, but that you were to tell the whole truth about this thing, that is what you were sworn to do. Do you understand now that you are to tell the whole truth and not conceal any of the truth?

Mr. DOHENY.—I understand that I am to tell the whole truth in answer to any questions that are asked me, but I am not supposed to tell the truth about things that do not concern the committee, or that might be connected with it by some other mind than mine, and in this particular connection I had intended to and did tell you the truth about the note. I said that the note was not in my possession, and is not in my possession yet, and I am here voluntarily to-day, although I was subpoenaed last night, to produce that part of the note which I have, and to tell you that I expect to get the remainder

of the note when I go back to California, and that the whole note will then be before the committee if it is possible to find the remainder of it.

Senator PITTMAN.—Now, Mr. Doheny, you understand that you were sworn to tell the whole truth, do you not, about any transactions concerning which you were testifying? You were asked by Senator Walsh to tell all about this loan, and the execution of that note, and about what became of the note. Did you tell all that you knew about it?

Mr. DOHENY.—I don't know that I was asked all of those questions that you speak of.

Senator PITTMAN.—Well, if you were asked that question then you did not tell the whole truth? Get down to that.

Mr. DOHENY.—If I was asked those questions I did not tell you about the note that I had in my pocket, and which was mutilated by the signature being torn off.

Senator PITTMAN.—Well, if you were asked by any member of the committee to tell all about this loan and that note, then you did not tell the whole truth, did you?

Mr. DOHENY.—Are you trying to get me to admit that I lied about it? Because there is no use; if I lied about it, I lied about it. I don't need to admit it to you. It is in the evidence, whatever I said, and my admitting it doesn't make any difference in this testimony at all.

Senator PITTMAN.—No, I am trying to see if you are as innocent as you are pretending to be.

Mr. DOHENY.—Well, I am quite sure that when I was here before, Mr. Pittman, that you were going to be disappointed when I produced the note.

Senator PITTMAN.—I have no doubt about it. I want to read a little of that examination to show how disappointed I am.

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—I have tried to make it very plain to you, Mr. Doheny—

Mr. DOHENY.—(Interposing.) That you didn't believe me.

Senator PITTMAN.—Yes.

Mr. DOHENY.—And you did make it very plain to me that you didn't believe me.

Senator PITTMAN.—Yes, I did.

Mr. DOHENY.—And this evidence here proves that you were wrong and I was right.

Senator PITTMAN.—Well, we will find out whether it proves it.

Mr. DOHENY.—Very well.

Senator PITTMAN.—It was known that this committee was suspicious about the very existence of the note.

Mr. DOHENY.—Yes, I know that. [148—75]

Senator PITTMAN.—At least, I was suspicious.

Mr. DOHENY.—I know that, and that is why I hurried back here to bring the part of the note that I had to allay those suspicions. That is why I hurried back, so as to produce the mutilated part of the note just to allay those suspicions.

Senator PITTMAN.—You hurried back here, Mr.

Doheny, to allay the suspicion, and yet, knowing that there were suspicions, you had the note in your pocket, and you could have reached in your pocket and pulled it out to allay those suspicions, just as you have done now.

Mr. DOHENY.—You are saying that. I am not saying it.

Senator PITTMAN.—Is not that true?

Mr. DOHENY.—I thought I could produce the whole note.

Senator PITTMAN.—Is not that true, though?

Mr. DOHENY.—I thought I could produce the whole note.

Senator PITTMAN.—But you hurried back to produce this?

Mr. DOHENY.—This is not the whole note that is in my possession, but I brought it to allay suspicion.

Senator PITTMAN.—To allay suspicion. And yet you could have allayed suspicion by reaching in your pocket and pulling it out?

Mr. DOHENY.—Could I?

Senator PITTMAN.—Well, I agree with you. I will agree that with the signature torn off that you have not quite allayed the suspicion.

Mr. DOHENY.—That was the impression that I was under, that with the signature torn off it would not allay suspicion, and that I would go to New York and try to see if I could find it in a place there where my wife and I thought we could find it. We went over there, and we went through my safe deposit box with the greatest care, and

we found out it was not there, and then we made up our mind to come back and deliver as much as we had, and we concluded that we could get word from California to see where the remainder of it was.

Senator PITTMAN.—Now let us see what was testified to the other day, to see if you told the whole truth or not (reading):

“Senator PITTMAN.—Then you attached some value of his note?

Mr. DOHENY.—Yes, sir; I attached \$100,000 value to it.

Senator PITTMAN.—Where do you keep your notes and properties of that kind?

Mr. DOHENY.—I keep most of them in Los Angeles, except such as are developed in New York. Those are in New York.

Senator PITTMAN.—You have made a search for this note in Los Angeles?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And it is not there?

Mr. DOHENY.—Yes; we made a hurried search in Los Angeles before we started here and did not find it.

Senator PITTMAN.—The transaction started in New York?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And that is where you keep that kind of things, in New York?

Mr. DOHENY.—Some things. We do not keep all of those things there.

Senator PITTMAN.—Have you seen that note since it was delivered to you by your son?

Mr. DOHENY.—Yes.

Senator PITTMAN.—When?

Mr. DOHENY.—Oh, I have seen it more than once, I think.

Senator PITTMAN.—Where were you when you saw it more than once?

Mr. DOHENY.—Well, I saw it in New York.

Senator PITTMAN.—More than once in New York?

Mr. DOHENY.—Yes; more than once in New York.

Senator PITTMAN.—And whereabouts was it being kept when you saw it?

Mr. DOHENY.—It was being kept right in this book.

Senator PITTMAN.—How long did you keep it in that book?

Mr. DOHENY.—I kept it in that book until, I think, we got back to Los Angeles but then I have an idea now that we may have put it in the Guaranty Trust or one of our safe-deposit boxes in New York.

Senator PITTMAN.—Do you carry many notes that length of time in your pocketbook?

Mr. DOHENY.—Yes; quite a few of them. [149—76]

Senator PITTMAN.—That length of time?

Mr. DOHENY.—I have not said what length of time.

Senator PITTMAN.—How long did you keep this note of Senator Fall's in your pocketbook?

Mr. DOHENY.—I do not know. I presume I

kept it—my thought is that I kept it until we got back to Los Angeles.

Senator PITTMAN.—Have you a safe-deposit box, or more or several, in Los Angeles?

Mr. DOHENY.—Yes.

Senator PITTMAN.—Do you keep your notes in any particular place there?

Mr. DOHENY.—I do not know what we do. Most of my notes are turned over to Mr. Ritter, our private accountant there.

Senator PITTMAN.—Have you lost many notes in the last few years?

Mr. DOHENY.—No, sir.

Senator PITTMAN.—Did you ask Mr. Ritter to assist in searching for those notes in Los Angeles?

Mr. DOHENY.—No, sir.

Senator PITTMAN.—Who else did you ask to help in searching for those notes in Los Angeles?

Mr. DOHENY.—I asked my son and my wife.

Senator PITTMAN.—And did they assist you?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And you did not find it?

Mr. DOHENY.—No, sir.

Senator PITTMAN.—You realized that this committee would like to see that note?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And you have made a sincere search for it?

Mr. DOHENY.—Yes, sir; and I am going to produce the note.

Senator PITTMAN.—That is exactly what I am

getting at. How long do you think it will be before you produce the note?

Mr. DOHENY.—As soon as I get back to Los Angeles, or if it is in New York I will get it when I get there. Because the note is not lost; I have not lost any notes.

Senator PITTMAN.—That is the reason I am getting at that. Your evidence so far has indicated that it is not in Los Angeles.

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And it is not very far from here to New York?

Mr. DOHENY.—That is right.

Senator PITTMAN.—And as it is a question that has naturally aroused some suspicion—I do not mean your testimony, but the matter of this note. There has been several notes, you know, flying around before the committee. They would like to see the note.

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And as one member of the committee, I hope that before the session is over you can find it without having to go to Los Angeles for it."

Senator PITTMAN.—Now, Mr. Doheny, after that examination and those answers, do you think that having that note in your pocket which you have this date produced, that you were telling the whole truth to this committee?

Mr. DOHENY.—My dear sir, I am not here attempting to answer questions as to whether I told the truth or not. I am here to answer questions as

to the note I received from this loan, and that is no evidence before this committee as to whether I told the truth then or not. I told the truth then as I saw it, and I tell the truth now as I see it. I have got the note Fall gave for that loan, if it is in fact a note without the signature. I had that with me when I was before the committee before. I didn't produce it at that time because I thought I could produce a note in the form that would allay suspicion. I could not produce the whole note, until I got back to California, if I can at all, so I produced what I have got for what good it will do. This note is there for whatever influence it will have on this committee's mind. That note was sent to me by Mr. Fall through my son. It is the note for what I loaned him; that is all there is to it. All your questions cannot make me admit that I purjured myself, Senator. [150—77]

Senator PITTMAN.—Where did you keep this note that the signature is torn off of that is introduced in evidence?

Mr. DOHENY.—Where did I keep it?

Senator PITTMAN.—Yes.

Mr. DOHENY.—Kept it in Los Angeles part of the time, and part of the time in my pocketbook.

Senator PITTMAN.—You brought it on from Los Angeles at the time you came here to testify?

Mr. DOHENY.—Yes, sir; and I tried to find the remainder of it if I could. As I stated in my testimony—maybe I didn't make it clear, that the remainder was what I was looking for, and the sig-

nature is what makes the note, and in my opinion that was a fair answer under the circumstances.

Senator PITTMAN.—Now you testified that you kept this part of the note?

Mr. DOHENY.—Yes.

Senator PITTMAN.—And that your wife kept the signature?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And that your wife made a search in Los Angeles for the note?

Mr. DOHENY.—For the signature—for the note. For the signature; the signature is what makes the note.

Senator PITTMAN.—And while you were in Los Angeles with your wife you had this part of the note?

Mr. DOHENY.—What is that?

Senator PITTMAN.—You had this when you were in Los Angeles?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And your wife was then with you?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And she was supposed to have the signature part?

Mr. DOHENY.—Yes, sir.

Senator PITTMAN.—And you came on here for the purpose of testifying that you had made a loan to Secretary Fall, and came on with this part, without the other part?

Mr. DOHENY.—That is what I did.

Senator PITTMAN.—Did you make a careful search in Los Angeles for it or not?

Mr. DOHENY.—No, hurried search, as I stated in my testimony.

Senator PITTMAN.—Did you not consider that the signature was a very material part of that note?

Mr. DOHENY.—Indeed, I did.

Senator PITTMAN.—And you were coming on here to testify in this matter without making a careful search in Los Angeles?

Mr. DOHENY.—I came on here hurriedly, because I had made up my mind to come, and we looked for that portion of the note, and we didn't find it, so we made up our mind that in all probability it was in New York; that is why we did not make any closer search in Los Angeles.

Senator PITTMAN.—When you were on the stand before did you testify that you might have to go back to Los Angeles to get the note?

Mr. DOHENY.—Yes; to get the signature to the note, of course.

Senator STANFIELD.—Mr. Doheny, when did you repay your son the \$100,000 that he loaned you to pay to Senator Fall?

Mr. DOHENY.—I don't know just when it was. The notes will show it. It was probably a month or two afterwards.

Senator STANFIELD.—You mean the checks, not the notes?

Mr. DOHENY.—Yes, the checks will show. I paid him with one check of \$40,000, I think, and one check for \$60,000.

Senator STANFIELD.—That was near the same time that the loan was made to Secretary Fall?

Mr. DOHENY.—What is it?

Senator STANFIELD.—That was near the same time that this loan was made to Secretary Fall?

Mr. DOHENY.—Yes, within a month or afterwards.

Senator STANFIELD.—Within a few days?

Mr. DOHENY.—Yes, within a month or so afterwards.

Senator STANFIELD.—That is all. [151—78]

Senator BURSUM.—Mr. Doheny, how long have you known Secretary Fall?

Mr. DOHENY.—I have known him, I suppose, about 30—between 30 and 35 years.

Senator BURSUM.—Has your relationship been of an intimate character during this time?

Mr. DOHENY.—It was of a very intimate character in the early years, and pretty intimate during the last five years.

Senator BURSUM.—You say you loaned Mr. Fall \$100,000 in 1921?

Mr. DOHENY.—Yes, sir.

Senator BURSUM.—What was the object of making him that loan? Was it on account of friendship, or favors received, or was it on account of favors to come?

Mr. DOHENY.—Naturally it was on account of friendship. I have already testified to that. I am giving you the same answer now.

Senator BURSUM.—Prior to Secretary Fall's

taking the position of Secretary of the Interior had you had any business relations with Mr. Fall?

Mr. DOHENY.—Not business relations, but I had some very intimate relations with him concerning matters that interested the public; Mexican matters.

Senator BURSUM.—Had Fall ever rendered you any service during all of these years of your acquaintance?

Mr. DOHENY.—I think he rendered me the greatest service while he was chairman of the committee to investigate the Mexican situation. He rendered it to me and to every other person interested in Mexico of any sort that had been rendered by any public man in the United States since the Mexican situation commenced in 1910.

Senator BURSUM.—At the time that you made the loan did you consider yourself under obligations to Mr. Fall?

Mr. DOHENY.—Yes, sir; I considered myself under a great obligation both on account of friendship and on account of the service he had rendered our company and other companies.

Senator BURSUM.—At the time that you made the loan did you have in mind the obtaining of any lease or concession from the Government?

Mr. DOHENY.—No, sir.

Senator BURSUM.—Had you consulted about it?

Mr. DOHENY.—What is that?

Senator BURSUM.—Had you consulted or applied for any lease?

Mr. DOHENY.—There is a letter here to-day that is a surprise to me, that I don't remember, that has entirely left my mind, which is evidence that I knew something about a lease that the Secretary of the Navy was considering, or not a lease, but a contract that the Secretary of the Navy wanted to make regarding the building of storage at Pearl Harbor.

Senator BURSUM.—That was with the Secretary of the Navy?

Mr. DOHENY.—Yes, sir.

Senator BURSUM.—If I understood you correctly when you testified before, you stated that it was one of your hobbies to all old friends which you had known when you were poor, working in New Mexico. I will ask you if you have aided other people outside of Mr. Fall of the old-time acquaintances?

Mr. DOHENY.—Yes, sir.

Senator BURSUM.—When were you mining in New Mexico, do you know a man by the name of Mike Moffett who mined at Kingston?

Mr. DOHENY.—I knew him, yes, sir.

Senator BURSUM.—Did you loan him some money last fall?

Mr. DOHENY.—No, sir.

Senator BURSUM.—You did not?

Mr. DOHENY.—No, sir.

Senator BURSUM.—Have you loaned any money to any other friends?

Mr. DOHENY.—I have loaned some money to John Moffett, a brother to Mike Moffett.

Senator BURSUM.—A brother of Mike Moffett?

Mr. DOHENY.—A brother of Mike Moffett.

Senator BURSUM.—Was he one of the old-time miners?

Mr. DOHENY.—He was one of the old-time miners.

Senator BURSUM.—That worked with you in the eighties?

Mr. DOHENY.—Yes, sir. [152—79]

Senator BURSUM.—How much money did you loan him?

Mr. DOHENY.—I loaned him enough to buy a mine that was being sold at sheriff's sale, and in which he was interested, and which he could not raise the money to buy, and was about to lose his interest. I have forgotten how much it was now. I think about \$2,500.

Senator BURSUM.—When was this loan made?

Mr. DOHENY.—About—I don't remember; about a year ago or such a matter.

Senator BURSUM.—What security did you take?

Mr. DOHENY.—He gave me none.

Senator BURSUM.—Have you made other loans?

Mr. DOHENY.—Yes, sir.

Senator BURSUM.—In substantial amounts?

Mr. DOHENY.—Yes, sir; I loaned Billy Boyle, a prospector, whom I knew at Kingston, Ariz., in the early days, and who afterwards went up to Cripple Creek, and who later came over to Lovelocks, Nev., and then down into Arizona—he wanted to buy a mine in the Chloride district there—I have forgot-

ten the name of the mine—but I loaned him \$20,000 to buy the mine.

Senator BURSUM.—Were you repaid?

Mr. DOHENY.—Yes, sir; he sold the mine for \$75,000 and repaid me, and died a few weeks afterwards and left his widow about \$30,000 profit that he had made out of that transaction.

Senator BURSUM.—Did you take security on your loan?

Mr. DOHENY.—No, sir; no security.

Senator BURSUM.—Just took his word?

Mr. DOHENY.—Yes, sir.

Senator BURSUM.—Have you made other loans to the old timers?

Mr. DOHENY.—Yes, sir; I made a loan to C. W. Like, who used to be the general superintendent of the Chrystolite mine in Leadville in the days when Senator Adams' father was Governor of Colorado. I loaned him \$5,000 at one time, and \$3,000 at another, to open up a mine in Nevada, and unfortunately they didn't make any profit out of it, and of course I never got the money back.

Senator BURSUM.—How strong is your friendship for Mr. Fall? Supposing now that you lose your lease, that it be canceled. Mr. Fall is out of any position to do you any favor.

Mr. DOHENY.—My friendship for Mr.—

Senator BURSUM.—After that would you be willing to make him other loans?

Mr. DOHENY.—My friendship for Mr. Fall and for every other one of my friends is not measured by their financial condition or by mine. My ability

to do them service depends upon my financial condition. If Mr. Fall was out of a position to-morrow and was in a good frame of mind and physically able, he could get employment with me at work wherein he would be of service to me.

Senator BURSUM.—But suppose that he were not in a position to render you service of any kind or character, to what extent would your friendship extend toward giving him relief?

Mr. DOHENY.—Well, it would be measured by what I thought were his necessities at the time.

Senator BURSUM.—Would you make another loan of \$100,000?

Mr. DOHENY.—I don't think I would now.

Senator BURSUM.—How?

Mr. DOHENY.—I don't think I would under present circumstances.

Senator BURSUM.—That is all.

The CHAIRMAN.—Mr. Doheny, just where did this mutilation of the note take place?

Mr. DOHENY.—It took place in our rooms. I don't know near which door nor what rug we were standing on.

The CHAIRMAN.—But I mean in New York?

Mr. DOHENY.—In the Plaza Hotel in New York, in our rooms.

The CHAIRMAN.—In your rooms?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—Immediately after you had gotten it?

Mr. DOHENY.—No, sir.

The CHAIRMAN.—How long afterwards? [153—80]

Mr. DOHENY.—Two or three weeks afterwards. Probably two weeks. I don't know just what date we started back to California.

The CHAIRMAN.—But before your return to California?

Mr. DOHENY.—Yes, sir; just as we were—we were contemplating our return at the time that I mutilated the note.

And Mrs. Doheny took the signature part?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—In her possession?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—And kept it in her possession?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—And you took the balance of it?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—Then why did you tell us, Mr. Doheny, that you kept that note in your pocket-book?

Mr. DOHENY.—Now, Mr. Lenroot, I want to be frank with you. You are asking me the most embarrassing questions; that I can't see why they concern this. I do not know why I didn't tell you and I am sorry I didn't tell you.

The CHAIRMAN.—I want to know just what was in your mind, Mr. Doheny?

Mr. DOHENY.—Well, I don't know why. I am sorry that I didn't tell you.

The CHAIRMAN.—It has been very apparent that the committee has been very greatly misled by you.

Mr. DOHENY.—I am sorry.

The CHAIRMAN.—It is of interest to this committee whether that misleading was intentional or not.

Mr. DOHENY.—Well, it is a question of whether or not I could have produced the whole note. If I could have produced the whole note you would not have been misled as much as you are now.

The CHAIRMAN.—Well, when you testified before the committee you did not consider that what you had in your pocketbook was the note?

Mr. DOHENY.—No, sir; I did not consider it the note.

The CHAIRMAN.—But when you testified that you kept the note in your pocketbook, then you thought it was the note?

Mr. DOHENY.—When I what?

The CHAIRMAN.—I say, when you testified before this committee at that time, your reason for not producing it was because you did not consider it a note?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—Am I correct?

Mr. DOHENY.—Yes, sir.

The CHAIRMAN.—But when you testified that you had had it in your pocketbook until your return to Los Angeles, you considered it was a note then?

Mr. DOHENY.—It was a note then, of course.

The CHAIRMAN.—But it was mutilated, just

(Testimony of Oscar Sutro.)

the same then as it is now, was it not, because Mrs. Doheny had the other part of it?

Mr. DOHENY.—Mrs. Doheny had the other part of it; yes sir.

The CHAIRMAN.—So if it was not a note when you had it in your pocketbook it was not a note when you took it to Los Angeles, was it?

Mr. DOHENY.—Probably you are right.

The CHAIRMAN.—One other question, Mr. Doheny. Did it occur to you that if anything happened to you, that you would not want the public to know that you had had these financial relations with Mr. Fall while he was Secretary of the Interior?

Mr. DOHENY.—No, sir.

The CHAIRMAN.—That was not a reason for the action that you took?

Mr. DOHENY.—No, sir." [154—81]

Testimony of Oscar Sutro, for Plaintiff.

OSCAR SUTRO, a witness on behalf of the plaintiff, testified that he is an attorney at law residing in San Francisco; that in 1921 and 1922 he was attorney for the Standard Oil Company of California and rendered an opinion to that Company dated January 27, 1922, which he identifies. Thereupon plaintiff offered in evidence the said opinion of the witness, plaintiff's counsel stating that the offer would be followed by proof that the substance of the opinion was brought to the attention of the Secretary of the Interior, Mr. Fall, before the contract

(Testimony of Oscar Sutro.)

(of April 25, 1922, in issue in this case) was closed, to show knowledge of the questions that were raised and to show that he had this matter called to his attention before he proceeded to make the contract. Defendants objected to the admission of said paper in evidence on the grounds that it is incompetent, irrelevant and immaterial; not admissible against the defendant companies; Mr. Fall is not a party defendant or a party litigant in the case; it is not connected in any way with, and it is not proposed by plaintiff's counsel to connect it with, or show that it was ever brought to the knowledge of, or that it in any way affected the motives or actions of, the defendant companies; that an opinion rendered to the Standard Oil Company, or any opinion that the witness might have held, with regard to the legality or illegality of the contracts in issue in this case is utterly irrelevant, immaterial, and cannot be binding as against defendants, cannot be used to aid the plaintiff, and cannot properly affect the Court's deliberations; that the fact, offered to be hereafter shown, that one of the parties to a contract in issue had this matter brought to his attention, has in no way affected the legality or illegality of his action; what witness' opinion may have been, communicated or not communicated to Mr. Fall or anyone else representing the plaintiff, is not binding upon, and neither as a matter of law nor a matter of fact could have any effect upon official actions of the plaintiff's representatives. The counsel for plaintiff replied

(Testimony of Oscar Sutro.)

that the opinion was offered not on the question of legality of the contract, but as a fact to be shown as part of the circumstances leading up to the consummation of the transaction. The Court overruled the objection and admitted the opinion of the said witness in evidence, to which ruling and action of the Court defendants duly reserved exceptions. Thereupon the paper identified by the witness was received in evidence as Plaintiff's Exhibit No. 51, and is as follows: [155—82]

PLAINTIFF'S EXHIBIT No. 51.

“January 27, 1922.

Mr. H. M. Storey,
Vice-President, Building.

Dear Sir:

I have carefully considered the question whether the Secretary of the Navy has power, under the naval appropriation bill of June 20, 1921, to exchange oil and gas products from the properties within the naval petroleum reserves for tankage for storage of Navy oil. I am clearly of the opinion that the act does not confer such authority.

The proviso to the naval appropriation bill of June 20, 1921 (41 Stat. L., pp. 813-814), reads as follows:

‘Provided, That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves as are or may be come subject to the control and use by the United States for naval purposes, and on which there are no pend-

ing claims or applications for permits or leases under the provisions of an act of Congress approved February 25, 1920, entitled "An act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," or pending applications for United States patent under any law; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States; And provided further, That the rights of any claimant under said act of February 25, 1920, are not affected adversely thereby; And provided further, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922; Provided further, that this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct.'

It is my opinion that the word "exchanged" as here used authorizes the exchange of oil and gas products of the naval reserve lands for other oil and gas products. Any other construction would seem to defeat the legislative intent. For illustration, the aviation appropriation appropriates \$3,-

883,400 for aircraft. It cannot be supposed that after this appropriation is exhausted the Secretary of the Navy could exchange fuel oil from naval reserves for additional aircraft.

The second additional proviso appropriates \$500,000 'for this purpose,' which purpose includes the storage of oil. To permit the Secretary of the Navy to exchange oil for the storage would in effect authorize him to increase the amount of the appropriation made 'for this purpose.'

Furthermore, the third additional proviso directs the reimbursement of the \$500,000 appropriation 'from the proper appropriations on account of the oil and gas products from said properties used by the United States.' I take this to mean, for example, that if oil used from the naval reserve lands is used as fuel on battleships, then out of the \$10,000,000 appropriation for 'coal and other fuel for steamers' and ships' use' (41 Stat. L., p. 826), the value of the fuel oil so used shall be reimbursed to the \$500,000 fund above mentioned. If oil and gas could be exchanged for storage, the \$500,000 fund provided 'for this purpose' would have to be reimbursed under the third additional proviso above referred to, to the extent of the value of that storage, out of the same \$500,000 fund. To construe an act so as to require the reimbursement of a certain appropriation out of the same appropriation is, of course, an absurdity.

The program considered in Secretary Denby's letter of December 14, 1921, if carried out through the interposition of a contractor who would ex-

change tankage for oil upon an understanding with an oil company for the sale of the oil, would be virtually a sale of the oil and a purchase of tankage. The money value of the tankage would be determined, and I assume, would be arrived [156—83] at by bids. I assume that the money value of the oil would be determined according to its market value. To this would be added the circumstance that the oil company would have engaged to purchase the oil from the contractor. The operation in its essentials would be nothing less than the sale of the oil by the Navy, and the investment of the proceeds in storage.

Nor do I see anything in the suggestion that because the main proviso authorizes the Secretary to 'store' the oil and gas, it gives him unlimited authority 'to provide the means of storage.' Furthermore, the appropriation in the second additional proviso designates the source from which he is to provide the means of storage. If this appropriation is not sufficient, an additional appropriation should be requested, but the oil and gas products, in my opinion, cannot be exchanged in such a way as to evade the necessity of asking for such an appropriation.

There seem to be practically no precedents in the decisions on this subject. In the United States v. Steele (113 U. S. 128), an exchange of scrap material for plumbing work on naval vessels was held unauthorized and condemned as a circumvention of the law in respect to appropriations. The powers of the Secretary in that case were derived under

(Testimony of Oscar Sutro.)

a statute much narrower than the present act. In my opinion, however, this transaction would in the last analysis be tested by its true intent, and its intent would obviously appear to be to circumvent the limit placed by Congress upon Naval expenditure.

I may add that if the transaction is unauthorized, there is no statute of limitations which would bar an attack upon it. I think the plain purport of the statute is that the Secretary of the Navy shall sell the oil and convert the proceeds into the general fund, unless he exchanges it for other oil.

Therefore, I would not approve the proposed transaction.

Very truly yours,

OSCAR SUTRO." [157—84]

After the foregoing had been read to the Court the witness Sutro (over objections repeated on the grounds already stated and upon the further ground that anything witness may have said to any one regarding his opinion or regarding the validity of the contracts involved in the suit, or anything he had done, or anything said by any person not acting for the defendants, is irrelevant and as to these defendants hearsay and incompetent, which objections were overruled, to which rulings exceptions were reserved by defendants) testified that in March, 1922, he had a conversation with Assistant Secretary of the Interior Finney in the latter's office in Washington during which conversation there was discussion about the correctness of the

(Testimony of Oscar Sutro.)

witness' position as stated in the foregoing opinion, Mr. Finney's position being that the opinion of the witness was not correct, the witness maintaining in that conversation that it was; witness suggested that what the Attorney-General thought about it should be ascertained and Mr. Finney stated that the Secretary of the Interior did not consider that necessary; witness thinks he offered to take the matter up with the Department of Justice but is not definite about that; the substance of Judge Finney's answer to that suggestion, if it was made, was that the Secretary of the Interior, Mr. Fall, was satisfied with the legality of the contract and did not consider it necessary to take the Attorney-General's opinion.

Cross-examination.

Upon cross-examination witness testified that he had had some experience with practically all of the departments in Washington prior to the time referred to in his direct examination; he knew Judge Finney and had in his capacity as an attorney transacted business with Mr. Finney in his capacity as an official of the Interior Department; he was familiar with the fact that opinions of the Attorney-General are not rendered upon the request of attorneys in private practice and knew that at the time; he knew that such opinions were rendered only upon the request of the head of another coordinate department of the Government and so stated to Mr. Finney at the time. As to what gave rise to the rendition of the opinion of the witness

(Testimony of Oscar Sutro.)

(Exhibit No. 51) he was asked about a month or less before its date by either Mr. Kingsbury, President of the Standard Oil Company, or Mr. Storey, its Vice-President, whether a proposal, which was the proposal which led to the exchange contract, would be the basis [158—85] of a valid contract, and said he did not think so; this question was asked orally and he was not informed what gave rise to the inquiry; he thinks the proposal was sent to his office, which is in the same building with that of Messrs. Kingsbury and Storey, and he at first replied by telephone as it is not his practice to render written opinions to the company; this request for his opinion may have come to him early in January, 1922. In the conversation with Judge Finney to which witness has testified he does not think he said that he was not very positive in his opinion as regards the invalidity of such a contract; there was not much argument between Judge Finney and the witness, his call was a social one, he had occasion many times to bother Mr. Finney a good deal, and was glad to call on him when he had nothing to bother him about; he happened to be in Washington and made a social call to pay his respects, and in the course of that casual call the question came up and a discussion was had the substance of which he has stated; he does not think that he said anything to Judge Finney to indicate that he was not sure of his opinion or that it was a doubtful one, nor did he ever say that to any one because he does not recall ever having

(Testimony of Oscar Sutro.)

had any doubt. Asked whether he had ever advised Mr. Fall, in substance, that if he had been advising any other company than the Standard Oil Company he would have considered giving a different opinion because he would have thought the subject matter of the contract a legal risk for the company to take, he answered that he would have considered it a legal risk and it is quite possible he might have so advised; he remembers his position was that the contract was legally doubtful, that he did not believe it was valid, that if it was not valid the company that was surer to find it out than any other was the Standard Oil Company, and that it was the last one that should undertake a contract with the Government which was not valid or about which there might be a doubt; whether he would have advised another company that it might take a business risk or a legal risk in the matter he does not know; perhaps he would have; but the position the Standard Oil was in, and the way it had been harassed by Government prosecutions, made him take a more conservative view in giving that company his opinion than he would have taken had he been advising some other company; he does not remember that he so advised Secretary Fall, but he identifies as having been written by him to Secretary [159—86] Fall the following letter, which was read in evidence as Defendants' Exhibit "F," it being stipulated that the same is not in the files of the Interior Department:

DEFENDANT'S EXHIBIT "F."

"June 29, 1922.

My dear Mr. Secretary:

On Mr. Storey's return to San Francisco yesterday I was considerably surprised to learn that you had gained the impression that I was active in advising various oil producers, operating on Government lands, in respect to the legality of the tankage exchange agreement made by the Department. I was particularly concerned because this confirmed a statement by Mr. Loomis that you were annoyed at the technicalities which you considered I had interposed in this transaction.

On this last point Mr. Storey has quite reassured me, and has made it plain that you understand that I was acting merely according to my best lights in advising the Standard Oil Company as I did.

Mr. Storey stated to me that the gist of a letter which you had received on this subject from one of the other oil companies. He said you thought that this communication was addressed to you either at my instance, or under my inspiration. Permit me to assure you that this is not the case. I reached the conclusion which I did on this question in discussion with Mr. Storey alone and quite independently of any conference or exchange of views with other oil producers in California. My opinion was forwarded to Messrs. Ford, Bacon & Davis, who contemplated a bid on this tankage in connection with the sale of the oil to the Standard Oil Company. Messrs. Ford, Bacon & Davis

took independent advice in New York. A letter received by them from New York counsel, and which I believe I showed to the First Assistant Secretary last March in Washington, coincided with my conclusion, and was based in some respects on the identical reasons which I had expressed. Other than this I believe my views were not known, and I certainly did not express them to any other oil producer or counsel. On my return from Washington I learned for the first time that the counsel for the Associated Oil Company and for the General Petroleum Company had reached the same views. I believe at that time neither of them knew the position of our company.

I desire particularly to disclaim any responsibility, direct or indirect, for the letter referred to. In view of the patient courtesy and impartial consideration which I myself received at your hands in a matter of importance to my client, I would consider it not only an evidence of stupidity, but, what is worse, of a lack of appreciation, to have inspired the communication which was sent to you. I knew nothing of it, and had nothing whatever to do with it. Nor, as I have intimated, have I directly or indirectly advised any company, other than the Standard Oil Company, on this subject.

As to the merits of this matter: I trust you will believe that if I could have conscientiously reached a different conclusion I would have done so. My client wanted the business. The first doubt

(Testimony of Oscar Sutro.)

on the matter arose in the minds of the officers of the corporation, by reason of a legal opinion submitted by the Department, and I could not satisfy that doubt. I think if some other company had been involved, I might have been more inclined to have advised the taking of what I consider a legal risk. The experience, however, of our company, which during the previous administration was subject to endless litigation, running into sums exceeding ten million dollars, on claims which were commercially immoral and which proved to be unfounded in law, has been such that with the changes in administration which each election makes possible, I felt myself bound to advise our company not to take any chances. The Department has been so helpful to the oil industry in some of its problems, that I was more than reluctant to advise against the execution of an agreement which would carry out departmental plans. But I trust you will believe me when I say that I did so from a sound conviction, and from a sense of the duty which my employment imposes upon me. I would very much rather have taken the other course, and extended to the Department that cooperation which we desire to give it wherever we can possibly do so.

Believe, me, very sincerely and with great respect,

Yours,

OSCAR SUTRO.

Secretary of the Interior, Washington, D. C."

(Testimony of E. C. Finney.)

The witness testified that he never saw Secretary Fall after 1921 and never discussed this matter with Assistant Secretary Finney after the conversation in March, 1922, about which he testified on direct. He did not transmit to the Interior Department, either to Secretary Fall or Assistant Secretary Finney, copy of his opinion of January 27, 1922; it is his best recollection that the only thing in writing from him to the Secretary of the Interior or the Assistant Secretary of the Interior on the subject of his opinion in this matter is his letter to the Secretary dated June 29, 1922 (Defendants' Exhibit "F" above).

Testimony of E. C. Finney, for Plaintiff.

E. C. FINNEY, called as a witness on behalf of the plaintiff, testified that he is and since March 18, 1921, has been Assistant Secretary of the Interior; prior to that date for four or five years he was a member of the Board of Appeals, Department of the Interior, which is a legal board of review, reviewing decisions in land cases under the Homestead Laws, mining laws, and all branches of public land laws; this board sits as a board of review, reviewing decisions, and makes recommendations to the Secretary or the Assistant Secretary, the board itself not signing or making decisions; prior to becoming a member of this board witness was for a number of years assistant attorney of the Department of the Interior, prior to that he was chief law officer of the Reclamation

(Testimony of E. C. Finney.)

Service, and prior to that he was an examiner of mining claims in the General Land Office; he is an attorney at law, duly admitted to practice.

Between March 18 and May 11, 1921, at the request of Secretary Fall, Judge Finney placed before the Secretary some of the official files of the department which dealt with mining claims and applications for leases in the naval reserves in California, which included the file which related to the Honolulu Consolidated Oil Company and also the application of certain other oil companies for land in these reserves; some of these papers related to claims under the general mining laws, and others relating to application for leases under the Act of February 25, 1920. Secretary Fall asked to be advised as to the situation and wanted information as to some of the claims, mentioning particularly the Honolulu Consolidated Oil Company, and witness drew and placed in his hands those files. Judge Finney also showed the Secretary [161—88] a map of the two reserves and depicted the situation at that time; at the time there were pending claims to lands in both the California naval reserves, a large number thereof being in Reserve No. 2. The witness had no connection with events leading up to the passage of the Act of June 4, 1920, relating to the naval reserves, and did not know of its enactment until some weeks after it had become law, nor from the time of its passage until he became First Assistant Secretary of the Interior did he

(Testimony of E. C. Finney.)

personally have any communication with the Navy Department as to that Department's policy as regards the naval reserves.

During the first part of May, 1921, Secretary Fall spoke to Judge Finney about the proposed order, or about a plan by which the Interior Department could undertake to administer some of the lands in the naval reserves, and asked for a brief statement as to the applicable law. Judge Finney prepared a memorandum a photostat copy of which was produced and he identified as in his handwriting his initials, E.C.F., in the upper corner thereof. This memorandum was received in evidence as Plaintiff's Exhibit No. 52 and reads as follows: [162—89]

PLAINTIFF'S EXHIBIT No. 52.

E.C.F.

“DEPARTMENT OF THE INTERIOR,
WASHINGTON.

Memorandum.

The so-called naval oil reserves were created by Executive order of the President. There are two in California, one in Wyoming, and two shale oil reserves in Colorado and Utah.

Section 18 of the oil-leasing act of February 25, 1920, provides with respect to mining claims initiated prior to withdrawal of lands in naval reserves, that the Secretary of the Interior may lease to the claimants producing wells only, with an area of land sufficient for their operation. The President,

in his discretion, may permit the drilling of additional wells by the claimant or his assignee, or he may, in his discretion, lease the remainder or any part of any such mining claim upon which wells have been drilled, the mining claimant or his assignee to have the preference right to such lease.

A clause in the naval appropriation act for the year ending June 30, 1921, (41 Stat., 812), directed to the Secretary of the Navy to take possession of properties within naval reserves on which there are no pending claims or applications for permits or leases under the oil-leasing act and to 'conserve, develop, use, and operate the same, in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas' as well as the royalty oil from leased lands in naval reserves.

It will be perceived that the Secretary of the Interior has jurisdiction to lease producing wells, the President authority to permit additional wells to be drilled or to lease the remainder of any mining claims in naval reserves, and that the Secretary of the Navy is authorized to conserve, develop and use the naval reserves free from existing claims 'directly or by contract, lease or otherwise.' Therefore, the President may commit to the Secretary of the Interior the matter of authorizing additional wells or leases under section 18 of the leasing act and the Secretary of the Navy may, under authority of the naval appropriation act cited, request the Secretary of the Interior to handle for the Navy the conservation, development, and op-

eration of other lands in naval reserves. 'The royalties from existing leases and such other royalties as may be derived from future leases in naval reserves may be turned over to the Navy Department directly or may be exchanged by the Secretary of the Interior, to the end that the Navy may have its equivalent in fuel oil.

This would avoid the duplications, antagonism, and diversion of authority which existed under the past administration with respect to these matters."

Mr. Finney handed the foregoing memorandum to Secretary Fall and the next step was the preparation of a letter to the Secretary of the Navy, which the witness initialed, thereby indicating that it was either prepared by him or seen by him before it was sent. This matter was received in evidence as Plaintiff's Exhibit No. 53, and reads:

PLAINTIFF'S EXHIBIT No. 53.

"DEPARTMENT OF THE INTERIOR.
WASHINGTON.

May 11, 1921.

PERSONAL.

The Honorable

The Secretary of the Navy.

Dear Mr. Secretary:

Referring to our conversation yesterday, and to your suggestion to the President that the Secretary of the Interior be placed in charge of administration of the laws relating to naval reserves, I am submitting herewith for your consideration a brief memorandum stating the facts and law with re-

spect to naval reserves, a tentative form of letter for your signature if it meets with your approval, and a form of Executive order for the President's signature, if it meets your suggestions of yesterday. Please consider the same and give me any criticisms or suggestions which may occur to you. If they meet with your approval and no changes [163—90] occur to you, kindly return them, with your approval, in order that the matter may be taken up with the President.

Respectfully,
(Sgd.) ALBERT B. FALL,
Secretary.

Inclosure 19756.

(Initials ECF.).” [164—91]

Judge Finney learned of the making of the Executive Order of May 31, 1921, after it had been promulgated; he does not know of any other opinion or memorandum of law on the subject except the above, Exhibit 52, and was not present at any conference between Secretary Fall and any other official of the Government touching the proposed Executive Order. After May 31, 1921, Secretary Fall told the witness that he wished some one who was familiar with the naval reserves and knew something about oil would assist in these matters and Mr. Finney, who had been in California the year previous with Dr. Mendenhall of the Geological Survey and visited the California naval reserves, recommended Dr. Mendenhall to the Secretary who asked Dr. Mendenhall to represent him in those matters. Mr. Finney does not know the

full scope of the representations but he asked the Doctor to act for him or with him.

In April, 1921, there was sent from the White House to the Interior Department the application of the President of the United Midway Oil Company for a lease, prior to which time the witness had had connection with the matter of that application. The United Midway Company had made an application under the previous administration when Mr. Payne was Secretary, and Judge Finney either wrote or initialed the decision which denied the claim. The company appealed to the White House and no action had been taken by President Wilson during his administration. The papers were transmitted to the Secretary of the Interior by the President's secretary in April, 1921.

Under date of June 2, 1921, there was transmitted to the Secretary of the Interior from the Navy Department a communication which, as Plaintiff's Exhibit No. 54, was received in evidence, and reads as follows: [165—92]

PLAINTIFF'S EXHIBIT No. 54.

"My dear Mr. Secretary:

In view of the fact that the President has signed the Executive order committing the naval petroleum reserves to the Secretary of the Interior, with certain reservations, there are forwarded herewith a number of bids which were submitted to the Navy Department in connection with a proposal to drill 22 wells on Section 1-31-24, naval reserve No. 1. As you doubtless know the opening of these bids

314 *Pan American Petroleum Company et al.*

was held up pending the issuance of the Executive order above referred to.

Inasmuch as action on these bids has been delayed for a considerable time it is presumed that the Department of the Interior will take immediate action thereon in order not only to protect the Government's interests in the matter but also to release the \$10,000 checks of the unsuccessful bidders on this land.

The list of bids follows: Roy N. Bishop, Union Oil Co. of California, Pacific Oil Co., Standard Oil Co. of California, Oil Operators Syndicate, Coalinga Mohawk Oil Co., Thos. A. O'Donnell, Miocsne Oil Co., Spaulding Gas & Petroleum Co., United Oil Co., Chas. J. Wrightsman, proposal No. 2 Pan American Petroleum & Transport Co.

While these bids have not been opened officially it should be noted that some of them were opened through inadvertence. A telegram was sent to Lieutenant Commander Landis, the officer in charge of Naval petroleum reserves in San Francisco, not to open the bids, but through a delay on the part of the Postal Telegraph Co. in sending the message some of the bids were opened. However, the contents of the bids were not divulged.

Bids from the following were also received but were withdrawn later by request: Louis Titus, Chas. J. Wrightsman, proposal No. 1; R. H. Anderson.

Before final action is taken on these bids it is requested, that consultation thereon be had with

(Testimony of E. C. Finney.)

the Secretary of the Navy as set out in the Executive order referred to.

There is also inclosed herewith a copy of the proposal inviting bids for the lease of the aforesaid lands.

Sincerely yours,

CHAS. B. McVAY, Jr.,

Acting Secretary of the Navy." [166—93]

After receipt of this communication the witness opened the bids enclosed therewith and turned them over to Dr. Mendenhall for analysis. He advised the Secretary of this action and left Washington about the middle of June, 1921, returning about the middle of July. On his return he learned that while he was in the west leases had been authorized for eight of the twenty-two wells advertised to the United Midway Company and fourteen to the Pan American. After Mr. Finney's return to Washington in July there was some conversation between him and Secretary Fall about these leases and about the United Midway claim during which Mr. Fall told him that Mr. Doheny had very courteously waived his right to eight of the wells in order to permit the Secretary to adjust the claim of the United Midway, that the making of the lease to the United Midway had been opposed by Commander Stuart of the Navy and that Dr. Mendenhall had agreed with Stuart, that he did not like Stuart's attitude and was sorry that Mendenhall had been selected to act for the Department in those matters.

Under the previous Administration many of the

(Testimony of E. C. Finney.)

oil and gas leases had been signed by the Secretary of the Interior himself, and in conversation with Secretary Fall he authorized the witness to sign these leases, the understanding being that he would consult the Secretary as to any matters of policy. There is a written order to that effect in the files of the Department which in substance states that all matters of policy involving reversal of established precedents should be submitted to the Secretary before action.

Secretary Fall left Washington for the west about the end of July, 1921, and just prior to leaving he told Mr. Finney that he was going to discuss with some oil men in California the matter of exchanging royalty oil for fuel oil for the Navy. The Secretary returned to Washington the latter part of October. Secretary Fall never discussed with the witness the proposal of Mr. D'Heur on behalf of the Pacific Oil Company, Plaintiff's Exhibit No. 15.

During Secretary Fall's absence in the west and while the witness was Acting Secretary there was received from the American Oil Engineering Corporation letter dated San Francisco, August 27, 1921, which was identified by the witness and offered in evidence by plaintiff. The defendants objected to the receipt of the letter from the American Oil Engineering Corporation in this case on the ground heretofore stated to the Court in connection with defendants' objection to the admission in evidence of correspondence between Mr. D'Heur [167—94] of the Pacific Oil Company and the

Department of the Interior. The Court overruled the objection and admitted the letter in evidence, to which ruling and action of the Court defendants duly reserved an exception. The Court at the same time ordered the right reserved to the defendants to move hereafter to strike the said communication from the record of evidence in the case. The letter referred to is Plaintiff's Exhibit 55 and reads: [168—95]

PLAINTIFF'S EXHIBIT No. 55.

"To the Honorable Secretary of the Interior,
A. B. Falls,
Washington, D. C.

Dear Sir:

In August of 1920, the American Oil Engineering Corporation, through its New York Office, 52 William Street, carried on negotiations with the Navy Department with proposed plan whereby the American Oil Engineering Corporation would act in an engineering capacity in drilling wells, building of pipe lines and storage in connection with the Naval reserve oil lands in California. These negotiations were carried along and finally discussed in detail with Commander Landis, who was in charge at San Francisco. Commander Landis, apparently was favorable to our outline and, we believe, recommended to the Secretary of the Navy at Washington some such plan as we outlined. About the time that this took form, we were informed the President had put most of this Naval reserve work in your hands, and recently Commander Landis of San Francisco

was good enough to suggest that we should take the matter up, in letter form, with you as he was of the opinion that the original proposal possibly did not come before you. We, therefore, would like to give you a brief outline of the proposal that we suggested originally, and would like your consideration of same.

The American Oil Engineering Corporation is a corporation employing the highest class engineers and operators both in the development and in construction work covering pipe lines, refineries, etc. This corporation is independent from any oil company and has in the past, through the engineering firm of Sanderson & Porter, 52 William Street, New York, who are the active heads of the American Oil Engineering Corporation, constructed many of the largest pipe lines in the United States. Sanderson & Porter constructed the General Petroleum pipe line running from Taft to San Pedro, also the Shell Oil of California Company's line running from Coalinga to Martinez. They also constructed the Yarhola and Ozark pipe lines in the Mid-continent running from southern Oklahoma into Illinois. These pipe lines include also pumping stations, tankage, etc. During the past three years, the American Oil Engineering Corporation have done considerable development work in the Mid-continent fields. This company is competent to carry out any obligations that they may undertake, both financially and physically.

Our original proposal as offered to the Navy De-

partment, through the Honorable Josephus Daniels, is briefly:

To carry out any drilling of oil wells and the handling of oil in connection with the Naval reserve in California; this to be done under our supervision in conjunction with the Navy or Interior Department; we to drill the wells wherever designated, which would naturally be only offset wells, and turning over to the Government the entire production less $\frac{1}{8}$ royalty, which we would retain as our fee. This $\frac{1}{8}$ royalty would be the only fee we would receive, and this royalty would be delivered to the Government at the posted price, if desired.

It was intimated in the early negotiations that the Navy Department did not have sufficient appropriations to carry on such work, and we proposed to advance and finance at actual cost under voucher form all moneys necessary for such development, and were to be reimbursed through the production and sale of oil which would go to the Navy Department, and would be paid from their fuel oil funds. This was to be handled strictly on voucher forms, representatives of the Government having the proper auditor and checking system.

This brought about further plans of possible pipe lines and tankage that the Navy would require probably located at San Francisco Bay and San Pedro.

American Oil Engineering Corporation are competent to handle any situation in connection with this development work, or the transportation of oil, or in making dehydration arrangements and,

thereby, delivering to the Navy fuel oil. If it was desired, we would put ourselves in a position to deliver refined products in the future. [169—96]

Compensation for the engineering or construction work of pipe lines or tankage would of course be arranged on a mutually agreed plan; but our first proposal of the drilling and the developing of oil was strictly on a $\frac{1}{8}$ royalty basis, the American Oil Engineering Corporation to receive this $\frac{1}{8}$ royalty as its fee. We refer you to our letter to the Honorable Josephus Daniels, September 27, 1920, and our letter to Commander I. F. Landis, San Francisco, dated July 21, 1921, of which we were informed a copy was sent to the Navy Department at Washington. Copy of this letter is hereto attached.

We thoroughly understand the present conditions of the oil situation in this State and do not assume to make any suggestions to the government officials, but would thank you to give this proposal your consideration for the future. We would be pleased to meet you at any time to discuss any features of our proposal. We believe this would be a sort of blanket arrangement whereby the government would get its full $\frac{7}{8}$ of the production secured it at a minimum cost and without any politics or marketing influences behind the idea. We respectfully submit this and would appreciate your reply.

Yours very truly,

B. T. DYER,

For American Oil Engineering Corp.

909 Nevada Bank Building,

San Francisco, California."

(Testimony of E. C. Finney.)

The witness referred the above letter to Secretary Fall under cover of a memorandum dated October 22, 1921, after which time he knows nothing of the matter. He identified his memorandum, which, over the objection and exception of the defendants on the same grounds as that stated respecting Exhibit 55, was received in evidence and is as follows (Exhibit 56):

PLAINTIFF'S EXHIBIT No. 56.

"DEPARTMENT OF THE INTERIOR,

Office of the First Assistant Secretary, Washington.

October 22, 1921.

Secretary Fall:

I am not advised as to your conclusions in re Navy oil in California nor your plans relative thereto, so can make no comment on this letter of the American Oil Engineering Corporation except that in my opinion the plan is not feasible or advisable.

FINNEY."

There was a conference among the Secretary of the Interior representatives of the Bureau of Mines and one or two from the Navy in October, 1921, in which Mr. Finney did not take part, though he was present for a few minutes. The occasion of his going into the Secretary's office during this conference was a request from the Secretary for a map of the Naval Reserves, which witness in person carried to that office. Mr. Finney saw the letter of Secretary Denby dated October 25, 1921, and Secre-

(Testimony of E. C. Finney.)

tary Fall's reply of October 30th some time after their date; Secretary Fall was on duty in Washington during the month of November and handled those matters and the witness does not recall any dealings with the naval reserve during that month except that he did have a visit from Mr. Cotter and Mr. Staygers who reported that the wells drilled under the leases entered into the previous July had been such small producers that the lessees were losing money on them, that it was impossible to operate them at a profit under the high royalty reserved, and they asked for a reduction of the royalty. Mr. Finney told Cotter and Staygers that he did not think it would be possible to grant the reduction in question but suggested that written applications therefor would be considered if filed. After his talk with Cotter and Staygers, and after they had filed a written application, witness took the matter up with Secretary Fall and talked with him about it and he agreed that it would not be advisable to grant reduction of royalties largely on the ground that those royalties had been fixed by competitive bidding, [171—98] but said he was willing to grant some additional leases in reserve No. 1 to these lessees at lower royalties, which would perhaps enable them to make up their losses on the first wells. The Secretary indicated approximately what these leases should cover; the United Midway having only eight wells they were to have a strip lying south of their eight and the Pan American was to have a lease on the remainder of Section 1 lying outside of the other

(Testimony of E. C. Finney.)

lease areas. Witness' memory is a little vague as to whether or not the Secretary told him how the territory to be covered by these leases at lower royalties was to be ascertained; he thinks there was some agreement proposed between the companies as to the territory which they each should have and that it was proportioned to the number of wells they had. The witness identified lease dated December 14, 1921, between the United States and the Pan American Petroleum Company, which was made pursuant to and in the circumstances above related by him, and the same was received in evidence as Plaintiff's Exhibit No. 57. This lease covers all of Section 1 of the reserve except that theretofore leased and that leased the same day to W. R. Ramsey, referred to in the next paragraph hereof (as shown by map, Exhibit XXX herein), and provided that the lessee pay royalties of oil of 30 degrees Baume or over at the rate of $12\frac{1}{2}$ per cent, on that portion of the average production per well not exceeding 20 barrels per day for the calender month; $16\frac{2}{3}$ per cent when that production exceeded 20 and was not more than 50 barrels, 20 per cent on production over 50 and not exceeding 100 barrels, and 25 per cent on that portion of the average production per well of more than 100 barrels per day; the royalties reserved on oil of less than 30 degrees Baume, on the same graduation, are $12\frac{1}{2}$, $14\frac{2}{7}$, $16\frac{2}{3}$, and 20 per cent, respectively.

Witness identified lease between the United States and W. R. Ramsey, dated December 14, 1921, as

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(Testimony of E. C. Finney.)

lease issued to Ramsey as assignee of the United Midway Oil Company for 63 acres of land in Section 1 of Reserve No. 1 which lease was made under the same circumstances as related by the witness as to the Pan American lease and provides for the same royalties. This lease was received in evidence as Exhibit No. 58 and in substance is as above stated.

On December 22, 1921, witness wrote two letters to the General Land Office, one in each of the above mentioned cases, which letters are identical, one being for filing with the United Midway case and the other being for filing [172—99] with the Pan American case, and the latter was received in evidence as Plaintiff's Exhibit No. 59. It is dated December 22, 1921, addressed to the Commissioner of the General Land Office, signed E. C. Finney, Acting Secretary, transmits the applications of the Pan American and United Midway Companies and states that: "These applications were denied orally by the Secretary of the Interior and no further action need be taken thereon other than to file the papers."

Secretary Fall left Washington for the west December 1, 1921. Either he, or Dr. Bain, or perhaps both of them, told Judge Finney about that time that Dr. Bain was to go to California in December and talk with various oil companies about a provision for exchanging Government royalty oils for fuel oil and storage. Mr. Finney knew that Dr. Bain of the Bureau of Mines and Mr. Am-

(Testimony of E. C. Finney.)

brose, the Chief Technologist, had been in consultation more or less with the Secretary and, to a degree, that that work had been committed to the Bureau of Mines, and he knew if he wanted information he could get it from that Bureau. The witness issued a memorandum on November 30, 1921, which by reason of the fact that it contained the words "By direction of the Secretary" he assumed to have been issued by him as the result of oral authority or directions from the Secretary. This memorandum was received in evidence as Plaintiff's Exhibit No. 60 and reads as follows: [173—100]

PLAINTIFF'S EXHIBIT No. 60.

"In re royalty oil, Naval Reserves, California.

By direction of the Secretary, and until further notice, the local representative of the Bureau of Mines, in California, is authorized and directed to send all crude oil certificates representing the Government royalty oil under leases in Naval Petroleum Reserves, California, directly to the Secretary of the Navy, Washington, D. C., at the same time sending to the Bureau of Mines, Department of the Interior, copies of said certificates.

It appearing that the Bureau of Mines has already made arrangements for exchanging crude oil for fuel oil produced during the months of November and December, 1921, the certificates or papers evidencing the amount of fuel oil to which the Navy will be entitled for those months will be de-

livered to the Secretary of the Navy, sending copies to the Secretary of the Interior.

It further appears that the Bureau of Mines is negotiating contracts for the exchange of crude for fuel oil for the calender year beginning January 1, 1922. It is directed that no such contract be consummated, but the pending negotiations may proceed for the time being, the matter to be taken up with and by the Navy at a later time.

(Sgd.) E. C. FINNEY."

Within five or six days after Secretary Fall had left Washington, Judge Finney learned of an opinion of the Judge Advocate General of the Navy with reference to a change of idea concerning the handling of royalty oil from the reserves by the Navy and under date of December 6, 1921, he wrote a letter to the director of the Bureau of Mines which was read in evidence as Plaintiff's Exhibit No. 61, and is as follows:

PLAINTIFF'S EXHIBIT No. 61.

"Dear Mr. Director:

November 20, 1921, you were directed to advise your field representatives in California to send all crude oil certificates representing Government royalty oil, under leases in naval petroleum reserves in California directly to the Secretary of the Navy.

It appearing that arrangements for exchanging crude for fuel oil had been made for the months of November and December, 1921, the certificates evidencing the amount of fuel oil to which the Navy was to be entitled were directed to be delivered

(Testimony of E. C. Finney.)

to the Secretary of the Navy. You were also advised to proceed with contracts which were being negotiated for exchange of crude for fuel oil for the calendar year beginning January 1, 1922, but not to consummate any such contract until further advised.

I am now advised that the solicitor for the Navy Department has rendered an opinion to the effect that it is legal and proper to exchange royalty oil for crude oil for the Navy and to store such oil in tanks to be constructed under arrangements with oil companies, which will build the tanks, taking oil in payment therefor, such tanks to become the property of the United States.

This opinion has been approved by the Secretary of the Navy, who has directed that the arrangements be carried out.

The Navy now requests that our original program be carried through. Accordingly, said order of November 30, 1921, is hereby recalled, and you are directed to proceed in accordance with the plan originally outlined, holding certificates evidencing the oil to which the Government is entitled available for such arrangements as may be later worked out for storage and tankage. Notify your field representatives accordingly.

Respectfully,

E. C. FINNEY,

Acting Secretary." [174—101]

As regards what the witness meant by the phrase "our original program" in the foregoing, he tes-

(Testimony of E. C. Finney.)

tifies that prior to November 30th there had been some discussion about getting fuel oil and storing it, and no conclusion had been reached but Secretary Fall and Dr. Bain were to go west and discuss the matter with oil men. The original plan was to get certificates and hold them until some conclusion was reached so that if the storage was determined upon the certificates could be utilized for fuel oil. Witness did not hear any discussion by any one in the Department in connection with a change of program upon receipt of Mr. Doheny's letter of November 28, 1921. As regards that letter it bears at the top in pencil the name "Finney" in the handwriting of Mr. Safford, who was Administrative Assistant to Secretary Fall, which indicates upon the receipt of that letter in the Secretary's office that Mr. Safford had referred it to the witness, that is to say, by that notation, "Finney," the paper was routed to his desk, this being the customary practice in the Department. The witness read Mr. Doheny's letter of November 28th and took no action upon it and returned it either to Mr. Safford or Mr. Fall, probably the former.

Admiral Robison of the Navy advised him over the telephone about December 5 or 6, 1921, of the opinion of the Judge Advocate-General and it was pursuant to that advice that he wrote Exhibit 61 above. [175—102]

Plaintiff offered and there was received in evidence as its Exhibit No. 237 a telegram dated at

(Testimony of E. C. Finney.)

Washington, D. C., December 6, 1921, reading as follows:

PLAINTIFF'S EXHIBIT No. 237.

To Hon. Albert B. Fall,
c/o U. S. Reclamation Service,
Yuma, Arizona.

Navy Department requests that we proceed as originally planned with reference to exchange of oil and securing storage. Have advised Bureau of Mines. Am advised State of California preparing to file claim with Secretary of the Treasury for royalty naval reserves. Am writing you San Diego.

FINNEY.

There was received by the witness, and by him referred to the Bureau of Mines, the following letter, admitted in evidence as Plaintiff's Exhibit No. 62: [176—102a]

PLAINTIFF'S EXHIBIT No. 62.

"9 December, 1921.

My dear Mr. Secretary:

I have prepared a set of plans and specifications covering the storage of 1,500,000 barrels of fuel oil in steel tanks at Pearl Harbor, T. H. This is, as you know, the storage that is to be constructed and filled with fuel oil in connection with the exchange of royalty oil obtained from the naval petroleum reserves.

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The following is a list of the plans submitted herewith:

Sheet No.	Bureau	
	Serial Number.	Description.
1	94393	Location and wiring.
2	94394	Piping on Upper Tanks.
3	94395	Piping on Lower Tanks.
4	60660	Details of Tank.
5	94396	Piping in Tanks.
6	94397	Foam Fire Protection (Upper Tanks).
7	94398	Foam Fire Protection (Lower Tanks).
8	94399	Quay Wall — Location.
9	94400	Quay Wall — Cross Section.

There are also forwarded herewith one copy of the specifications covering the construction of this plant and one set of the usual General Provisions forming a part of the Bureau of Yards and Docks, Navy Department, contracts for public works.

The plans and specifications as submitted are complete except that no form of contract or bidding items have been prepared, and the elevations of the bottoms of the tanks, the depths of the trenches and the elevations of the pipe lines have not been fixed. Furthermore, certain features of the quay wall construction are also dependent upon securing data locally. This information has been asked for by cable and will be furnished when reply has been received. In preparing this project for bidders the Navy Department will be pleased to be of any assistance possible in connection therewith.

By reference of the detailed plans of this project it will be noted that the character of the tanks differs somewhat from the standard type of construction; this departure from this standard type is merely a detail however, and is considered necessary on account of the military features of the project and in view of the fact that the tanks are to be used for storing fuel oil for long periods of time.

In connection with the actual construction work on the project and the inspection thereof it is believed that the technical force of the Navy Department can be of material help and benefit and I shall be pleased to detail an officer for duty of this character at such time as you may request.

In view of the fact that this project is embodied in the war plans of the Navy Department it is requested that all matters in connection therewith be regarded in as confidential a manner as possible.

Sincerely yours,

(Signed) THEODORE ROOSEVELT,
The Honorable, The Secretary of the Interior, Department of the Interior." [177—103]

Witness acknowledged the above by Plaintiff's Exhibit No. 63, as follows:

PLAINTIFF'S EXHIBIT No. 63.

"December 10, 1921.

(Attention of Admiral J. K. Robison.)

The Honorable,

The Secretary of the Navy.

Dear Mr. Secretary:

I have to acknowledge the receipt of letter from

Assistant Secretary Theodore Roosevelt, dated December 9, 1921, relative to the matter of providing tanks for storage of fuel oil. The matter will be promptly taken up by our Bureau of Mines.

Admiral Robison recently advised me over the telephone of opinion rendered by your Solicitor as to the legality of exchange of crude for fuel oil and of payment for storage tanks, to become the property of the Navy, in oil instead of money, stating further that you had authorized and directed that this Department proceed to handle the oil and make the exchanges according to original plans.

I have to request that this oral information be confirmed formally in writing, and in that connection would be pleased to have a copy of your solicitor's opinion.

There seems to exist some uncertainty as to the desires of the Navy in connection with the oil coming to the Government as royalties in the naval reserves. Our department, through the Bureau of Mines, has arranged with four pipe line companies for the exchange of royalty crude oil received during the months of November and December for fuel oil, to be delivered by the contractors at tide-water points. Is it your desire that similar arrangements be made as to royalty oil received during the first six months of the calendar year 1922, or do you desire that such oil be utilized in payment for tankage for the Navy, to be constructed at such points as you may designate? In other words, under present plans, the royalty oil accru-

ing to the Government will not be adequate to supply the Navy with fuel oil for current use, and at the same time be utilized as a medium for purchase of storage facilities.

It occurs to me that some definite understanding should be reached, and it may be advisable to arrange a conference between representatives of your Department and of this Department in order to reach a definite understanding as to future procedure. If you agree with this view, I shall be glad to arrange such a conference to suit the convenience of the Navy Department.

Sincerely,

E. C. FINNEY,
Acting Secretary."

Thereupon plaintiff offered and there was admitted in evidence as Plaintiff's Exhibit No. 64 the following extract from the minutes of meeting of the Navy Council:

PLAINTIFF'S EXHIBIT No. 64.

"Thursday, 8 December, 1921.

Present:

Secretary Denby.

Assistant Secretary Roosevelt.

Admiral Coontz.

Rear Admiral Washington.

McVay.

Robison.

Raylor. [178—104]

Capt. Bakenhus, representing Y&D.

Capt. Leutze, representing S&A.

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Rear Admiral Stitt.

Gen. Neville, representing Marine Corps.

Rear Admiral Latimer.

Moffett.

Smith.

Captain Willard.

Commander Rowcliff.

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No. 14. Admiral Robison stated that the Judge Advocate General had given opinion on the various points raised in the oil question to the effect that these propositions were legal; and that the immediate need is appropriation for those tanks at Pearl Harbor. Asked permission to request Secretary of Interior to enter into contract to be referred to Navy Department before execution for consideration, etc., the Secretary said he wanted the details from the Secretary of the Interior before he took it up with the Appropriation Committee. Discussion was then had of a letter that had been prepared to the Secretary of the Interior in which doubt was expressed as to the legality of the procedure, and it was decided to omit any reference to this, the Secretary saying that anything going to the Secretary of the Interior should go through him."

Under date of December 14, 1921, witness signed and there was sent to the Secretary of the Navy letter which as Plaintiff's Exhibit No. 65 was admitted in evidence and is as follows: [179—105]

PLAINTIFF'S EXHIBIT No. 65.

"Dec. 14, 1921.

The Honorable

The Secretary of the Navy.

Dear Mr. Secretary:

Referring again to your letter of November 15, 1921, regarding the exchange of royalty oil for fuel oil used by the Pacific Fleet:

I have already arranged for the exchange of royalty oil, produced within Naval Petroleum Reserves Nos. 1 and No. 2, for fuel oil to be delivered at tidewater points on the Pacific Coast for the months of November and December, 1921, and the Department now has under consideration further exchanges for the first six months of 1922. In addition to this, certain leases have been granted for the drilling of additional wells in Naval Reserve No. 2 and the Department has called for bids on three strips of land located in Naval Reserve No. 1.

Estimates have been made of the amount of royalty oil which will be produced from present wells and wells to be drilled in the near future and estimates have also been made of the amount of fuel oil which can be received in exchange for the royalty oil produced on these reserves.

You will find below a table giving the estimated amount of royalty oil which will be produced up to June 30, 1922 and the estimated amount of royalty oil to be available for the fiscal year 1923, together with figures showing the equivalent fuel oil available at tidewater points on the Pacific Coast:

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	Royalty Oil in barrels	Equivalent Fuel Oil in Barrels at Tidewater
1921		
November - December	62,200	61,220
1922		
January - February	140,000	139,100
March - April	160,000	154,040
May - June	230,000	213,046
<hr/>		
Total 8 months		
November 1 - June 30	592,200	567,406
Fiscal Year -		
July 1, 1922 - July 1, 1923	1,350,000	1,282,460

As soon as exchange arrangements have been made for the first six months of 1922 I will advise you as to the points of delivery of this fuel oil.

The fuel oil exchanged for each months' production will be available at tidewater points 15 to 20 days after the end of the month in which it was produced. The estimated 61,220 barrels of fuel oil available from production for November and December will be delivered by the following companies at the various tidewater points listed below:

Points of Delivery of Fuel Oil for Both November
and December, 1921.

Company	Quantity	Delivery Points
Associated	11,000	San Francisco Bay Monterey or Gaviota
[180—106]		
General Petroleum	17,800	San Pedro
Standard	18,020	Richmond or San Pedro
Union	14,400	San Louis or San Pedro
<hr/>		
Total	61,220	

You appreciate of course that the figures submitted above are based upon a certain given drilling program. Many of the wells will have a greater or less initial production than the amounts estimated and it will be necessary therefore to submit you from time to time as drilling progresses, revised estimates. I believe, however, that the above figures furnish a reasonable basis considering the uncertainties involved.

Respectfully,

E. C. FINNEY,

Acting Secretary." [181—107]

The "certain leases" which had "been granted for the drilling of additional wells in Naval Reserve No. 2," referred to in the foregoing letter (Exhibit No. 65), resulted from the sending out by the Secretary of the Interior November 14, 1921, of nine telegrams (in this statement already set forth as Exhibit No. 27); these telegrams were initialed by Mr. Safford, the Secretary's Administrative As-

(Testimony of E. C. Finney.)

sistant, and signed by Secretary Fall; they did not pass through Mr. Finney's hands.

The said leases all provided that the lessee should render to the Government royalties on a scale of $12\frac{1}{2}$ to 25 per cent, these royalties being known as the Interior Department regulation royalties,
pp.

The names of the lessees, dates of the leases and acreage covered by each are as follows: Union Oil Company of California, December 5, 1921, 320 acres; General Petroleum Company, December 20, 1921 (acreage not given); Consolidated Mutual Oil Company, January 1, 1922, covering an area in the west half of Section 28; United Oil Company, November 30, 1921, 80 acres; Caribou Oil Company, February 6, 1922, 90 acres; Record Oil Company, February 6, 1922, 40 acres; Wilkes Brothers and others, April 10, 1922, 80 acres; Buena Vista Oil Company, two leases dated December 5, 1921, one for 40 and one for 60 acres; Associated Oil Company, two leases, one dated December 1, 1921, for 1020 acres, and one dated April 4, 1922, for 160 acres; Murvale Oil Company, January 10, 1922, for 1121 acres; making in all twelve leases to ten lessees in Reserve No. 2 all entered into under the provisions of the Act of February 25, 1920, and pursuant to telegrams of November 14, 1921.

The reference to the call "for bids on three strips of land located in Naval Reserve No. 1" in the above Exhibit No. 65 related to strips in Section 2, Section 6, and Section 25, the last two adjoining Section

(Testimony of E. C. Finney.)

36 located near the center of the reserve; lease on the strip on the north side of Section 2 was ultimately awarded to the Pan American Company, the highest and best bidder. No satisfactory bids were in fact received for leases in Section [182—108] 6 and Section 25 and no award of leases in those sections was made at that time.

Letter addressed to the Secretary of the Interior from the Secretary of the Navy dated December 14, 1921, crossed the above letter (Exhibit 65) in the mail, and it was received by Judge Finney and as Plaintiff's Exhibit No. 66 admitted in evidence. Said letter reads: [183—109]

PLAINTIFF'S EXHIBIT No. 66.

"My Dear Mr. Secretary:

I am in receipt of Acting Secretary of the Interior Finney's letter of December 10, 1921, with reference to certain matters in connection with the oil to be obtained from the Naval Petroleum Reserves and the disposition thereof.

In confirmation of Admiral Robison's telephone conversation with Judge Finney, I beg to inform you that it is my desire that the Interior Department proceed to handle the oil and make the exchanges for fuel oil and storage according to plans as set forth in Navy Department letters of October 25, 1921, and December 9, 1921.

In this connection I would quote for your information an extract from an opinion, which I have

approved, of the Judge Advocate General of the Navy anent the question of the exchange oil royalty crude oil for fuel oil in storage:

'The act above quoted (naval appropriation act of June 4, 1920, 41 Stat. 812) authorizes the Secretary "to use, store, exchange, or sell the oil and gas products from the properties within the naval petroleum reserves and those from all royalty oil from the lands in the naval reserves for the benefit of the United States." The authority granted the Secretary of the Navy "to store" this oil and its products necessarily carries with it the authority to designate the place of storage and the authority to provide the means of storage. The authority granted "to exchange" is unrestricted: i. e., the act does not specify nor limit what may be taken in exchange for the oil and its products. Hence, if the Secretary of the Navy desired "to store" some of the oil and its products, he has the authority "to exchange" a part of the crude oil for oil or for tanks or for both fuel oil and tanks under such arrangements as he may see fit to negotiate with the lessors or others; and said fuel oil and tanks so received in exchange may legally become the property of the United States."

I would further state that it is my desire for the Department of the Interior to use all royalty crude oil until further notice in payment for tankage for the Navy and for filling said tankage with fuel oil for storage. It is presumed, therefore, that the Department of the Interior will proceed as soon as

practicable to make a contract for constructing the storage tanks at Pearl Harbor, Hawaii, in accordance with the plans and specifications recently forwarded to your department. Plans and specifications for storage tanks at other points will be furnished in due time and prior to the completion of the Pearl Harbor project.

It is not anticipated that any of the royalty oil accruing to the Government will be used to furnish a current supply of fuel oil to the Navy for several years to come. If practicable, I also desire to use the accrued royalty oil received during the months of November and December, 1921, as a credit against the construction and filling of the Pearl Harbor storage. If, as it appears from Acting Secretary Finney's letter of the 10th instant, arrangements have already been made with reference to the disposition of the November and December royalty oil, I should be pleased to know as soon as practicable whether or not the equivalent fuel oil to be obtained therefor cannot be used for filling in part the storage tanks to be constructed at Pearl Harbor, Hawaii.

I have designated Rear Admiral J. K. Robison as my representative to handle all details in connection with naval petroleum reserve questions, and I feel sure that he will co-operate with the officials of your department in every way possible.

If entirely practicable, I should be pleased to receive a monthly summary of the operation of the reserves and of the progress of the work being done

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on storage tanks in order that the Navy Department may be kept in close touch with this most important unit of its future fuel supply.

Sincerely yours,

EDWIN DENBY." [184—110]

During the period covered by these last few letters Admiral Robison, representing the Navy Department, Dr. Bain, Director of Mines, and Mr. Ambrose, fuel technologist of the Bureau of Mines, were in consultation on the subject matter referred to in the correspondence. On December 16th Dr. Bain came to Judge Finney's office with Mr. Doheny's letter of November 28, 1921 (Exhibit No. 33 above), which letter witness had not seen from the time he returned it to Mr. Safford late in November; in some way it had got into Dr. Bain's hands and he brought it to Judge Finney's office and said he would like to see Mr. Cotter and asked the witness to write Mr. Cotter to that effect. Pursuant to that request witness under date of December 16, 1921, wrote the following letter (Exhibit 67):

PLAINTIFF'S EXHIBIT No. 67.

"Mr. J. J. Cotter,

Pan American Petroleum and Transport Co.,
120 Broadway,
New York, N. Y.

Dear Cotter:

Will you be in Washington any time between now and December 27? If so, please call on Director Bain of the Bureau of Mines who wishes some in-

formation from you with respect to the matter discussed in Mr. Doheny's letter of November 28, 1921.

Please let me know when you will be here.

Sincerely,

E. C. FINNEY,
Acting Secretary."

On the retained file copy of the above in Dr. Bain's handwriting is the following notation: "I asked Mr. Finney to send this since Doheny's bid will be considered through the New York office and I thought we might get it outlined before we go west. Bain."

Plaintiff's counsel thereupon stated that while he did not intend to ask the witness about the same, he desired at this point, so as to keep the matter chronological, to offer two letters, one dated New York, December 14, 1921, from E. L. Doheny, Jr., to Admiral J. K. Robison, and the other dated Washington, December 15, 1921, from Admiral Robison to E. L. Doheny, Jr., which two letters were admitted in evidence as Plaintiff's Exhibits 68 and 69, respectively, and read as follows: [185—111]

PLAINTIFF'S EXHIBIT No. 68.

"December 14, 1921.

"My dear Admiral:

Pursuant to the conversation which we had Monday night after dinner, I discussed with my father your plan in connection with the development of the Naval Reserve Lands. He agrees with you that the plan of off-setting wells drilled on privately owned lands adjoining the Naval Reserve is the proper one

and that a double line of wells will get better results than a single one.

He believes that wherever possible the drilling plan of competitors of the department should be anticipated and wells drilled along boundary lines to protect the Naval Reserve. This, of course, should not apply to cases where the adjacent lands are being exploited by other branches of the Government since it is not economical for one Department of the Government to compete with another to such an extent that it will cause what is called "a boundary fight."

My father will probably be in Washington on Saturday, and you might take advantage of that fact to have a chat with him as I suggested.

Thanking you again for the very pleasant evening last Monday, and with best regards to yourself and Mrs. Robison, I remain

Yours sincerely,

(S) NED.

E. L. DOHENY, Jr."

PLAINTIFF'S EXHIBIT No. 69.

"December 15, 1921.

"My dear Doheny.

Thank you for your full note of the 14th. I will make an effort to be here when your father comes to Washington on Saturday; and will be glad to see him again and talk over the oil situation.

Yours sincerely,

J. K. ROBISON."

Thereupon there was admitted in evidence as Plaintiff's Exhibit No. 70 letter signed H. Foster Bain, reading, in part, as follows:

PLAINTIFF'S EXHIBIT No. 70.

"December 23, 1921.

The Honorable,

The Secretary of the Interior,

Dear Mr. Secretary:

Confirming my telegraphic correspondence with you, I am planning to stop off at Three Rivers the morning of the thirty-first, arriving from Chicago, on the Rock Island, and will leave the next morning for Los Angeles.

I am going West primarily to consult with the Standard and such other companies as we may determine in conference between us should be taken into account with regard to the tankage plant of the Navy. I have seen Mr. Cotter, and he is getting for us additional data now. I have also had a preliminary conference with the J. G. White Company, which has done a large amount of construction work for the Navy and is also dealing in oil. By the time I reach you I will be able to give you some idea of the character of the contract which should be made in this case. Mr. Finney has, I believe, already told you that the Navy has given the Department a free hand to go ahead." [186—112]

Dr. Bain left Washington for the West in December; before leaving he mentioned having talked with Mr. Cotter; he returned to Washington January 23 or 24, 1922, and Secretary Fall, who

left Washington December 1, 1921, returned January 27 or 28, 1922. After Bain returned from the west he told witness that he had interviewed a number of oil companies and there was a conference in Secretary Fall's office at which the Secretary, Dr. Bain, and witness were present and regarding which witness testifies: "I recall distinctly that Mr. Fall said he wished Bain and myself to look after the particular matter of the construction of tankage and the filling of it with oil in the West because he would be occupied with some other affairs or other business."

On January 25, 1922, witness received from Dr. Bain the following, read in evidence as Plaintiff's Exhibit No. 71:

PLAINTIFF'S EXHIBIT No. 71.

"Dear Mr. Finney:

Attached is a copy of the opinion of the Advocate General of the Navy covering the exchange of royalty crude oil for fuel oil in storage. It may be well to get the opinion of the department solicitor, informally, at least, on this matter.

Cordially yours,

H. FOSTER BAIN,
Director."

At a later date the witness discussed with Secretary Fall the matter of whether the law authorized the tankage, but he does not remember discussing with the Secretary that particular letter (Exhibit 71).

The invitations for bids for construction work

at Pearl Harbor, in exchange for royalty oil in the California naval reserves, which were dated February 15, 1922, with specifications that accompanied them, were brought in rough draft to Mr. Finney's office by Dr. Bain, a few days prior to February 15th, and the former went over them largely as to legal form, he not being an expert on oil matters. This was the first draft of invitation for proposals or specifications which he had seen. About or prior to that time Dr. Bain told witness that the Pan American and J. G. White Engineering companies were contemplating co-operating on the Pearl Harbor storage project, under a plan by which the White Company would do the building.

Under date of January 11, 1922, from San Francisco Dr. Bain [187—113] wrote to Mr. Gano Dunn of the J. G. White Engineering Corporation the following letter which was read in evidence as Plaintiff's Exhibit No. 72:

PLAINTIFF'S EXHIBIT No. 72.

"Dear Mr. Dunn:

I have gone over with a few of the leading oil companies out here the matter you and I discussed in Washington. It appears to them that it is one which should be handled primarily by an engineering company, though each of the big companies has expressed an entire willingness to cooperate in the enterprise and to make contracts that will protect the engineering company as to market and financing.

In particular, I discussed the matter with Mr. E. L. Doheny, who had previously been called into it and had at first thought of undertaking the whole project. I took the liberty of mentioning to him our conversations in general terms. His feeling is that there is a natural basis for co-operation between his company and yours, and I have told him I would mention that fact to you. He expects to leave for the East on Saturday of this week and you will hear from him in New York soon after his arrival. I shall probably be in Washington at the same time and will come over to New York as soon as I can after my return.

I think there would be certain advantages to an engineering company and an oil company working together on the project since each would be able to estimate the risks in a special phase of the work, and to provide against them. I may say that a similar combination as the one I am suggesting to you is in line of being formed between the Standard and one of the other engineering corporations.

I hope to see you before long and discuss matters in greater detail as also to arrange for some definite proposals which we may submit to the Secretary.

Cordially yours,

H. FOSTER BAIN,

Director." [188—114]

(Testimony of E. C. Finney.)

The witness testified that there was no discussion between Secretary Fall and himself, or Dr. Bain and himself, as to who should get the above referred to invitations for bids, nor does he recall any discussion between the Secretary and himself, or between the Secretary and Bain in his presence, or between Bain and himself, as to advertising these proposals; the only discussion he heard was the plan to have Dr. Bain proceed to the west and visit various oil companies, he did not hear the names of them, it was just a general statement; he has no knowledge how it was determined to whom the invitations dated February 15th should be sent; the first invitations were sent out by Dr. Bain.

Thereupon plaintiff offered in evidence a letter from H. Foster Bain to E. L. Doheny, Mexican Petroleum Company, stipulating in open court in connection with that exhibit that letter of similar import, except as to the name of the party addressed, was at the same time sent to H. M. Storey, of the Standard Oil Company, Standard Oil Building, San Francisco, California; A. C. McLaughlin, Associated Oil Company, San Francisco; Charles N. Black, care of Ford, Bacon and Davis, San Francisco; and J. G. White Engineering Corporation, New York City; the paper was admitted in evidence as Plaintiff's Exhibit No. 73 and is as follows:

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PLAINTIFF'S EXHIBIT No. 73.

"February 15, 1922,

Mr. E. L. Doheny,
Mexican Petroleum Company,
120 Broadway,
New York, N. Y.

Dear Mr. Doheny:

You will find inclosed an outline of a plan for the erection and filling of storage tanks with 1,5000,000 barrels of fuel oil which is being sent to you to serve as a basis in making your bid to the Secretary of the Interior regarding the provision and filling of the storage referred to above.

Your attention is invited to the fact that this bid should be in the hands of the Secretary of the Interior not later than March 1, 1922.

Cordially yours,

H. FOSTER BAIN,

Director."

Plaintiff thereupon offered in evidence the enclosure sent with each of the above-mentioned letters which Exhibit 73 is one, which enclosure [189—115] was admitted as Plaintiff's Exhibit No. 74 and was substantially as follows:

PLAINTIFF'S EXHIBIT No. 74.

Paper dated February 15, 1922, calling for bids to be submitted to the Secretary of the Interior not later than March 1, 1922, for the acceptance of royalty crude oil accruing to the Government from leases in naval petroleum reserve No. 2, California, in exchange for certain storage facilities

to be provided at Pearl Harbor and 1,500,000 barrels of fuel oil to be delivered into the storage facilities to be constructed at that point.

The call for proposals provided that the storage facilities should be constructed under plans and specifications prepared by the Navy Department and the work done under inspection and subject to acceptance of an engineer officer representing the Government, to whose approval all contracts or subcontracts would be subject as well as all plans, methods of work, etc.; that construction work should be started promptly and completed within 18 months from its commencement.

It was provided that the ratio of exchange of the Government's crude oil for the storage facilities should be the market field price of the crude oil delivered at the time of its production or any higher price that might be agreed upon on the one side, and on the other, the actual and necessary expense of the bidder in constructing the storage facilities as approved by the engineer officer in charge and a fixed sum to be proposed by the bidder to cover engineering supervision and all general expenses; that the ratio of exchange for Government crude oil for fuel oil to be delivered by the bidder would be for each barrel of crude oil of the various gravities produced for such number of barrels or fraction of barrels of fuel oil in tanks at Pearl Harbor as the bidder would propose for each specified gravity of crude oil;

That proposals would be received for the furnish-

ing of the storage facilities and fuel oil either jointly or separately; [190—116]

That in the event separate proposals were made for the storage facilities, bidders would agree to accept therefor crude oil in the field, and that in the event proposals were made separately for furnishing the fuel oil in storage the bidder would agree to accept therefor crude oil in the field, and, if required, also to accept at market prices oil tendered by the successful bidder for the construction of the storage facilities. It was provided that 4,000,000 barrels of royalty crude oil from naval reserve No. 2, California, or as much thereof as might be necessary would be allocated to cover demands accruing to the successful bidder, and that should leases already granted or thereafter granted fail to produce sufficient oil and thereby tend to prolong the term of the contract, the Secretary of the Interior would in his discretion lease additional lands in naval reserve No. 2 or in such other petroleum reserves as he might designate sufficient to maintain crude oil deliveries to approximately 500,000 barrels per annum.

It was provided that proposals would also be considered based upon delivery of crude oil from naval petroleum reserve No. 1 in addition to naval reserve No. 2, and it was estimated that the yield per annum of Government royalty crude oil from naval reserve No. 1 was from 500,000 to 600,000 barrels.

It was also provided that upon the signing of a satisfactory agreement there would be turned over

to the successful bidder oil which had accumulated since November 1921, amounting to about 102,000 barrels, credit for such advance delivery to be given the Government. It was further provided that advance credits on either side would be subject to an interest charge at — per cent per year, determined on daily balances and to be paid in oil.

The successful bidder was required by the terms of the proposal to furnish bond in the sum of \$100,000. [191—116-a]

Thereupon plaintiff offered, and there was admitted as Plaintiff's Exhibit No. 76, letter dated February 8, 1922, initialed H. F. B., A. W. A., E. C. F., addressed to Mr. Paul N. Shoup, San Francisco, signed by the Secretary of the Interior, and reading:

PLAINTIFF'S EXHIBIT No. 76.

"My dear Mr. Shoup:

Mr. H. Foster Bain, Director of the Bureau of Mines, has advised me of the conversation in your office on January 16, 1922, between A. C. McLaughlin, Morris Lombardi, A. W. Ambrose, H. Foster Bain and yourself, regarding the advisability of setting up the temporary reserve located mostly in Naval Reserve No. 1, California.

The Department of the Interior hereby agrees not to start the drilling of any well without six months notice to the Pacific Oil Company provided the Pacific Oil Company agrees not to start the drilling of any well without six months notice to the Department of the Interior on the land described

354 *Pan American Petroleum Company et al.*

(Testimony of E. C. Finney.)

below and shown on the attached plat in hatched lines. The land included in this so-called temporary reserve is described as follows:

T. 30. S., R. 24 E.

SW. $\frac{1}{4}$ Sec. 27, S. $\frac{1}{2}$ Sec. 28, S. $\frac{1}{2}$ Sec. 29, SE. $\frac{1}{4}$ Sec. 30, E. $\frac{1}{2}$ Sec. 31, All of Sections 32 and 33, W. $\frac{1}{2}$ Sec. 34.

T. 30. S., R. 24 E.

NW. $\frac{1}{4}$ Sec. 3, N. $\frac{1}{2}$ Sec. 4, N. $\frac{1}{2}$ Sec. 5, NE. $\frac{1}{4}$ Sec. 6.

Please advise me whether or not this proposal is satisfactory to the Pacific Oil Company.

Respectfully,

ALBERT B. FALL,

Secretary."

Witness testified that he was advised either by the Secretary or by Dr. Bain that the proposition referred to in the above was under consideration and he saw a map on which the area had been defined by the Bureau of Mines; that another letter addressed to Mr. Paul N. Shoup, at New York, dated February 17, 1922, was prepared in the Bureau of Mines, signed by the witness, and the same having been admitted in evidence as Plaintiff's Exhibit No. 77, was read, as follows:

PLAINTIFF'S EXHIBIT No. 77.

"Dear Mr. Shoup:

Secy. Fall wrote you on February 8, 1922, regarding a temporary reserve located within Naval

Petroleum Reserve No. 1.

Mr. Frank Mulks, office manager, San Francisco, has just wired me as follows:

‘Your letter eighth to Mr. Shoup inclosure 78211, Mr. Shoup in New York will you kindly mail copy your letter to him there 165 Broadway.’

In response to this telegram you will find inclosed a copy of my letter of February 8, and the blue print which accompanied it.

Respectfully,

E. C. FINNEY,
Acting Secretary.” [192—117]

Mr. Shoup replied from New York under date of February 24, 1922, his letter, received in evidence as Plaintiff’s Exhibit No. 78, reading:

PLAINTIFF’S EXHIBIT No. 78.

“Dear Mr. Finney:

Your favor of the 17th enclosing copy of Secretary Fall’s letter of February 8th:

The proposal outlined in the Secretary’s letter is acceptable to the Pacific Oil Company and this letter and the letter of the 8th are accepted as binding the Government and our Company to the program outlined.

Yours truly,

PAUL SHOUP.”

So far as Judge Finney knows the arrangement made by the two last quoted letters is still in force.

Within a day or two after the invitation for bids on the Pearl Harbor project dated February 15, 1922

(Exhibit 74), had been sent out, Mr. Finney's attention was called to the following letter from Admiral Gregory, Chief of the Bureau of Yards and Docks of the Navy, which letter as Plaintiff's Exhibit No. 79 was admitted in evidence:

PLAINTIFF'S EXHIBIT No. 79.

"February 14, 1922.

From: Chief of Bureau of Yards and Docks.

To: Chief of Bureau of Engineering.

Subject: Additional fuel oil storage, naval station,
Pearl Harbor.

1. The bureau understands that as a result of a conference held at the Department of the Interior on February 13, 1922, between the Secretary of the Interior and the Chief of Bureau of Engineering, it is the intention of the Department of the Interior to contract for the construction of the proposed additional fuel-oil storage at Pearl Harbor on what is known as a 'cost-plus-a-fixed-fee' basis. The bureau views such an arrangement with much concern and desires to point out that its experience with contracts of the type proposed has generally proved most unsatisfactory.

2. While it is commonly believed that a 'cost-plus-a-fixed-fee' contract is an improvement in some respects over other 'cost-plus-a-percentage' contract, it should be understood that neither form offers any incentive to a contractor to perform work economically, and, in fact, serves to put a premium on wastefulness. Either form is fraught with innumerable possibilities for criticism, litiga-

(Testimony of E. C. Finney.)

tion, and contractual difficulties and burdens the supervisory force by the need for additional checkers and accountants. It is the opinion of the bureau that contracts of this type are to be carefully avoided.

3. The bureau would respectfully call attention to the fact that its opinion is based upon experience gained in the execution and supervision of nearly 4,600 contracts covering public-works construction of widely different character and of considerable magnitude, and of which a number during the war period were of a 'cost-plus' form. Inasmuch as the design and the supervision of the construction of the proposed project will rest with the bureau, it is felt that its experience as to the form of contract covering the work should be given equal consideration.

L. E. GREGORY." [193—118]

When this letter came to the attention of the witness Dr. Bain was out of town and witness took the matter up with Mr. Ambrose and also mentioned it to Secretary Fall, both of whom agreed that the cost-plus plan was not feasible. Mr. Ambrose and witness drafted a telegram which was sent to E. L. Doheny of the Pan American Petroleum & Transport Company, A. C. McLaughlin of the Associated Oil Company, H. M. Storey of the Standard Oil Company of California, Gano Dunn of the J. G. White Engineering Corporation, and Charles N. Black of Ford, Bacon and Davis; these telegrams which, except as to addresses, were all the same, bore date February 17, 1922, were signed "Finney,

Acting Secretary," were admitted in evidence as Plaintiff's Exhibit No. 80, and read:

PLAINTIFF'S EXHIBIT No. 80.

"Referring letter Director Bain February 15th relative bids, please defer action until receipt my letter this date. Change proposed."

Identic letter dated February 17, 1922, referred to in the foregoing telegrams, and addressed to the same persons as were the telegrams, were mailed on that date and read as follows (the same having been received in evidence as Plaintiff's Exhibit No. 81): [194—119]

PLAINTIFF'S EXHIBIT No. 81.

"It has been found necessary to change the basis of bids for the erection of storage tanks and facilities and the storage of fuel oil in tanks at Pearl Harbor according to the plans submitted in Director Bain's letter of February 15, 1922.

You are invited therefore to submit bids for the same storage facilities and the same quantity of fuel oil as outlined in the plans submitted with Director Bain's letter, except that the Department now wishes bids to cover all royalty oil in Naval Reserves 1 and 2, California.

The new plan of bidding provides essentially for (1) the taking of royalty oil referred to above in exchange for which the bidder agrees to pay such sums as may be designated by the Secretary of the Interior but not exceeding the value of the royalty oil already delivered, to any contractor under con-

tract with the Secretary of the Interior for the construction of storage tanks and facilities, and (2) the filling of the storage tanks with fuel oil on a basis of exchange of royalty crude oil for fuel oil in tanks at Pearl Harbor.

Competition in the present bidding therefore relates to (1) the premium which the bidder will pay above the posted field price for the account of construction of the storage, and (2) the ratio of fuel oil which the bidder will deliver in storage tanks at Pearl Harbor for each barrel of crude oil in the field.

You are requested, therefore, to bid upon the following plan:

Bid No. 1.

For each barrel of royalty crude oil in the field of the gravity designated below, the bidder agrees to credit to the account for the erection of storage, — cents above the posted field price at the time of production.

14° to 17.9° — cents above posted field price at time of production.

18° to 18.9° — cents above posted field price at time of production.

19° to 19.9° — cents above posted field price at time of production.

20° to 20.9° — cents above posted field price at time of production.

21° to 21.9° — cents above posted field price at time of production.

22° to 22.9° — cents above posted field price at time of production.

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- 23° to 23.9° — cents above posted field price at
time of production.
- 24° to 24.9° — cents above posted field price at
time of production.
- 25° to 25.9° — cents above posted field price at
time of production.
- 26° to 26.9° — cents above posted field price at
time of production.
- 27° to 27.9° — cents above posted field price at
time of production.
- 28° to 28.9° — cents above posted field price at
time of production.
- 29° to 29.9° — cents above posted field price at
time of production.

For each increase in gravity of one (1) full de-
gree above 30° gravity up to and including
34.9° gravity — cents additional;

35° gravity and above — cents additional.

Bid No. 2.

The bidder agrees to fill the storage when com-
pleted or as completed with fuel oil of a grade speci-
fied in Director Bain's letter of February 15, 1922,
upon the following basis of exchange:

1 bbl. crude oil in field.

Gravity (Baume) to equal the number of barrels
of fuel oil as hereinafter specified: [195—120]

14° to 17.9° — bbls. of fuel oil in tanks at Pearl
Harbor.

18° to 18.9° — bbls. of fuel oil in tanks at Pearl
Harbor.

19° to 19.9° — bbls. of fuel oil in tanks at Pearl
Harbor.

- 20° to 20.9° — bbls. of fuel oil in tanks at Pearl Harbor.
- 21° to 21.9° — bbls. of fuel oil in tanks at Pearl Harbor.
- 22° to 22.9° — bbls. of fuel oil in tanks at Pearl Harbor.
- 23° to 23.9° — bbls. of fuel oil in tanks at Pearl Harbor.
- 24° to 24.9° — bbls. of fuel oil in tanks at Pearl Harbor.
- 25° to 25.9° — bbls. of fuel oil in tanks at Pearl Harbor.
- 26° to 26.9° — bbls. of fuel oil in tanks at Pearl Harbor.
- 27° to 27.9° — bbls. of fuel oil in tanks at Pearl Harbor.
- 28° to 28.9° — bbls. of fuel oil in tanks at Pearl Harbor.
- 29° to 29.9° — bbls. of fuel oil in tanks at Pearl Harbor.

For each increase in gravity of one (1) full degree above 30° gravity up to and including 34.9° gravity, — barrels additional.

35° gravity and above — barrels in tank at Pearl Harbor.

(Note: Carry above to third decimal place.)

After bids have been received covering the handling and disposition of oil under the amended plan outlined herein, detailed plans and specifications will be furnished and the Secretary of the Interior will call upon contractors for bids for the construction of storage tanks and facilities, on a

lump-sum basis. Cost-plus bids will not be considered. The successful oil bidder will be a party to the construction contract to the extent of payment for the construction work.

You will find in the proposal submitted with Director Bain's letter of February 15, 1922, information regarding the estimated yield of these reserves, fuel oil specifications, etc., which will be helpful in considering the new plan of bidding.

Respectfully,

E. C. FINNEY,

First Assistant Secretary." [196—121]

Under date of February 16, 1922, Gano Dunn, President, the J. G. White Engineering Corporation, New York, wrote to H. Foster Bain, Director of the Bureau of Mines, Washington, the following letter, which was admitted in evidence as Plaintiff's Exhibit No. 82:

PLAINTIFF'S EXHIBIT No. 82.

"Dear Mr. Bain:

Your letter of the 15th and specifications were received in the mail this morning and Vice-Presidents Williams and Chilson of my company and I promptly had a conference with Mr. Doheny, Mr. Danzig, and Mr. Cotter for a thorough discussion of the specifications and preparations for putting in a bid.

We got all points settled as to our relations with Mr. Doheny's company under your specifications so that he will put in a bid for the whole work, taking a bid from us for the construction, which

(Testimony of E. C. Finney.)

he on your behalf will finance to us, our bid to him being in such form and subject to such Government requirements as will be acceptable to you. All inspection and discipline generally of us to be carried out directly by you or by Yards & Docks, the same as if our contract were directly with the Department of the Interior.

Having now the substance of our relations with Mr. Doheny settled, we are starting to embody them in our contract and proposal, which next week we will take up with you to make sure that we have correctly met your provisions. There are some features in the specifications that affect Mr. Doheny and us together but Mr. Cotter is going to take these up with you for us both.

On our part, we shall have no difficulty in having our bid ready by March 1st or considerably before that date.

Faithfully yours,

GANO DUNN,
President." [197—122]

In reply to the foregoing Dr. Bain's secretary, in the Director's absence, advised Mr. Dunn by letter dated February 17, 1922, that Dr. Bain would be in New York on the 24th of the month, at which time he would be glad to see Mr. Dunn. This communication was received in evidence as Plaintiff's Exhibit No. 83.

On February 17, 1922, Mr. Dunn from New York wrote a letter to Dr. Bain stating that Exhibit No. 80 had been received from Mr. Finney, and Mr.

3
6
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(Testimony of E. C. Finney.)

Cotter had talked with Mr. Finney over the telephone and learned the general reasons for the delay; that they planned to come to Washington the following Monday to submit to Dr. Bain contract forms and other particulars for his review before putting them into final shape for formal submission, and this would be done unless Secretary Finney's letter changed these plans. Mr. Dunn's letter was put in evidence as Plaintiff's Exhibit No. 84.

This was followed by another letter from Mr. Dunn to Dr. Bain stating that the change in the situation, set forth by Mr. Finney's letter of February 17th (Exhibit No. 81), involving the question of lump sum versus fee bids, made it desirable for Mr. Dunn to meet Mr. Cotter in Washington as he had already planned, but that he would be in New York to see Dr. Bain when the latter was there. Mr. Dunn closed his letter by saying: "I assume that the specifications received represent your own views on the fee for services question and that anything I can say on the subject to Mr. Finney will have your approval if I go with Mr. Cotter to call on him as I should like to do." This letter was read as Plaintiff's Exhibit No. 85.

The witness testified that he recalls having a conversation with Mr. Dunn at or about the time indicated in the foregoing correspondence, that Mr. Dunn stated that he preferred and contended for the cost-plus plan, but as the witness had seen Admiral Gregory's letter and discussed the matter

(Testimony of E. C. Finney.)

with the Secretary and with Ambrose he advised Dunn that the Government would not change.

On February 21, 1922, witness signed another letter addressed to the parties to whom the letter of February 15th and telegram and letter of February 17th had been sent, advising them that the words "but not exceeding the value of the royalty oil already delivered" contained in his letter of February [198—123] 17th (Exhibit No. 81) should be disregarded, and that plans and specifications would be mailed about March 1st and bids were desired not later than March 15th. This letter was introduced in evidence as Plaintiff's Exhibit No. 86. Before it was sent Dr. Bain pointed out to the witness, in connection with the letter of the 17th (Exhibit 81) that the amendment to the conditions under which bids were asked would not be workable in that there was no obligation on the part of the person doing the constructing to build any faster than oil receipts came in; in other words, that they would only be obligated to proceed as fast as royalty oil came from the ground and was delivered and he suggested and advised the cancellation of the clause as was done by Exhibit 86; the matter was not taken up with anyone else before that letter was sent out on February 21st. For these technical matters witness relied on others as he is not an expert engineer or contractor; he gathered the general impression that the February 17th draft did not provide for the carrying on of the work any faster than the oil was received and

(Testimony of E. C. Finney.)

might have resulted in delays in building the tanks.

Judge Finney received from Mr. Cotter letter dated February 24, 1922, which enclosed one from Gano Dunn, President of the J. G. White Engineering Corporation, to E. L. Doheny of the same date, which two communications were read in evidence as one exhibit, Plaintiff's Exhibit No. 87, and are as follows: [199—124]

PLAINTIFF'S EXHIBIT No. 87.

"Dear Mr. Finney:

Receipt is acknowledged of your letter of February 21st, making a certain change in your letter of February 17th, and stating that detail plans and specifications covering the work referred to will be mailed about March 1st, and that it is desired that bids be mailed not later than March 15th.

Upon receipt of Director Bain's letter dated February 15th we took up this matter with the J. G. White Engineering Corporation with a view of obtaining from that Corporation a proposal to furnish all materials and do all work in accordance with the Navy Specifications, and with the thought that we would submit to the Department a proposal for completing the work and furnishing the desired amount of fuel oil at Pearl Harbor, we to be compensated for both the work done and the fuel oil furnished by delivery to us by the Government of crude oil produced in the California naval reserves. It was our intention to submit a bid under which we would agree to take this crude oil at the posted

price or at a price based thereon and to deliver the fuel oil at Pearl Harbor at the going market price or a price based thereon, plus a stated sum per barrel for transportation. Mr. Dunn, President of the J. G. White Engineering Corporation, had agreed to make us a proposal along the following lines:

They would agree to furnish all of the materials and do all of the work in accordance with the Navy's plans and specifications, and to the satisfaction of the naval officer in charge.

They would handle on a lump-sum basis all of the work possible to be done in that way. That is, they would call for lump-sum bids from sub-contractors for all work, the nature of which would render it possible for such bids to be made thereon. Upon receipt of such bids they would be submitted to the Secretary of the Interior or to the Secretary of the Navy as you may direct, and the bid in each instance selected by the Secretary would be accepted by the White Corporation. Mr. Dunn said that probably 75 per cent of the work could be done on this lump-sum basis; that probably 25 per cent, such as dredging, pile driving and grading, by reason of the fact that sufficient data are not available to make practicable the fixing of a definite sum for these items, would be done on force account, subject, of course, to the supervision and approval of the naval officer in charge.

We have planned that all payments for work done would be made by us, to the White Corporation upon the direction of the Navy officer in charge and

after his certification that such payments should be made by reason of the satisfactory completion of definite portions of the work. This plan contemplated that the J. G. White Engineering Corporation would receive a definite stated sum as a fee for its construction and engineering services and in the coordination and supervision of the work.

The foregoing seemed to be in consonance with the plan outlined in Director Bain's letter of February 15th. However, as of course you know, certain changes have since been made and it is my understanding from your letters and from my last conversation with yourself and Admiral Robison that what is now desired is a proposal from us along the lines set forth above except that the Department now wishes a lump-sum bid for the entire work. This the J. G. White Engineering Corporation cannot make, and consequently we cannot make such a proposal to the Department unless it is possible for us to find some other engineering or construction concern that would make such a proposal to us, and this seems to be doubtful. The difficulties in this connection are set out in a letter which Mr. Dunn has written and which I attach hereto. As Mr. Dunn and I are coming to Washington to see Admiral Robison on next Monday morning to discuss this matter, I am taking the liberty of sending the Admiral a copy of this letter.

Cordially yours,

J. J. COTTER."

"J. G. WHITE ENGINEERING CORPORATION.

Copy

February 24, 1922.

612947-690

[200-125]

E. L. Doheny, Esq., President,

Pan American Petroleum & Transport Co.,

120 Broadway,

New York.

Dear Sir:

We are unable under the conditions obtaining and with the information at hand to make a lump-sum bid under the plan of procedure and specifications issued by the Department of the Interior on February 15th, as modified by their letters of February 17th and February 21st, although prior to the receipt of the modifications we had completed a bid under the plan and specifications.

We are relying upon an interview with Admiral Robison next Monday morning to learn more fully his views and to put before him circumstances which may not have come to his attention in connection with the work near Honolulu which affect our position.

We appreciate the Navy Department's objections to 'cost plus' contracts, in which the contractor is paid a percentage on whatever the work costs. A dishonest contractor is induced in this way to multiply costs to increase his fees, or at least to be less careful.

Our proposal was not of this type, although I

may say almost the whole of our work for many years past has been under this type of contract.

We planned that three-fourths (the exact proportion to be determined in advance) of the Pearl Harbor job was to be executed under straight lump-sum bids, and not only this, but the conditions were to be such that although our client would be technically the Pan American Petroleum and Transport Company, there would be no relation in which the supervision, direction, and control of the Department of the Interior and of the Navy Department would be less than if our clients were they.

There is considerable work in the putting together of a large number of lump-sum contracts which cannot be determined accurately in advance and consequently cannot be covered by a lump-sum contract except under excessive percentages for contingencies in the nature of a contractor's safeguard.

Our proposal therefore was in the nature of lump-sum bids on three-quarters of the work with a fixed lump-sum fee for coordinating the whole and performing the remainder, which remainder also was to be as fully under the direction of the Department of the Interior and of the Navy Department as the other parts of the work.

The rigidity of relation brought about by lump-summing the remainder which does not lend itself to lump-summing is unfavorable to securing low costs for the other three-fourths and is also unfavorable to rapid completion.

Under the information supplied us unit price

contracts would subject the Government to indeterminate and possibly excessive costs in a similar manner to an abused cost plus contract.

We present these considerations to you as an interim observation pending our conversation with Admiral Robison and Assistant Secretary Finney next Monday morning.

Very truly yours,

GANO DUNN,
President."

Plaintiff next offered in evidence letter from H. Foster Bain, Director of the Bureau of Mines, to Mr. Gano Dunn, President of the J. G. White Engineering Corporation, [201—126] dated February 24, 1922 (Plaintiff's Exhibit No. 88), and telegram to Dr. Bain from Mr. Dunn dated February 25, 1922 (Plaintiff's Exhibit No. 89), which two exhibits read as follows:

PLAINTIFF'S EXHIBIT No. 88.

"Dear Mr. Dunn:

I find that the Navy Department has available for consideration of the construction work we have discussed a one-foot contour map of the site, with knowledge as to the amount of earth and rock involved in the excavation. The grades for all ditches and embankments have been fixed so that the land work can be calculated in advance as to quantities and character of material.

With regard to the marine work, soundings have been taken over the whole area and twenty-five test piles have been driven. It is believed sufficient ma-

terial is available to permit definite knowledge on the points we have discussed.

I have had a talk with your liaison officer, who comes from the Yards and Docks, and have asked him to discuss with his superiors the possibility of substituting for the fixed engineering fee one with penalty and bonus. I did this for the reason that I find that there was some feeling in that Bureau that the general contractor should have an inducement to cheapen the work. There is a little fear that he may not make the bidding on some contracts sufficiently open and might be a little too complacent as to high prices.

It is probable that to-morrow or next day I will have a conference with the Yards and Docks people and so may have more information by Monday.

Cordially yours,

H. FOSTER BAIN,

Director."

PLAINTIFF'S EXHIBIT No. 89.

"February 25, 1922.

H. Foster Bain, Esquire,

Director, Bureau of Mines, Washington, D. C.

Letter received. Willing undertake penalty and bonus contract. As per Cotter's telephone hope you can join him and me conference breakfast Willard eight o'clock Monday morning.

GANO DUNN." [202—127]

Early in March, 1922, amended plans and specifications were sent out calling for bids to be submitted April 15th. Mr. Finney had very little to do with

the preparing of these invitations of March; that matter was turned over to the Bureau of Mines to work upon in conjunction with the Navy; he thinks he went over the matter with Dr. Bain; he was interested more in the form and legal phases than technical details relating to the exchange of oils or of construction. On March 4, 1922, the following order was made in the Department (Plaintiff's Exhibit No. 90):

PLAINTIFF'S EXHIBIT No. 90.

"DEPARTMENT OF THE INTERIOR.

Washington, March 4, 1922.

ORDER.

Subject to the supervision of the Secretary, the Director of the Bureau of Mines will have charge of matters pertaining to and arising in connection with the care and administration of naval petroleum reserves, including the drilling and production of oil and gas therein. The Bureau of Mines will, of course, cooperate with other bureaus as to matters falling peculiarly within their province, so that there shall be no duplication of work performed or records kept.

ALBERT B. FALL,
Secretary."

Under date of March 7, 1922, letter prepared in the Bureau of Mines, initialed by Dr. Bain, and signed by the witness, was sent to all of the persons to whom the letter of February 15th (Exhibit No. 73) and the telegrams and letters of February 17th

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(Exhibits Nos. 80 and 81) had been sent, each letter being the same except for the change in the names of the addressees. One of these identic letters, dated March 7, 1922, was received in evidence as Plaintiff's Exhibit No. 91, and reads as follows: [203—128]

PLAINTIFF'S EXHIBIT No. 91.

"Dear Sir:

In accordance with my letter of February twenty-first, I send you herewith detailed plans and specifications covering the proposed exchange of Naval royalty oil for fuel oil in storage at Pearl Harbor. The large amount of additional information regarding the site and conditions under which the work will be done makes it desirable to alter slightly the plans which have been discussed. Accordingly the request for proposals has been entirely rewritten and the one sent herewith is to supersede all previous communications. Please make your proposals accordingly correspond with the plans and specifications sent herewith. Since you may wish time to study local conditions in Hawaii the time for receipt of bids has been set ahead to April fifteenth, and telegraphic correction of bids up to and including April fourteenth will be permitted.

Respectfully,

E. C. FINNEY,

First Assistant Secretary."

The enclosure transmitted with the foregoing letter was introduced in evidence as Plaintiff's Exhibit No. 92 and reads:

PLAINTIFF'S EXHIBIT No. 92.

"PROPOSALS FOR EXCHANGE OF NAVAL
OIL.

GENERAL CONDITIONS.

1. The Secretary of the Interior invites proposals for acceptance of royalty crude oil accruing to the Government from leases in Naval Petroleum Reserves No. 1 or No. 2 in the State of California or both, in exchange for:

(a) Storage facilities to be provided by the bidder at Pearl Harbor, Hawaii, according to the conditions and specifications hereto attached.

(b) 1,500,000 barrels, or as much thereof as the Secretary may require, of Fuel Oil, according to the specifications hereto attached and made a part hereof this notice, delivered into said storage within the period specified herein, for the possession and use of the United States Navy.

2. Bids, stated in barrels of oil, may be made separately or jointly for the storage facilities (a), and the oil in storage (b). In event that separate bids are made and accepted the Secretary reserves the right to pro rate deliveries of oil to the two bidders in such ratio and under such terms as he may consider equitable.

3. Bidders for furnishing the storage facilities shall state their bids in terms of acceptance of barrels of crude California oil of 14° to 17° gravity at the average field price per barrel from Nov. 1 to Dec. 31, 1921, but agree to accept in payment such various grades as the leases may yield and the Secretary may deliver, and the quantities called for under the bids are to be adjusted to correspond with

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the actual grades delivered and actual market prices of the date of delivery, or any higher price that may be mutually agreed upon between the Secretary, representing the Government, and the successful bidder.

4. The storage, when completed or as completed is to be filled with fuel oil of a grade specified as herein provided upon the following basis of exchange:

1 bbl. crude oil
in field.

Gravity (Baume) to equal the number of barrels of fuel oil as hereinafter specified:

14° to 17.9° — bbls. of fuel oil in tanks at Pearl Harbor.

18° to 18.9° — bbls. of fuel oil in tanks at Pearl Harbor. [204—129]

19° to 19.9° — bbls. of fuel oil in tanks at Pearl Harbor.

20° to 20.9° — bbls. of fuel oil in tanks at Pearl Harbor.

21° to 21.9° — bbls. of fuel oil in tanks at Pearl Harbor.

22° to 22.9° — bbls. of fuel oil in tanks at Pearl Harbor.

23° to 23.9° — bbls. of fuel oil in tanks at Pearl Harbor.

24° to 24.9° — bbls. of fuel oil in tanks at Pearl Harbor.

25° to 25.9° — bbls. of fuel oil in tanks at Pearl Harbor.

26° to 26.9° — bbls. of fuel oil in tanks at Pearl Harbor.

27° to 27.9° — bbls. of fuel oil in tanks at Pearl Harbor.

28° to 28.9° — bbls. of fuel oil in tanks at Pearl Harbor.

29° to 29.9° — bbls. of fuel oil in tanks at Pearl Harbor.

For each increase in gravity of one (1) full degree above 30° gravity up to and including 34.9° gravity, — barrels additional.

35° gravity and above — barrels in tank at Pearl Harbor.

(Note: Carry above to third decimal place.)

Said ratio of exchange to cover all and every expense incident to the exchange and movement of the oil from field to storage. The bidder may supply the fuel oil in storage at any rate he may elect provided that it be all provided and the transaction completed within the period during which the Government is delivering to him crude oil in the field under this contract. Fuel oil delivered by the bidder in storage in advance of receipt by him of the equivalent crude in the field to be and remain the property of the bidder until the Government shall have furnished to the bidder the equivalent crude required by the exchange agreement; provided that any fuel oil delivered in advance of exchange shall be subject to purchase by the Navy at the Honolulu market rate of the date of purchase.

5. Any bidder proposing separately to furnish the oil in storage shall agree that for any crude oil in the field or pipe line certificates delivered to him by the Government in advance of readiness of the

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Pearl Harbor storage herein provided for, he will on request of the Secretary furnish to the Navy Fuel Oil at Pacific Coast ports, on such terms and ratio as he may indicate in his bid.

6. Proposals will be received on the basis of payment in oil from Naval Petroleum Reserves No. 1 and No. 2 together or separately. It is estimated that the oil from No. 1 will accrue at the rate of 600,000 to 650,000 bbl. per annum and from No. 2 at the rate of 500,000 to 600,000 bbl. per annum. In event that the bidder elects to receive payment in oil from No. 1 alone the Secretary of the Interior agrees to allocate from the royalty oil accruing from the leases in said reserve 6,000,000 bbls. of royalty crude oil, or as much thereof, as may be necessary to cover equities accruing to the successful bidder or bidders under the contract or contracts herein contemplated. In event that the successful bidder or bidders elect to take oil from Naval Petroleum Reserve No. 2 only, the Secretary will agree similarly to allocate 4,000,000 bbl. or as much thereof as may be necessary. In event that the successful bidder or bidders elect to take payment in oil from both reserves, the Secretary will allocate 3,000,000 bbl. of oil from Reserve No. 1 and 2,000,000 bbl. from Reserve No. 2, or so much thereof as may be necessary to satisfy the equities accruing under the contracts to be made. The bidder or bidders agree to take the oil, month by month, as it is furnished by lessees, in satisfaction of this contract or contracts, until all claims thereunder are satisfied. The Secretary reserves the right to deliver at a greater or less rate than above estimated according as the various leases

yield. In event that the leases already granted or which may hereafter be granted shall fail to yield an amount of oil approximate to the estimate herein made, or that decrease of production shall occur and exist such as shall tend to prolong the term of this contract unduly, then the Secretary of the Interior will in his discretion grant additional leases on such lands as he may designate, sufficient [205—130] to maintain royalty oil deliveries as nearly as may be to approximately 500,000 bbl. per annum.

7. Upon signing of a satisfactory agreement the Secretary of the Interior will turn over to the successful bidder the oil which has accumulated since November 1, 1921, and now being held by certain pipeline companies amounting to about 40,000 bbl. of 28° gravity oil and 62,000 bbl. of 20° gravity oil as of January 1, 1922. All oil delivered is to be credited on account as advance delivery by the Government, to be valued as of the market price at point of delivery of the month produced as against later delivery by the successful bidder of storage facilities or fuel oil in advance of delivery by the Government of the equivalent amount of oil in exchange, to the end that the credits measured in barrels per month shall be equalized. In final settlement of the contract to be hereinafter made and executed any advance credit on either side not so equalized shall be adjusted on the basis of interest at a rate to be proposed by the bidder, the amounts due to be determined on daily balance and to be paid in oil.

8. The Secretary invites proposals upon the basis of lump sum bids to include all charges to be made

against the Government in connection with the contract that may be made for provision of the storage facilities, and a bid expressed as herein provided in ratio of exchange of crude for fuel oil covering the furnishing of the latter in the storage when provided. In event that any proposer finds it unacceptable to make a lump sum bid covering every item in the work of providing storage facilities, he may offer such alternative as he may care to suggest; provided that such alternative proposal be supported by acceptable bids for lump sum sub-contracts covering at least two-thirds of the work. In event that any bidder desires he may similarly offer an alternative bid for providing the fuel oil in storage, not stated in fixed terms of a ratio of exchange per barrel but such alternative offer must be clearly stated, must be complete, and must provide for payment by exchange for crude royalty oil in the field.

9. The successful bidder for providing the oil in storage shall execute a satisfactory personal or surety bond, as determined by the Secretary of the Interior, to the amount of \$100,000 for full and complete performance of all acts under such agreement covering said furnishing of fuel oil as may be entered into. The successful bidder for providing the storage facilities shall furnish such bond as is provided in Section 259 of the specification of provision of storage facilities attached. The successful bidder for both items jointly shall furnish such bond, not exceeding the sum for the two above specified, as the Secretary may require.

10. The time within which the storage facilities

must be furnished shall be 500 calendar days, subject to penalty and bonus for lump sum bidders as in Item 5 of the attached specifications. Bidders are asked to propose a time not greater than 500 days within which they will undertake to complete such work and to which the same penalty and bonus provision shall apply. Proposers of alternative plans, as in Sec. 8, may suggest time, penalty and bonus in making their proposals. As between otherwise equal bids the one offering the shorter period of construction will be favored. The period for the agreement or agreements as a whole shall extend to cover the entire time necessary for the Government to deliver to the successful bidder or bidders the amount of oil necessary under the agreement or agreements to cover all liability to the Government under said agreement or agreements.

11. The Secretary reserves the right to reject any or all bids.

12. For any further information application should be made to the Secretary of the Interior, Washington, D. C.

13. Bids shall be opened on April 15, 1922, at noon, and shall be marked: (Proposals for Exchange of Naval Oil."

PROPOSALS.

Proposals shall be submitted in accordance with the requirements of the General [206—131] Conditions and the Specifications attached, including General Provisions, upon the following items:

Item 1. Net time of providing storage facilities, and number of barrels of oil as specified in Section

3 of General Conditions, for both providing and filling storage in accordance with the drawings, specifications, and conditions herewith.

Item 2. Net time and number of barrels of oil, as specified in Section 3 of General Conditions, for providing the storage facilities complete in accordance with the drawings, specifications, and conditions herewith.

Item 3. Ratio of exchange of field oil for fuel oil for filling the Pearl Harbor storage under conditions herein, and for furnishing fuel oil *ad interim* at other Pacific Coast terminals as provided in Section 5 of the General Conditions.

Bidders on Items 1 and 2 shall also state:

(a) Amount to be added to or deducted from the net amount of oil bid, for each concrete pile in excess of or less than the number indicated in the drawings, based on a length of 45 feet per pile.

(b) Amount to be added to or amount to be deducted from the net amount of oil bid, for each linear foot of concrete pile in excess of or less than 45 feet per pile.

(c) Net amount of oil per cubic yard (based on dredging as measured in place) to be added to or deducted from the amount bid, as the actual dredging required may differ in amount from that estimated in the bid as called for in section 160 of the specifications.

(d) Amount of oil per cubic yard (based on dredging as measured in place) to be added to the amount bid, for any yardage dredged which shall be found to consist of rock.

Alternative bids on the various items may be made as provided in Section 8 of the General Conditions.” [207—132]

Attached to the foregoing were the regular Navy specifications for fuel oil, the quantity being as specified as 1,500,000 barrels. The foregoing Exhibit 92, and the fuel oil speculations, and printed detailed specifications for the Pearl Harbor construction work, as well as the letter of March 7, 1922 (Exhibit 91), it was stipulated in open court were sent in exactly the same form to the Pan American Petroleum & Transport Company, the Standard Oil Company of California, the Associated Oil Company of California, the J. G. White Engineering Corporation, New York, and Ford, Bacon & Davis, San Francisco, counsel for the Government agreeing “that full information went to all of them.”

Neither Secretary Fall nor Dr. Bain at any time discussed with the witness the question what persons should receive those papers. He knew that they had been sent to the five companies which had been named because he signed the letters and telegrams to them in February.

From San Francisco on March 28, 1922, there was addressed to the witness a telegram from H. M. Storey, Vice-President of the Standard Oil Company, to which he replied from Washington under date of March 31st; these two telegrams were received in evidence as Plaintiff's Exhibits 93 and 94, respectively, and read as follows:

PLAINTIFF'S EXHIBIT No. 93.

"Hon. E. C. Finney,
Ass't Sec'y, Dept. of Interior,
Washington, D. C.

Referring to our recent conversation. We have given considerable thought to your proposal in the hope that we might offer some suggestion that would be of aid. We are now led therefore to offer the following: 'We are willing to accept naval reserve royalty crude oil from the government at the well and in exchange therefor deliver fuel oil at tide-water to the United States Navy, the United States Shipping Board, or such other agency as the government may designate.' We are not sure that this suggestion will be of interest but feel that we would like you to know just what we can do.

STANDARD OIL CO.

H. M. STOREY,

Vice-Prest."

PLAINTIFF'S EXHIBIT No. 94.

"H. M. Storey,
Standard Oil Company,
San Francisco, California.

Department feels that matter should be handled under specifications and plan heretofore submitted and cannot consider bid as suggested in your telegram.

FINNEY,
First Assistant Secretary." [208—133]

(Testimony of E. C. Finney.)

The conversation referred to in Mr. Storey's telegram took place in the witness' office in Washington some time in March, 1922. To the best of witness' recollection Mr. Sutro, the attorney for the Standard Company, and Dr. Bain were also present, and Sutro and the witness had some discussion regarding the law; Mr. Storey is not a lawyer and stated his views from the standpoint of a layman and Mr. Sutro expressed a doubt as to the right of the Department to carry through such an arrangement. Mr. Sutro and witness had something of a discussion of the law; the latter took from his bookshelf the statutes, particularly that containing the clause in the Naval Appropriation Act of June 4, 1920, and read the clause, line by line, emphasizing what he thought were the pertinent words; there was an argument back and forth which lasted for some time, Mr. Sutro expressing an opinion or a doubt as to the authority of the Department to pay for storage and fuel oil in storage by that method, and Judge Finney expressing the opinion that the law did warrant the Department in making such an arrangement because of its language. During that conversation witness does not think Mr. Storey definitely stated that his company would not bid on the proposals that had been sent out, but he expressed some doubt about it, relying, no doubt, on the advice of his attorney, Mr. Sutro. Mr. Storey may have said that it was doubtful whether they would bid but witness does not recall the exact language. It was some time later when the Sutro

(Testimony of E. C. Finney.)

written opinion was first shown the witness.

There was received at the Department letter dated March 3, 1922, which with its enclosure was not shown to the witness when it was received, and which was acknowledged under date of March 4, 1922. The said letter and acknowledgment, being Plaintiff's Exhibits Nos. 95 and 96, read as follows: [209—134]

PLAINTIFF'S EXHIBIT No. 95.

"FORD, BACON & DAVIS,

Incorporated.

115 Broadway, New York.

March 3, 1922.

Mr. H. Foster Bain, Director,
Bureau of Mines, Department Interior,
Washington, D. C.

Dear Sir:

I take pleasure in enclosing herewith copy of Mr. Sutro's opinion on the legality of the proposed oil exchange.

Will you be kind enough to send me two sets of blueprints and two sets of specifications for the oil storage facilities?

Mr. Storey advises me that he will arrive in New York this coming Sunday and expects to be in Washington on Tuesday.

Very truly yours,

CHARLES N. BLACK."

PLAINTIFF'S EXHIBIT No. 96.

"March 4, 1922.

Colonel Charles N. Black,
c/o Ford, Bacon & Davis, Inc.,
115 Broadway,
New York, N. Y.

Dear Colonel Black:

I am greatly obliged to you for the copy of Mr. Sutro's opinion which I am having studied here. I think we will be able to arrange a form of bidding which will meet the principal objections he has in mind, and I am sure we can back our plan with good legal opinion, since the matter happens to have been examined by attorneys outside as well as inside the service. I will give you the results later.

Meanwhile I note your request for two copies of the plans and specifications. We expect now to be able to send them out on Monday or possibly as late as Tuesday. I will be glad to see that copies reach you promptly.

I am delighted to know that Mr. Storey is coming East and will look forward with great pleasure to having the opportunity to discuss the situation with him here on Tuesday.

Cordially yours,

H. FOSTER BAIN,
Director." [209 $\frac{1}{2}$ —135]

Judge Finney was advised of Mr. Sutro's opinion on the occasion of the latter's visit in March and some time later, between that time and the 15th of April, Dr. Bain told him that he had had a conversation with Mr. Weil of the General Petroleum

(Testimony of E. C. Finney.)

Company in California and that Mr. Weil had expressed an opinion adverse to the proposed plan.

A lease covering approximately 142 acres in Section 34-30-24 east of M. D. M., Naval Reserve No. 1, between the United States and the Belridge Oil Company, under the Act of June 4, 1920, had been authorized prior to April 15th but was executed as of April 24, 1922, which indicated to the witness that it was actually signed after the latter date. This lease was signed on behalf of the Government by Mr. Finney as First Assistant Secretary of the Interior and by officers of the lessee on behalf of the Belridge Oil Company; when the written application of that company for a lease was filed Judge Finney took the matter up with the Bureau of Mines and discussed its various features, and then took it up orally with Secretary Fall, and explained briefly to him the proposition, its proposed acreage, its relation to adjoining privately owned lands, and the royalty which had been suggested, and the Secretary verbally agreed to the making of the lease, which was thereafter executed as above stated. This lease was admitted in evidence as Plaintiff's Exhibit No. 97. There was no advertisement and no competitive bidding for that lease.

Under date of February 8, 1922, a lease between the United States, signed on its behalf by the witness, was entered into with the Pan American Petroleum Company; that was awarded after competitive bidding, that company's bid being the best received; it recites that it is a lease under the provisions of the Act of June 4, 1920, and covers ap-

(Testimony of E. C. Finney.)

proximately 142 acres in the northeast corner of Section 2-31-24 east, M. D. M. It was received in evidence as Plaintiff's Exhibit No. 98.

Under date of February 8, 1922, a lease was entered into between the United States, the witness signing on its behalf, and the Pan American Petroleum Company for a strip of land in Section 2-31-24, immediately to the south of strip theretofore leased, so that the two covered the north half of that section; this lease of February 8, 1922, was made on a sliding scale of royalties, ranging from 12½ to 25 per cent, known as the Department's regulation royalties. [210—136] Regarding this lease the witness testified that when bids were received for a lease on the north strip of Section 2, as already testified to by him, he had an examination made of the records and found that all of Section 2 was covered by a pending application under the placer mining laws, which application was in the name of White and Coffin; they claimed a deposit of Fuller's earth; that application was pending before the local land office at Visalia, California; under the Department's rules another filing or lease on top of a pending application cannot be allowed; the pending application has to be disposed of first and the records clear; witness was about to take some steps for considering or adjudicating the above-mentioned pending mineral application when he received a letter from Mr. Cotter stating that his company, the Pan American, had acquired the White and Coffin mining application, and shortly thereafterwards Mr. Cotter made a proposal that

(Testimony of E. C. Finney.)

his company would convey to the United States title to the whole of Section 2 under the mining title if his company was given, under the leasing law, a lease to the whole of Section 2, outside of the north strip which had been the subject of bidding; witness prepared a written memorandum addressed to the Secretary reciting the facts and pointing out that to clear the records of the mining application by the ordinary procedure, which would involve probably a hearing and trial in the local office and the right of appeal, would take considerable time, and suggested the acceptance of a compromise offer which would expedite action on the pending leases. The Secretary authorized the leasing of the south half of the north half of Section 2 in accordance with that suggested memorandum. Thereupon a lease was made with the Pan American Company for the north 1173 ft. of Section 2 under that company's bid, specifying royalties on a sliding scale from $12\frac{1}{2}$ to 35 per cent on oil below 30 degrees Baume, and from $12\frac{1}{2}$ to 45 per cent on oils above that grade; and another lease, in consideration of the quitclaim of the White and Coffin title to the Government, for the remainder of the north half of Section 2 upon the regulation scale of royalties ranging from $12\frac{1}{2}$ to 25 per cent, that being the Department's standard scale of royalties in the settlement of mining claims. This lease was admitted in evidence as Plaintiff's Exhibit 99.

Under date of March 25, 1922, W. R. Ramsey, assignee of United Midway Oil Land Company, assigned to the Pan American Petroleum Company

(Testimony of E. C. Finney.)

the two leases theretofore awarded that company and its assignee and hereinbefore referred [211—137] to, which assignments to the Pan American Company were forwarded to the Secretary of the Interior by the Commissioner of the General Land Office with recommendation that they be approved, and they were each approved by E. C. Finney, First Assistant Secretary of the Interior, under date of April 7, 1922. The papers evidencing these assignments and the approval thereof were received in evidence as Plaintiff's Exhibits 100 and 101. By the middle of April, after the foregoing assignments, the only two lessees in Naval Reserve No. 1 were the Pan American Petroleum Company and the Beldridge Oil Company. In addition to advertising for offsetting strip leases already testified to, there had been an advertisement for bids for some offsetting near the center of the Reserve No. 1 surrounding what is called the Standard Oil Company's Section 36; these leases were to be of strips in Section 6 and Section 25 in that township, but no leases for these lands were awarded as no satisfactory bids were received. On April 15th witness had not heard of any other leases nor proposed leases except those he has already referred to.

Prior to the middle of April Judge Finney mentioned to Secretary Fall the discussion he had had with Mr. Sutro, but the Secretary agreed with Finney's view rather than with Mr. Sutro's; in other words, the witness and Mr. Fall both agreed that this thing was legal. This conversation between Mr. Finney and Mr. Fall was some time

(Testimony of E. C. Finney.)

after the former had his conversation with Mr. Sutro in March, 1922, and was prior to April 13th of that year because Mr. Fall left the Department and the City of Washington on April 13th to go to New Mexico. A few days before the Secretary's departure, Dr. Bain and Mr. Finney were in his office and Mr. Fall asked them how the proposed Pearl Harbor matter was getting along; they told him that the bids were not to be opened before April 15th; he expressed some disappointment, witness thinks, at that, stating that he desired to close the Teapot-Sinclair matter and this matter at the same time or about the same time, and was a little impatient, apparently, at the delay in the Pearl Harbor matter. Dr. Bain and Mr. Finney explained that the delay had been occasioned by the various changes which were made in the specifications; that it had been necessary to give considerable time to the Pearl Harbor matter so that the bidders could appraise themselves as to the conditions and that the last order had fixed April 15th as the day of the opening of bids and that bids could not be opened before that time. The [212—138] Secretary did not make any suggestion as to any other way of closing the matter up other than by waiting until the bids came in and were opened. Plaintiff thereupon offered in evidence, as Plaintiff's Exhibit No. 102, letter addressed to the Honorable Edwin Denby, Secretary of the Navy, dated April 12, 1922, reading as follows: [213—139]

PLAINTIFF'S EXHIBIT No. 102.

"My dear Mr. Secretary:

We have had some difficulty and delay in the matter of contracts for the construction of storage tanks at Pearl Harbor, for the following reason, to wit: The construction companies have no use for oil and can not, of course, take our crude oil and exchange fuel oil therefor. The oil companies, with whom such exchange must be made, are not engaged in such construction work as appears to be necessary to provide the storage at Pearl Harbor. The consequence has been that we must submit for bids propositions to the oil companies, and they in turn must submit bids based upon naval specifications, not only for the purchase of tanks, etc., but also for the purpose of doing the necessary construction by way of dredging, wharfage, excavation, cement work, etc. Our proposition, therefore must necessarily involve a profit on the construction to be made by the oil company in addition to any profits in oil exchange. If we were in a position to effect the oil exchange, upon the one hand, and having established a credit, to use the cash derived from such credit with which to make our own contracts, we would thus save the profits which will be made by the oil companies.

For the reasons above given I have drawn a proposal amendment to be attached to line 8, page 25, of the naval appropriation bill (or to be attached to any other proper paragraph in said bill), which amendment reads as follows:

'Provided further, That storage of fuel oil

from naval oil reserves may be provided either by exchange of oil for such storage or (and) by sale of royalty oil in sufficient amount and the payment of the proceeds thereof for such necessary storage facilities'—

And a copy of which I am handing you.

You will note that the amendment by its terms recognizes our right to obtain storage through exchange of oil, but further authorizes us to sell royalty oil and obtain storage with the proceeds of such sale. If adopted, this will save a great deal of trouble, and in the present cases which we are considering might save the Government several hundred thousand dollars—possibly half a million dollars.

I am therefore holding up the proposed contracts indirectly by taking abundant time for the consideration of bids, etc., with the hope that meantime this amendment may be adopted and that we may obtain the results suggested by the large saving which I am confident will accrue.

If you agree with me in this matter, would you have the amendment presented to Mr. Kelley with your approval? I am confident that should you see your way clear to take such action the Congress would unhesitatingly adopt the amendment. It may or may not be necessary to go fully into the details of what we are trying to do at Pearl Harbor; of course impressing Congress with the view that too great publicity should not be given to the subject.

Very sincerely yours,

ALBERT B. FALL." [214—140]

(Testimony of E. C. Finney.)

It was agreed between counsel for the parties that the Mr. Kelley referred to in the above letter was Honorable Patrick H. Kelley, member of Congress from Michigan, at the time chairman of the Sub-Committee on Naval Appropriations of the house of Representatives. The witness testified that he does not recall having been familiar with the preparation of the above letter or having at that time any discussion with the Secretary about it; nor did he discuss at about that time with Secretary Fall the question of whether a proviso in the naval appropriation bill such as mentioned in the above letter would cure any invalidity in the exchange of fuel or royalty oil. With reference to the mention in Exhibit 102 of contracts touching the naval reserves, the day Secretary Fall left Washington he showed Mr. Safford, his Administrative Assistant, and the witness a copy or copies of contract relating to the naval reserve in Wyoming, known as the Teapot Dome, stating that he was leaving it in his desk and giving Mr. Safford the key to the drawer of the desk. The witness' recollection is that Secretary Fall did not desire to give out information with respect to that contract until after the Pearl Harbor matter had been closed. The Secretary at the time stated that he had executed the Mammoth Oil contract on Teapot Dome.

Under date of April 12, 1922, there was addressed

to Secretary Denby the following letter, introduced in evidence as Plaintiff's Exhibit No. 103: [215—141]

PLAINTIFF'S EXHIBIT No. 103.

"My Dear Mr. Secretary:

I thank you for handing me the telegram from the Chicago Bridge & Iron works. A similar telegram was received by myself this morning and immediately replied to. I am herewith returning the telegram which you transmitted to me, with a copy of my reply to their message to me, which I think will certainly satisfy the protestants.

This, however, is but an illustration of the difficulties which we have to contend with when we must contract with constructors through an oil company rather than being enabled to contract directly, as will be the case if the amendment to the appropriation bill, which I have called to your attention this morning, should be adopted.

In other words, if we could make our personal contract with the oil companies and thus having a line of credit established then contract direct through competitive bids or otherwise, with the construction companies such as the Chicago Bridge & Iron Works, we would save money.

Of course, these parties merely do not understand the situation.

Very respectfully yours,

ALBERT B. FALL."

The telegram referred to in the foregoing is dated Chicago, Illinois, April 12, 1922, is Plaintiff's Exhibit No. 104, and reads:

PLAINTIFF'S EXHIBIT No. 104.

"Honorable Albert B. Fall,
Secretary of Interior,
Washington, D. C.

We understand the Interior Department has invited a selected list of bidders to submit bids privately at noon next Saturday, April 15, covering the construction of fuel oil storage plant at the United States naval station, Pearl Harbor, Hawaii. This work has not been advertised and has been handled with the utmost secrecy. We sent a representative from our New York office to Washington last week who was refused a set of plans and specifications covering this work and was advised pointedly that the Interior Department did not wish to have us bid. This seems almost unusual procedure for a Government department, and we are wiring this protest, urging that immediate steps be taken to postpone the opening of bids on this work and the awarding of the contract until other reputable contractors may be given an opportunity to prepare and submit bids. Will appreciate your kindness in wiring answer promptly at our expense as time is short and quick action must be taken.

CHICAGO BRIDGE & METAL WORKS."

To that reply dated at Washington, April 12, 1922, was sent, which reply is Plaintiff's Exhibit No. 105, and reads:

PLAINTIFF'S EXHIBIT No. 105.

"Chicago Bridge & Iron Works,
Chicago, Ill.

You are informed that neither this department nor Navy Department have solicited privately or otherwise, bids from any construction companies whatsoever for any oil-storage construction at Pearl Harbor or elsewhere. Under the law we are simply compelled to deal directly with oil producers for exchange crude for fuel oil including storage. Several oil companies have been bidding under the law, and I understand possibly Associated Oil, Pan American, and Standard of California may all offer bids. No publicity has been given, as we regard it no one's business particularly as involving military naval plans. It is possible one of these oil companies or others may be soliciting subcontracts material and construction. We know nothing of it. We can not entertain your protest nor is same or any criticism warranted.

FALL,
Secretary."

April 12, 1922, the following telegram was sent from Chicago, the same being Plaintiff's Exhibit No. 106: [216—142]

PLAINTIFF'S EXHIBIT No. 106.

"Hon. Albert B. Fall,
Secretary of the Interior,
Washington, D. C.

Thanks for your telegram. We are advised that the Pittsburgh-Des Moines Steel Co., of Pittsburgh,

Pa., have been furnished plans and specifications on the Pearl Harbor fuel oil plant. This company is one of our chief competitors, and if the above report is true feel that we have a perfectly good right, as a tax-paying American corporation, composed of American citizens to protest for not being given an opportunity equal to that afforded our competitors to bid on Government contract work. While not familiar with the law you refer to, can not understand why if we are willing to accept contract on basis of furnishing fuel oil in exchange for crude oil, why we should not be given the same opportunity to bid as oil producers. We fully appreciate the necessity of not divulging Government military plans to the public and assure you we are not endeavoring to invade the private military plans of the Navy, but simply asking for the same consideration that is being accorded our competitors.

CHICAGO BRIDGE & IRON WORKS."

Secretary Denby addressed to Secretary Fall on April 12, 1922, a letter which enclosed a telegram addressed to the Secretary of the Navy, in substance the same as above Exhibit 104; Mr. Denby's letter, offered in evidence as Plaintiff's Exhibit No. 107, reads as follows:

PLAINTIFF'S EXHIBIT No. 107.

"My dear Mr. Secretary:

Enclosed herein I send you a telegram just received from the Chicago Bridge & Iron Works, Chicago, Ill., with reference to bids for the con-

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struction of a fuel oil storage plant at Pearl Harbor Naval Station, to which no reply has as yet been made.

Sincerely yours,

EDWIN DENBY."

Telegram dated Chicago, Illinois, addressed to Secretary Fall was received as Plaintiff's Exhibit No. 108 and is as follows:

PLAINTIFF'S EXHIBIT No. 108.

"Honorable Albert B. Fall,
Secretary of the Interior,
Washington, D. C.

Our clients Chicago Bridge and Iron Works have handed us your telegram April 12th regarding Pearl Harbor fuel oil plant in which you state that under the law you are simply compelled to deal directly with oil producers for exchange crude for fuel oil including storage stop. Please wire our expense immediately what law you refer to stop. We do not know of any law giving oil producers greater rights in bidding on government work than are enjoyed by other bidders willing to accept same conditions.

AF 12.

DYRENFORTH, LEE, CRITTON and
WILES,

Attorneys.

Telegram from Chicago dated April 14th was introduced as Plaintiff's Exhibit No. 109 and follows:

PLAINTIFF'S EXHIBIT No. 109.

"Hon. Secretary Fall,
Department of the Interior,
Washington, D. C.

Please wire our expense reply to our wire of April twelfth regarding government work at Pearl Harbor.

DYRENFORTH, LEE, CRITTON &
WILES." [217—143]

On April 15, 1922, there was sent from the Department of the Interior in Washington the following telegram (Plaintiff's Exhibit No. 110):

PLAINTIFF'S EXHIBIT No. 110.

"Dyrenforth, Lee, Chritton & Wiles,
Attorneys, Chicago, Ill.

You wires twelfth and fourteenth interest Chicago Bridge and Iron Works Company received absence Secretary Fall. Before leaving he wired your clients fully regarding matter referred to. In addition Chicago Bridge & Iron Works Company took up this matter through Senators McCormick and McKinley to whom replies in detail by letters signed by Director Bain, Bureau of Mines, at direction of Secretary, were sent and no doubt forwarded to Bridge Company.

C. V. SAFFORD,
Administrative Assistant."

To this reply dated at Washington April 17, 1922, Plaintiff's Exhibit No. 111, was addressed to Mr. Safford, reading:

PLAINTIFF'S EXHIBIT No. 111.

"Dear Sir:

We acknowledge receipt of your wire of April 15, replying to our wires of the 12th and 14th. In the wire received by our clients from Secretary Fall, he referred to a particular law under which the department was proceeding. If it is not too much trouble, we would be very much pleased to have you give us the number, name, date, etc., of this law, so that we can locate it in our library here.

Thanking you in advance for this information, we remain

Yours very truly,

DRYENFROTH, LEE, CHRITTON &
WILES.

By M. A. HIRSCHL."

At the foot of the above exhibit there is this notation in pencil: "Representative called and Mr. Safford explained to him."

As Plaintiff's Exhibit No. 112 two telegrams, dated April 13, 1922, the first from East Chicago, Indiana, and the second from Washington, were read in evidence, as follows:

PLAINTIFF'S EXHIBIT No. 112.

"Hon. Albert B. Fall,

Secretary of Interior Department,
Washington, D. C.

We are informed Interior Department is receiving private bids for oil station plant for Pearl Harbor. We have seen no published bids for this work

(Testimony of E. C. Finney.)

and wish to have privilege for bidding on all or part.

Will you please advise at our expense?

GRAVER CORPORATION,

P. S. GRAVER,

Vice-President."

"Graver Corporation,

East Chicago, Ind.:

Interior Department is not receiving bids for construction. Parties proposing to handle naval reserve oils are, I understand, negotiating with constructors. Matter to which you refer is the handling of the naval oil for the United States Navy through cooperation Interior and Navy Departments. Storage of same involves construction but bids are only solicited or received from operating oil companies or parties proposing to operate oil lands and furnish fuel oil in exchange, the same to be placed in permanent storage.

FALL,

Secretary." [218—144]

Secretary Fall did not refer any of these inquiries to Mr. Finney nor discuss them with him. Mr. Finney became acquainted with the foregoing telegraphic correspondence at some later date, he thinks after April 15th, but he does not recall distinctly.

On April 12, 1922, Secretary Fall addressed the following letter to the Secretary of the Navy (Plaintiff's Exhibit No. 113):

PLAINTIFF'S EXHIBIT No. 113.

"My dear Mr. Secretary:

I am herewith handing you one of the triplicates

of the contract between the Mammoth Oil Company upon the one hand, and myself and yourself upon the other.

You have signed this contract in duplicate, one copy of which has been delivered to the Mammoth Oil Company, and the other is retained for the files of this office. The third, an exact triplicate, only lacks your signature, and I am handing it to you for your files.

The original retained by this office has attached to it deeds from the 'Belgo Oil Company,' 'Pioneer Oil Company,' etc., to the Mammoth Oil Company; quitclaim deeds of the Mammoth Oil Company to the United States for various lands in the Teapot Dome; also authorization of the Mammoth Oil Company for the execution of these deeds and the execution of the contract; also a temporary bond, approved by myself, to be submitted later upon demand, said bond being in the sum of \$250,000.

I am also handing you a copy of memorandum which I have made for the government of my staff in giving out any information concerning these contracts.

You will note that this memorandum simply states the general policy; distinguishes between the handling of naval oils and other governmental royalty oils; states the necessity for following the present policy, and states generally what we are doing through the exchange of crude oils for fuel oils.

I am also attaching a memorandum setting forth in very brief outlines, the salient provisions of the Mammoth Oil contract, which I am handing you.

I have instructed my office force to give out nothing of the details of any of these contracts and to retain in a secure place the original contract with the deeds, etc. attached. This for the reason that it has been customary to file all contracts with the general files, where by inadvertence they might be subject to examination by parties not entitled to see them.

I am particularly anxious that no details should be given out pending the final agreement upon the contracts for the construction of reservoir facilities in Hawaii.

Very sincerely yours,
ALBERT B. FALL."

With the foregoing there was enclosed a memorandum read in evidence as Plaintiff's Exhibit No. 114, as follows:

PLAINTIFF'S EXHIBIT No. 114.

"DEPARTMENT OF THE INTERIOR,
Office of the Secretary.

April 13, 1922.

MEMORANDUM:

Referring to constant requests for information concerning rumors or statements [219—145] as to disposition of naval reserve oil lands:

The general policy in these matters has been given publicity. In carrying out this general policy as it is being carried out through the cooperation of the Navy Department and of the Interior Department, it is being handled by the Secretary of the In-

(Testimony of E. C. Finney.)

terior and the Secretary of the Navy but not in a routine manner by either department. The consequence is that the officials of the bureaus of either department are not able to give out any information whatsoever as to the detail of any plans of any kind or character." [220—146]

The other two enclosures with Exhibit No. 113 consist of a brief on the Mammoth Oil Company lease.

As Mr. Finney already stated, Secretary Fall on the day he was leaving Washington, April 13th, or the day before, said that he did not desire information given out as to the Mammoth contract until the Pearl Harbor matter was closed; witness saw or was given a copy of the memorandum last above quoted which was issued for the guidance of the officials of the Department and which he followed by not giving out information.

Judge Finney opened bids received April 15, 1922; there was a stenographer present to make a memorandum and in brief the stenographer's memorandum is an accurate statement of what happened and who were present. Thereupon as Plaintiff's Exhibit No. 115 the said memorandum was read in evidence and is as follows:

PLAINTIFF'S EXHIBIT No. 115.

"April 15, 1922.

Meeting held in the office of Acting Secretary Finney, Department of the Interior, at 12 o'clock noon, April 15, 1922, for the purpose of opening bids for the furnishing of 1,500,000 barrels of fuel

oil in storage and the construction of storage facilities at Pearl Harbor, Hawaii. There were present the following:

Mr. J. J. Cotter, representing the Pan American Petroleum & Transport Co.; Mr. Gano Dunn, representing the J. G. White Engineering Corporation; Secretary to Mr. A. C. McLaughlin, representing the Associated Oil Co.; Mr. J. C. Hammack and Mr. J. C. Trimble, representing the Pittsburg-Des Moines Steel Co.; Mr. E. M. Talcott, representing W. R. Grace & Co.

There were also present Messrs. Bain, Ambrose, Tough, and Campbell of the Bureau of Mines.

The Secretary said: I have before me three bids. It may be that some other bids are in the mails and have been received somewhere in this department, which is rather a large one, as you know. They may be upstairs, but of course in the event the bid was in the mails and received in time, we will reserve the right to open it and consider same, although not here at this moment.

I will now proceed to open the bids which are before me.

The first bid opened, which I have marked 'A,' is signed by H. M. Storey, vice-president of the Standard Oil Co.

The second bid opened, which I have marked 'B,' is from the Pan American Petroleum & Transport Co., and comprises two papers, proposal A and alternative proposal B.

The third bid, which I have marked 'C,' is signed

(Testimony of E. C. Finney.)

by the Associated Oil Co., Sharon Building, San Francisco, Calif.

The Secretary then read the substance of the bids, and thereafter said:

Bids will be carefully considered and the conclusion of the department announced later, of which bidders will be advised." [221—147]

Thereupon there was offered and received in evidence as Plaintiff's Exhibits 116, 117, 118a and 118b the bids which were received and opened on April 15th as reported in the foregoing memorandum, said exhibits being, respectively, as follows:

Bid of the Standard Oil Company dated San Francisco, California, April 3, 1922, signed by the company per H. M. Storey, Vice-President, addressed to the Secretary of the Interior, stating that the Standard Oil Company will enter into a contract with the Government, agreeing to accept total amount of the Government's royalty crude petroleum oil produced in either or both naval reserves Nos. 1 and 2, but shall not be obligated to accept more than 20,000 barrels in any one day or 300,000 barrels in one month. In exchange for said royalty crude oil Standard Oil Company will agree to deliver into the tankage of the Government at Pearl Harbor, Hawaii, and/or into tank ships of the Government at the company's dock, Richmond, California, and/or into tank ships of the Government at the company's dock, San Pedro, California, a quantity of fuel oil equivalent in value to the royalty crude oil delivered by the Government to the company. For the purposes of the

(Testimony of E. C. Finney.)

contract, the value of the royalty crude oil delivered thereunder shall be the prices the Standard Oil Company may offer from time to time to producers in the Midway-Sunset oil field, Kern County, California, for crude oil of like gravity, and the value of the fuel oil delivered thereunder shall be the Standard Oil Company's current selling prices for fuel oil at places of delivery, Pearl Harbor, Richmond, or San Pedro. The bid gives the prices offered by the company for crude oils of various gravity in the Midway-Sunset oil field at the date of the proposal and also the then prevailing prices of fuel oil at the places of proposed delivery. The ratios of exchange as of the date of the proposal are set forth together with statement of what fraction of a barrel of fuel oil will be exchanged for each barrel of crude. It is provided that whenever and as often as and while at any time during the period of the contract the prices offered by the Standard Oil Company to producers in the Midway-Sunset oil field for crude oil of like gravity, or the Standard Company's selling prices for fuel oil at the points hereinbefore specified, shall be higher or lower than the prices herein set forth, as of the date of this proposal, then said ratio shall be changed to correspond with such higher or lower prices. The Standard [222—148] Oil Company will undertake to make advance deliveries of fuel oil at Pearl Harbor, Richmond, and San Pedro in excess of the receipts of royalty crude oil, but such advance deliveries shall not at any time exceed the quantity of fuel oil due the Government by more

(Testimony of E. C. Finney.)

than 100,000 barrels. In the event the Government does not take delivery currently of its fuel oil, the company will undertake to carry the surplus fuel oil due the Government as a credit to the Government, free of charges, in an amount not to exceed 500,000 barrels. Deliveries of fuel oil at Pearl Harbor shall be made from vessels into Government's pipe-line connected with Government's tankage in quantities and at times mutually satisfactory, but the company shall not be obligated to deliver less than 60,000 barrels in any one cargo. Deliveries at Richmond and San Pedro shall be into Government's tank ships at the Standard Company's docks and shall not exceed 70,000 barrels in any one day at either point or 300,000 barrels per month. The bid recites the specifications of the fuel oil. A surety bond of \$100,000 for performance is tendered. It is provided that the proposed contract shall be for a period of four years from its date unless the tankage at Pearl Harbor shall be filled before the expiration of four years in which event contract may be terminated by either party on thirty days' notice.

Bid of the Associated Oil Company is dated San Francisco, California, April 15, 1922, and is signed by the company per A. C. McLaughlin, Vice-President, is addressed to the Secretary of the Interior, and, in substance, proposes that "Subject to ratification and/or confirmation by Congress of the authority of the Secretary of the Interior and/or the Secretary of the Navy, to agree to exchange and/or to exchange oil produced from the naval petroleum

(Testimony of E. C. Finney.)

reserves for storage facilities and appurtenances, the Associated Oil Company, hereby proposes to furnish all material and construct the fuel oil storage plant called for in full compliance with the" plans and specifications sent out under cover of letter dated March 1, 1922, "to be located at the United States naval station, Pearl Harbor, Hawaii, and proposes to furnish 1,500,000 barrels of fuel oil into said storage; and said Associated Oil Company proposes to accept as payment" crude oil from Naval Reserve No. 2 in quantities specified in the bid which also provided that the quantity would increase or decrease with changes in the posted field prices and would differ as the gravity of the oil differed. [223—149]

Pan American Petroleum & Transport Company's Proposal A is in substance, as stated by counsel for plaintiff and agreed by counsel for the defendants, in strict accordance with the invitation for bids and for a larger number of barrels of oil than that company's Proposal B, the comparison of the two proposals, it being agreed by counsel for the parties in open court, being accurately shown in Plaintiff's Exhibit 119, *infra*, and Pan American Petroleum & Transport Company's Proposal A, it is further stated and agreed, does not contain the clause found in Proposal B which agrees to give the Government the benefit of any saving in cost, and does not contain the provision for a preferential right. Counsel for both parties agree that these are the only three material differences between Proposals A and B. Proposal

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(Testimony of E. C. Finney.)

A was received as Plaintiff's Exhibit 118a and Proposal B, received as Exhibit 188b, is set forth in full following Exhibit "B" to the Amended Bill of Complaint.

The witness Finney thereupon testified that after he had opened the bids and there had occurred the proceedings set forth in the above-quoted memorandum, he turned all of the bids over to Mr. Ambrose and Dr. Bain of the Bureau of Mines with directions to study them and submit a report and recommendation; that was on Saturday, April 15, 1922; he received a report back in the shape of a memorandum from Mr. Ambrose on April 17th, which memorandum the witness identified and it was thereupon offered in evidence as Plaintiff's Exhibit 119 and is as follows: [224—150]

PLAINTIFF'S EXHIBIT No. 119.

"April 17, 1922.

Memorandum to Secretary Finney:

Bids on the Pearl Harbor fuel oil storage project were opened in the office of Secretary Finney at 12 o'clock noon, April 15, 1922. The three sealed bids received were (A) Standard Oil Co. of California, (B) Pan American Petroleum & Transport Co., consisting of two proposals, and (C) Associated Oil Co.

The following table gives a comparison of the different bids with an estimate made by Lieutenant Keating, of the Navy Department, of the cost of the storage facilities at Pearl Harbor":

And then he states them.

"Bid	Company	Barrels Royalty Oil	Present Value Royalty Oil	Interest Rate for Advance- ments Per cent	Extras
A	Standard Oil Co.				
B1	Pan American Petroleum & Transport Co.	6,092,709	\$6,701,979.90	5	Same in B1, B2 and C.
B2	do	5,878,905	6,466,795.50	5	
C	Associated Oil Co.	6,201,903	6,822,093.30	5	do
D	Navy Department estimates	5,850,000	6,435,000.00		

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Bid (A) — Standard Oil Co. of California.

This bid was confined to the exchange of royalty crude oil for fuel oil at Pearl Harbor on an exchange basis according to prices at the date of delivery of crude oil to the pipe line company. There was no offer for the erection of storage facilities.

Bid (B) — Pan American Petroleum & Transport Co.

Proposal (A) — This company agrees to erect and fill the storage at Pearl Harbor for 6,092,709 barrels of 14° to 17.9° crude oil which at the present price of \$1.10 per barrel equals \$6,701,979.90. The proposal for an increase or decrease in the proposal sum of 6,092,709 barrels of crude oil in case of an increase or decrease in the number of piles, the length of the piles and the amount of dredging, is expressed in barrels and according to Lieutenant Keating of the Navy the figures are reasonable. This proposal provides interest for advancements by the Government or the contractor at the rate of 5 per cent per annum.

Proposal (B) — The company agrees to erect and fill the storage at Pearl Harbor for 5,878,905 barrels of 14° to 17.9° gravity crude oil which at the present price of \$1.10 per barrel equals \$6,466,795.50. The bid regarding increase in the number of piles, increase or decrease in length of piles, dredging, rate of interest, etc., are the same as in proposal (A) above. The company further agrees in case this bid is granted, to give the Government any advantage which may result in the construction and erection of storage facilities for lesser cost

than represented by the number of barrels of 14° — 17.9° oil used in estimating the cost of erection and construction of the storage facilities. Proposal (B) is made on the condition that if accepted the Secretary of the Interior will agree to give the company preferential right to drill any lands within naval petroleum reserve No. 1, California, which the Government may decide to lease.

Bid (C) — Associated Oil Co.

The Associated Oil Company agrees to erect and fill the storage at Pearl Harbor for 6,201,903 barrels of crude oil of 14° to 17.9° gravity which at the present price of \$1.10 per barrel equals \$6,822,093.30, but limits the oil that it will [225—151] take to naval reserve No. 2. The proposal of this company for additional costs due to length of concrete piles, increase in number of piles, amount of dredging, is expressed in dollars and is the same as both bids of the Pan American Petroleum & Transport Co., which are expressed in terms of barrels of crude oil. The Associated bid also goes into considerable detail regarding their interpretation of the excavation, filling, electrical work, etc., but Lieutenant Keating has stated that practically all of their interpretations are satisfactory. The statement regarding the method of computing the ratio which a barrel of fuel oil at Pearl Harbor will bear to the crude oil delivered in the field for different changes in price, is not believed to be a proper interpretation, but it is thought that in case the Associated Oil Co. is granted the bid, this ratio can be expressed in a way entirely satisfactory to

both parties. The rate of interest on all amounts advanced by either party, proposed by the Associated Oil Co. is 5 per cent, the same as that proposed by the Pan American Petroleum & Transport Co.

Comparison of Bids.

The bid of the Standard Oil Co. of California is confined to the exchange of royalty crude oil for fuel oil at Pearl Harbor, based upon current field prices of crude oil and the posted price of the Standard Oil Co. for fuel oil at Honolulu. It is not believed that this is any better exchange than that offered by either the Associated Oil Co. or the Pan American Petroleum & Transport Co.

It is believed that both proposals submitted by the Pan American Petroleum & Transport Co. are better than the bid of the Associated Oil Co. for the following reasons: (1) The highest bid (proposal A) of the Pan American Petroleum & Transport Co. is \$120,113.40 less than the bid of the Associated Oil Co. and the lowest bid (proposal B) of the Pan American is \$355,297.80 less than that of the Associated Oil Co. (2) The Associated Oil Co. proposes to take only oil from naval reserve No. 2. This would extend the life of this contract to perhaps a period of eight years while the Pan American Petroleum & Transport Co. proposes to take the oil from both reserves Nos. 1 and 2, in which case, the contract would not have a life of over four or five years. (3) The rate of interest for advancement by either the Government or the contractor is the same in the bids of both companies and also the increase

or decrease in number of piles, length of piles and dredging is the same.

The difference in the two proposals submitted by the Pan American Petroleum & Transport Co. is as follows: In proposal (A) they will do the entire job for 6,092,709 barrels of 14° to 17.9° gravity oil, which at the present price of \$1.10 per barrel is valued at \$6,701,979.90, while in the second proposal (B) they will fulfill the contract for 5,878,905 barrels of the same grade of oil which at the present price of \$1.10 is \$6,466,795.50, provided that in proposal (B) they will give the Government any benefit in saving which may be effected in handling this job, and provided that this company gets the preferential right to drill any land in naval reserve No. 1 which the Secretary decides to lease. It therefore is reduced to a matter of deciding whether or not the Secretary decides to grant this preferential right to the Pan American Petroleum & Transport Co. and make certain that the job will be accomplished at a saving of \$235,184.40 less in proposal (B) than in proposal (A).

Recommendations.

It is recommended that proposal (B) of the Pan American Petroleum & Transport Co. be accepted for the following reasons: (1) It is the lowest bid submitted. (2) The Pan American Petroleum & Transport Co. has drilled leases already granted to them in naval reserve No. 1, in a manner satisfactory to the Department of the Interior. (3) By granting the preferential right to drill any leases granted in naval reserve No. 1 the department is

certain of a direct saving of 235,184.40, and inasmuch as this proposal provides for giving the Government any benefit of a saving accomplished by doing the work at a less cost than estimated, the Government also has a possibility of saving more than \$235,184.40. (4) The meaning of the term "preferential right" should be clearly outlined in the contract and should be stated somewhat as follows: The term "Preferential right" means that the contractor is given a right to drill such leases in naval petroleum reserve No. 1 as the Secretary [226—152] may decide to lease, provided that the contractor makes an offer to drill up any tract requested by the Secretary according to the terms and conditions approved by the Secretary of the Interior, and in the event that the Secretary desires to drill a certain tract of land that the contractor does not meet the royalty or other requirements of the department, then this tract of land shall be thrown open to competitive bidding and the Secretary of the Interior shall award the tract drilled to the highest bidder. The contractor shall have a right to bid in the competitive bidding, but the term "preferential right" does not in any event mean that the contractor has the right to drill the land under the highest competitive bid submitted, because if this were allowed the second time a tract was thrown open to bid the Government would not have any bidders.

It should be further agreed to in this contract that the preferential right should extend only to leases to be granted to protect interests of the Gov-

(Testimony of E. C. Finney.)

ernment during the life of this contract and the acreage should be limited to what is practically the east half of naval reserve No. 1, or that land located in T. 30 S., R. 24 E., and T. 31 S., R. 24 E.

A. W. AMBROSE."

When Judge Finney received the foregoing report from Mr. Ambrose he called Ambrose and Admiral Robison into conference in his office; he does not recall distinctly whether Dr. Bain was there or not, but does remember distinctly that Ambrose and Robison were there; he discussed the matter with them and on the same day wired Secretary Fall, who was at his home in Three Rivers, New Mexico, the following telegram (Plaintiff's Exhibit No. 120):

PLAINTIFF'S EXHIBIT No. 120.

"Washington D. C., April 17, 1922.

To Hon. Albert B. Fall,

Three Rivers, New Mexico.

California reserve bids received and opened Saturday. Standard bid was for exchange only. Associated bid for oil in number two reserve only, six million two hundred and one thousand nine hundred barrels. Pan American bid oil from both reserves, six million, ninety-two thousand seven hundred barrels, with an alternative Pan American bid, five million eight hundred and seventy-eight thousand and nine hundred barrels, if given preference for drilling required by government in future in reserve number one. Pan American bid also advantageous, in that it provides for reduction in cost in case storage facilities erected for less money than estimated.

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In opinion Ambrose, Robison and myself, Pan American alternative bid best offered and should be accepted.

Referring telegram Safford and myself this morning, regarding Kendrick resolution. Similar demand for report had been made upon Secretary Denby. Denby desires complete publicity Navy Department's part in opening naval reserves. Suggest you authorize closing contract with Pan American. Details will require approximately three or four days to arrange. On conclusion this contract suggest you publish complete information concerning opening of all reserves. In any event, suggest you telegraph your desires to Secretary Denby at once.

If you agree with recommendation regarding California reserves, why not authorize me by wire to make award, and yourself immediately make public the entire disposition of all naval reserve contracts, with reasons therefor.

FINNEY,
SAFFORD."

Plaintiff thereupon offered in evidence as its exhibit No. 121 the reply to the foregoing, which is a telegram reading: [227—153]

PLAINTIFF'S EXHIBIT No. 121.

"Three Rivers, New Mexico, April 18, 1922.
Finney and Safford,
Interior Department,
Washington D. C.

Telegram Number Two reference California bids, if Admiral Robison and Secretary Navy think best

(Testimony of E. C. Finney.)

close immediately on basis Pan American deal and if authorized by Denby proceed immediately award and close contract and make public entire policy in fullest and completest manner.

Reference Wyoming oil you authorized if think best also give publicity concerning present status contract Shipping Board and my announced policy offering all royalty oils for sale with principal object to bring third competitor into Wyoming fields with other pipe lines and refineries and obtain highest prices for oils. Of course in giving publicity emphasize fact Mammoth Oil Company presented deeds for all outstanding claims of title of every character.

FALL,
Secretary,"

The witness then testified that upon receipt of the foregoing telegram he gave notice of the award on the 18th of April and he identified and there was thereupon offered in evidence as Plaintiff's Exhibit No. 122, the following letter:

PLAINTIFF'S EXHIBIT No. 122.

"Department of the Interior,

Washington, April 18, 1922.

Pan American Petroleum & Transport Co.,

120 Broadway, New York City, N. Y.

Gentlemen: Your bid filed April 15, 1922, for the exchange of Government royalty oils from naval reserves Nos. 1 and 2, California, for fuel oil and storage for naval purposes at Pearl Harbor, Hawaii, has been examined in connection with other bids sub-

(Testimony of E. C. Finney.)

mitted, and your alternative bid B found to be the lowest and best bid received. Accordingly award is hereby made to you of said contract, per your alternative bid B. Formal contract is being prepared for execution.

Respectfully,

E. C. FINNEY,

Acting Secretary," [228—154]

Mr. Finney had never heard that any preferential right was desired in Naval Reserve No. 1 by any bidder for this Pearl Harbor contract prior to April 15, 1922, nor until after the bids were opened on that day. There was no discussion at the time of the opening in his presence of the probability or likelihood of any future leasing. On April 18, 1922, when he sent the letter last read in evidence (Exhibit No. 122), he does not think or recall that he had, up to that time, heard of any additional leasing to be done in Naval Reserve No. 1. Immediately after April 18th there was started the preliminary work of getting up contract, this being done in the Bureau of Mines in conjunction with the Navy; sometime between the 18th and 23d there was a conference in Mr. Finney's office at which, in addition to himself, were present Mr. Cotter, Admiral Robison, Mr. Ambrose, and possibly one or two others, with respect to the proposed lease or contract, and at that time there was discussed the question of a preferential right for leasing certain areas. Mr. Cotter wanted some definite understanding or stipulation written into the contract as

(Testimony of E. C. Finney.)

to areas which would be leased and a time limit fixed. That was discussed between Mr. Ambrose, Admiral Robison and Judge Finney, and it was finally tentatively agreed at least that within one year from the date of the contract the Government would award a lease to the northeast quarter of Section 3 of the reserve, 160 acres, and to a strip of the east half of Section 34 just west of the Belridge lease, covering probably 140 or 150 acres, at royalties running up from 12½ to 45 per cent. As regards how that happened to be made the subject of a letter outside of the contract, the witness believes Mr. Cotter wanted some definite assurance in writing and it is "our practice as a rule, or my practice at least," to put those things in writing; he is not clear as to why it was not included in the formal contract; it was possibly because the rough draft of the contract had been made or because it was satisfactory to Mr. Cotter to have it in a letter. Mr. Finney dictated the draft of the letter of April 25, 1922 (Exhibit "E" to Amended Bill of Complaint), in the presence of Mr. Ambrose and Admiral Robison; he thought it desirable to advise Secretary Fall as to the matter, and as to all details relating to the proposed contract, and on April 20th he sent Mr. Ambrose to Three Rivers to acquaint Secretary Fall with all the details in the matter. Mr. Ambrose took with him a copy of his memorandum report to the [229—155] witness analyzing the bids (Exhibit 119 above), the proposed form of contract, and possibly a copy of the April

(Testimony of E. C. Finney.)

25th letter, though the witness is not clear as to whether Ambrose took a copy of that letter, but Ambrose knew what was to go in the letter and was instructed to talk the matter over with Secretary Fall; he was also instructed to ask Secretary Fall as to jointure of Secretary Denby in the contract; there had been some discussion as to that between Mr. Cotter and Mr. Finney in which discussion Mr. Cotter stated that he believed the Secretary of the Navy should be specifically a party, both in the body of the contract and by way of signature at the end, and Judge Finney rather agreed with Mr. Cotter's view; so Mr. Ambrose was also to ask Secretary Fall with respect to that. The witness identified a telegram dated at Three Rivers, New Mexico, April 23, 1922, as received by him, and the same was introduced in evidence as Plaintiff's Exhibit No. 123, and reads:

PLAINTIFF'S EXHIBIT No. 123.

"Finney,

Acting Sec'y Interior, Washington, D. C.

Ambrose arrived. Have consulted reference all contracts, as to both contracts go ahead. New appointment to be executed by you.

FALL, Sec'y."

The new appointment referred to in the foregoing telegram is in no way connected with the matters in this case.

On April 25, 1922, the witness as Acting Secretary of the Interior signed the contract, which was immediately sent over to Secretary Denby and was

(Testimony of E. C. Finney.)

signed by him on that or the next day, and the same was formally delivered. Thereupon there was offered and received in evidence as Plaintiff's Exhibit No. 124 contract between the United States and the defendant Pan American Petroleum & Transport Company, in words and figures as set forth in Exhibit "B" to the Amended Bill of Complaint. There were also offered and received in evidence as Plaintiff's Exhibit No. 125 letter dated April 25, 1922, which witness had referred to, and which is in words and figures as set forth in the Amended Bill of Complaint, as Exhibit "E." [230—156]

Plaintiff's said Exhibit No. 126 consists of several hundred printed pages of detailed specifications, covering minutely all of the construction work required under the contracts of April 25, 1922, and December 11, 1922, in issue in this case, and it was stipulated that said work had been generally described by Admiral Gregory in his testimony. Plaintiff's counsel stated that there was no part of this exhibit considered material except the paragraphs set forth below, and with the consent of defendants' counsel and the approval of the Court, the substance of said paragraphs were read as follows:

From specifications for work under April 25th, 1922, contract: [231—156-A]

Par. 12. Before commencing installation of any work the contractor shall submit to the Secretary of the Interior for approval drawings showing complete details of all reinforced concrete, pump in-

(Testimony of E. C. Finney.)

stallations, shop details of tanks, etc. Par. 132. Details of the foam fire protection system to be installed by the contractor shall first be submitted to and approved by the Secretary of the Interior before such installation. Par. 210. "The successful bidder will be the party of the first part to the contract and will be known as the contractor, and the Secretary of the Interior will be the party of the second part and known as the Government." Par. 215. "The work will be under the general direction of the Secretary of the Interior * * * appeals may be made to the Secretary of the Interior." Par. 225. Applications for extension of time on the part of the contractor must be made to the Secretary of the Interior through the officer in charge and the contractor agrees to accept the decision of the Secretary of the Interior as binding. Par. 227. In ascertaining liquidated damages which the contractor must forfeit by reason of delays, the Secretary of the Interior will determine what delays in the receipt of materials by the contract were unavoidable and therefore excused. A certified copy of the contractor's record of orders for materials must be made available to the Secretary of the Interior in determining the above question. Par. 229. The Secretary of the Interior may declare the contract null and void if it evidently cannot be completed within the prescribed time, or if the contractor commits a breach thereof. If the contract is annulled a board of U. S. officers shall determine the value of the work done by the con-

(Testimony of E. C. Finney.)

tractor, plus a reasonable profit allowable thereon. The Secretary of the Interior has the right to approve such findings and to approve the inventory which the board shall prepare of materials, tools, etc., belonging to the contractor, which said findings and inventory when so approved will be conclusive in an accounting between the parties. If the work is thereafter completed by the Government, the cost of completing same shall be determined, and when approved by the Secretary of the Interior shall also be binding upon the parties. Par. 230. The Government reserves the right [232—156-B] to make changes in the plans, specifications and contracts, and the cost of such changes when approved by the Secretary of the Interior shall be added to or deducted from the contract price. The contractor agrees to proceed with such changes as directed in writing by the Secretary of the Interior. Par. 231. The contractor's claims for extras will be referred to the Secretary of the Interior for approval and the finding of the Secretary shall be conclusive. Par. 236. Any violation of the eight-hour day law coming to the notice of Government officers will be reported to the Department of the Interior for such legal action as may appear warranted. Par. 237. Special or detailed plans, whenever it is necessary for the contractor to prepare them, must be submitted to the officer in charge or to the Secretary of the Interior, as may be directed, for approval. Par. 241. If conditions at the site of the work are dis-

(Testimony of E. C. Finney.)

covered to be different from the plans and specifications, a report shall be made to the Secretary of the Interior, who will determine whether a change in the contract price is to be made. If made it will be adjusted as per paragraph 230. Par. 255. Before the first payment is due the contractor must furnish to the officer in charge a schedule of prices of materials. This will be forwarded to the Secretary of the Interior and after his approval will govern the preparation of monthly estimates. Par. 256. Monthly vouchers covering all work done and materials furnished during the month shall be prepared by the officer in charge, certified by the contractor, and "forwarded to the Secretary of the Interior for approval and for crediting on account toward the delivery of the proper amount of oil in accordance with the terms of the exchange." The final payment shall not be made until the contractor shall deliver a release of all claims against the Government in such form as shall be approved by the Secretary of the Interior. Par. 258. The contractor shall furnish to the officer in charge for the information of the Secretary of the Interior, statements showing the substance of all subcontracts. Par. 259. Bids must be accompanied by certified checks payable to the Secretary of the Interior as a guarantee that the bidder will not withdraw his bid except with the approval of the Secretary of the Interior, and that if successful he will execute a [233-156-C] contract and give bond satisfactory to the Secretary of the Interior, and

(Testimony of E. C. Finney.)

will return same to the Secretary of the Interior within ten days after forms are furnished to him.

Par. 265. Prospective bidders are requested to report to the Secretary of the Interior for correction or interpretation before the date of opening of bids, any errors or omissions which they observe in the drawings and specifications.

The specifications for work under contract of December 11, 1922, contain, *inter alia*, paragraphs which in substance are:

Preamble: States that the specifications which form a part of the contract No. 4,800 are prepared by the Chief of the Bureau of Yards and Docks "under authority of the Acting Secretary of the Interior as given in his letter dated May 5, 1922 * * *."

Paragraph 11. Before installing any work "the contractor shall submit to the Secretary of the Interior for approval drawings showing complete details of all reinforced concrete, pump installations," etc. Paragraph 274. Work shall be under the general direction of the Secretary of the Interior. Appeals may be made to the Secretary of the Interior. Paragraph 283. Applications by the contractor for extensions of time are to be transmitted by the officer in charge to the Secretary of the Interior for action. Failure of the contractor to submit such applications within thirty days of the happening of a cause of delay may be construed by the Secretary of the Interior as a waiver by the contractor of his right to an extension. Decisions of the Secretary of the Interior on applications are

(Testimony of E. C. Finney.)

to be conclusive. Paragraph 285. In ascertaining liquidated damages for delays, the secretary will determine what delays in the receipt of materials by the contractor were unavoidable and therefore excused. A copy of the contractor's records of orders for materials must be made available to the Secretary of the Interior. Paragraph 288. The Government reserves the right to make changes in the contract, etc., and the contractor agrees to proceed with same as directed in writing by the Secretary of the Interior. Paragraph 293. Violations of the eight-hour day law are to be reported to the Department of the Interior for such legal action as may be deemed warranted. Paragraph 294. Whenever it is necessary to prepare special or detailed plans, copies of same must be submitted for approval to the officer in charge or to the Secretary of the Interior, as may be directed. Paragraph 298. If changed conditions are encountered [234—156-D] during the work, a report of same will be submitted by the officer in charge through official channels to the Secretary of the Interior, "who will decide what changes are to be made." Paragraph 312. Before the first payment is due the contractor must furnish to the officer in charge a schedule of prices for all work covered by lump sum subcontracts. This will be forwarded to the Secretary of the Interior, and after his approval will govern preparation of monthly estimates. Paragraph 315. As soon as the contractor has executed any subcontracts he shall furnish a state-

(Testimony of E. C. Finney.)

ment showing substance of same to the officer in charge for the information of the Secretary of the Interior. [235—156-E]

Continuing, Mr. Finney testified that, as he has stated, the Secretary, in the fall or early winter of 1921, stated that he desired Dr. Bain and the witness to conduct the call for offers for the exchange of oil and construction of storage; that was the beginning; when the various small leases were made in Sections 1 and 2, about which he has testified, witness conferred with the Secretary before acting upon the applications; then in the spring of 1922 after the bids were opened he wired on April 17th to the Secretary with respect to the award (as shown in telegram, Exhibit No. 120 above); on April 20th Mr. Ambrose was sent to the Secretary to acquaint him with the details and the witness received the telegram of April 23d (Exhibit 123 above) authorizing him to execute the contract; the witness regarded the matter as being one of importance, involving the policy of the Department, so he did not take any independent action but consulted with the Secretary before acting and received his authority. There were no other invitations for bids issued than those on which the bids of April 15th were based.

Plaintiff thereupon offered and there was received in evidence its Exhibit No. 127, reading as follows:

PLAINTIFF'S EXHIBIT No. 127.

"May 29, 1922.

The Honorable,

The Secretary of the Interior,
Washington, D. C.

Dear Mr. Secretary:

Pursuant to a letter of April 25, 1922, of the Acting Secretary of the Interior and the Secretary of the Navy, application is hereby made for Oil and Gas Lease for the NE. $\frac{1}{4}$ Sec. 3, T. 31 S., R. 24 E., MDM., Naval Petroleum Reserve No. 1, California.

It is considered that drilling upon this land at this time is necessary in order to protect same from drainage in drilling on lands outside the Naval Reserve immediately cornering this section.

Respectfully,

PAN AMERICAN PETROLEUM &
TRANSPORT CO.

By J. J. COTTER." [236—157]

Plaintiff's Exhibit No. 128, being lease dated June 5, 1922, in words and figures the same as Exhibit "F" to the Amended Bill of Complaint, was thereupon offered and received in evidence.

It was thereupon stipulated and agreed by the parties that shortly after the date of the foregoing lease the same was with the consent of the United States assigned by the defendant Pan American Petroleum & Transport Company to the defendant Pan American Petroleum Company and the latter assumed all of the obligations and rights of the original lessee thereunder.

(Testimony of E. C. Finney.)

The witness Finney continuing, testified that shortly after the execution and delivery of the contract of April 25, 1922, there was a conference in his office at which, in addition to himself, there were present Mr. Dunn of the White Engineering Corporation, Mr. Cotter of the Pan American Company, Mr. Ambrose of the Bureau of Mines, and someone from the Navy, he is not certain whether it was Admiral Robison, Admiral Gregory or Lieutenant Keating; an officer named Lieutenant Keating, a member of the Construction Corps of the Navy, had been appointed as liaison officer to work between the two Departments; one of the questions discussed was how disputes could be settled in case disputes arose between the contractor and the officers of the Navy or of any department; Mr. Dunn was very anxious and insisted that the umpire or final arbiter should be the Secretary of the Interior. As a result there was written the following letter, dated at Washington, May 5, 1922, signed by the witness as Acting Secretary of the Interior and approved by Secretary Denby of the Navy, which letter as Plaintiff's Exhibit No. 129 was read in evidence, as follows: [237—158]

PLAINTIFF'S EXHIBIT No. 129.

"The Secretary of the Navy.

Dear Mr. Secretary: April 25, 1922, the Navy and Interior Departments entered into a contract with the Pan American Petroleum & Trans-

port Co. for the exchange of crude oil for fuel oil in storage at Pearl Harbor. It is important that work under this contract begin at the earliest possible moment and that the method of procedure and supervision be agreed upon between the two departments. In that connection I submit for your consideration and approval, if you agree, the following:

Contract consists of two principal parts. The first is the exchange of crude oil for fuel oil to be delivered in tankers at Pearl Harbor. The second part is the construction of oil storage and the receiving of oil in the tanks at Pearl Harbor.

The Department of the Interior shall retain direct control of the oil business involved in this contract; in other words, of the first part of the contract mentioned above.

The Chief of the Bureau of Yards and Docks, Navy Department, Admiral L. N. Gregory, is designated as the representative of the Secretary of the Interior in handling the second part of the contract as noted above. This involves, first, all technical matters in connection with the plans and specifications for storage, and which in its general phases can be most expeditiously handled in Washington; second, the supervision of construction work in the field at Pearl Harbor; and third, the receiving of the oil at Pearl Harbor from the tankers and placing same in tank storage as it becomes available under this contract until such time as the completed plant shall be turned over to the Government.

(Testimony of E. C. Finney.)

The Secretary of the Interior expressly reserves at all times the right to recall the foregoing representation and to designate a successor from the Navy Department as his representative. The right of the contractor to appeal to the Secretary of the Interior, as provided in the contract, is not affected hereby. Notice of any appeal by the contractor from the decision of the officer in charge of the work and the reasons therefor shall be forwarded promptly, being routed through the commandant and the Chief of the Bureau of Yards and Docks on their way to the Secretary of the Interior. This will in no way involve the functions at present exercised by the Chief of the Bureau of Engineering in dealing with the Secretary of the Interior in regard to oil matters in general, since the only function of the representative of the Secretary of the Interior would be the technical work of constructing the tanks, the receiving and storing of the oil during construction, and reporting to the Secretary of the Interior the amounts received.

Respectfully,

EDWARD C. FINNEY,

Acting Secretary.

Approved:

EDWIN DENBY,

Secretary of the Navy." [238—159]

Judge Finney did not have anything personally to do with keeping accounts under the contract of April 25th, they were kept by officers and em-

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(Testimony of E. C. Finney.)

ployees of the Bureau of Mines and he is not familiar with them. During the time he has been First Assistant Secretary of the Interior the only leases that he knows of that were issued in which he did not participate in some way, unless absent from Washington, were the Sinclair lease for lands in Naval Reserve No. 3 in Wyoming and the lease for Reserve No. 1 dated December 11, 1922; he had no participation whatever in the negotiations for or the execution of that lease or the contract of that date.

Plaintiff offered and there was received in evidence as its Exhibit No. 130 the lease dated July 28, 1922, between the United States and the Pan American Petroleum Company, and it was stipulated that this document was merely a consolidation into a single lease of three small strip leases heretofore referred to in the evidence whereby one lease was made of the three on the same royalties and terms.

As regards certain leases made in 1922 and 1923 for lands in Naval Reserve No. 2, the witness testified that in March, 1922, a call was made for bids for the leasing of five tracts of land in Naval Reserve No. 2, which five tracts were free from all mining claims or applications of any kind; bids were to be received on or prior to a date in May, 1922; nine bids were received, not nine for each tract but nine for some of the more likely tracts, and several bids for each tract, except for the east half of Section 30 in the north part of Reserve 2

(Testimony of E. C. Finney.)

which was regarded as very doubtful and on which only one bid was received. The bids of Louis Titus for four of the tracts were the highest and best. [239—160]

In connection with the testimony of the witness Finney, and as a part of his direct examination, by stipulation the royalties specified in leases referred to in his testimony as having been granted on competitive bidding in Reserve No. 2, were read into the record, it being stipulated by counsel that it was unnecessary to read the formal leases in full. The matter was read by counsel for plaintiff pursuant to this stipulation as follows:

Per Cent.

For all oil produced of 30° Baume or over:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month12-1/2

On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month16-2/3

On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month20

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On that portion of the acreage production per well of more than 100 barrels per day for the calendar month61

(2) For all oil produced of less than 30° Baume:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month12-1/2

On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month14-2/7

On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month16-2/3

And from the lease to Louis Titus dated the 3d of June, 1922, Lease 010177:

(1) For all oil produced of 30° Baume or over:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month12-1/2

On that portion of the average production per well of more than 20 barrels and not more than 50 barrels

rels per day for the calendar
month16- $\frac{2}{3}$
[240—161]

On that portion of the average pro-
duction per well of more than 50
barrels per day and not more than
100 barrels per day for the cal-
endar month20

On that portion of the average pro-
duction per well of more than 100
barrels per day for the calendar
month69

(2) For all oil produced of less than 30°
Baume:

On that portion of the average pro-
duction per well not exceeding 20
barrels per day for the calendar
month12- $\frac{1}{2}$

On that portion of the average pro-
duction per well of more than 20
barrels and not more than 50 bar-
rels per day for the calendar
month14- $\frac{2}{7}$

On that portion of the average pro-
duction per well of more than 50
barrels and not more than 100 bar-
rels per day for the calendar
month16- $\frac{2}{3}$

On that portion of the average pro-
duction per well of more than 100
barrels per day for the calendar
month64

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And a lease dated the 3d of June, 1922, to Louis Titus, No. Visalia 010178:

- (1) For all oil produced of 30° Baume or over:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month12-1/2

On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month16-2/3

On that portion of the average production per well of more than 50 barrels per day and not more than 100 barrels per day for the calendar month20

On that portion of the average production per well of more than 100 barrels per day for the calendar month71

- (2) For all oil produced of less than 30° Baume:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month12-1/2

On that portion of the average production per well of more than 20 barrels and not more than 50 bar-

rels per day for the calendar
month14-2/7
[241—162]

On that portion of the average pro-
duction per well of more than 50
barrels and not more than 100 bar-
rels per day for the calendar
month16-2/3

On that portion of the average pro-
duction per well of more than 100
barrels per day for the calendar
month66

A lease of the same date to Louis Titus, numbered
Visalia 010179:

(1) For all oil produced of 30° Baume or
over:

On that portion of the average pro-
duction per well not exceeding 20
barrels per day for the calendar
month12-1/2

On that portion of the average pro-
duction per well of more than 20
barrels and not more than 50 bar-
rels per day for the calendar
month16-2/3

On that portion of the average pro-
duction per well of more than 50
barrels per day and not more than
100 barrels per day for the cal-
endar month20

On that portion of the average pro-
duction per well of more than 100

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barrels per day for the calendar
month77

- (2) For all oil produced of less than 30°
Baume:

On that portion of the average pro-
duction per well not exceeding 20
barrels per day for the calendar
month12-1/2

On that portion of the average pro-
duction per well of more than 20
barrels and not more than 50 bar-
rels per day for the calendar
month14-2/7

On that portion of the average pro-
duction per well of more than 50
barrels and not more than 100 bar-
rels per day for the calendar
month16-2/3

On that portion of the average pro-
duction per well of more than 100
barrels per day for the calendar
month72

A lease of the same date to Louis Titus, numbered
Visalia 010180:

- (1) For all oil produced of 30° Baume or
over:

On that portion of the average pro-
duction per well not exceeding 20
barrels per day for the calendar
month12-1/2

[242—163]

On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month16- $\frac{2}{3}$

On that portion of the average production per well of more than 50 barrels per day and not more than 100 barrels per day for the calendar month20

On that portion of the average production per well of more than 100 barrels per day for the calendar month74

(2) For all oil produced of less than 30° Baume:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month12- $\frac{1}{2}$

On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month14- $\frac{2}{7}$

On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month16- $\frac{2}{3}$

On that portion of the average production per well of more than 100

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barrels per day for the calendar
month69

The lease of the 24th of July, 1922, to the Equitable Petroleum Corporation, numbered Visalia 010181:

(1) For all oil produced of 30° Baume or
over:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month12-1/2

On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month16-2/3

On that portion of the average production per well of more than 50 barrels per day and not more than 100 barrels per day for the calendar month20

On that portion of the average production per well of more than 100 barrels and not more than 500 barrels per day for the calendar month25

On that portion of the average production per well of more than 500 barrels per day for the calendar month35

- (2) For all oil produced of less than 30°
Baume: [243—164]

On that portion of the average pro-
duction per well not exceeding 20
barrels per day for the calendar
month12-1/2

On that portion of the average pro-
duction per well of more than 20
barrels and not more than 50
barrels per day for the calendar
month14-2/7

On that portion of the average pro-
duction per well of more than 50
barrels and not more than 100
barrels per day for the calendar
month16-2/3

On that portion of the average pro-
duction per well of more than 100
barrels and not more than 500 bar-
rels per day for the calendar
month20

On that portion of the average pro-
duction per well of more than 500
barrels per day for the calendar
month35

On lease dated November 29, 1923, numbered N.
R. 22:

- (1) For all oil produced of 30° Baume or over:

On that portion of the average pro-
duction per well not exceeding 20

barrels per day for the calendar month	121½
On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month	16-2/3
On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month	20
On that portion of the average production per well of more than 100 barrels per day for the calendar month	56
(2) For all oil produced of less than 30° Baume:	
On that portion of the average production per well not exceeding 20 barrels per day for the calendar month	121½
On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month	14-2/7
On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month	162/3

On that portion of the average production per well of more than 100 barrels and not more than 250 barrels per day for the calendar month47½
[244—165]

On that portion of the average production per well of more than 250 barrels per day for the calendar month56

And on lease numbered N. R. 23, entered into December 12, 1923, with A. H. Heller:

(1) For all oil produced of 30° Baume or over:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month25

On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month33⅓

On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month40

On that portion of the average production per well of more than 100 barrels per day for the calendar month50

(Testimony of E. C. Finney.)

(2) For all oil produced of less than 30°
Baume:

On that portion of the average pro-
duction per well not exceeding 20
barrels per day for the calendar
month25

On that portion of the average pro-
duction per well of more than 20
barrels and not more than 50 bar-
rels per day for the calendar
month28-4/7

On that portion of the average pro-
duction per well of more than 50
barrels and not more than 100 bar-
rels per day for the calendar month 33½

On that portion of the average pro-
duction per well of more than 100
barrels per day for the calendar
month40

[245—166]

Cross-examination.

On cross-examination the witness Finney testi-
fied that he entered the service of the Interior
Department September 1, 1894, from the State of
Kansas, having previous to that time studied law
and been admitted to the bar of his State; during
the time intervening between 1894 and March 18,
1921, he was continuously in the service of the
United States, attached to the Interior Depart-
ment, and his duties required him to familiarize
himself with, and indeed to make a specialty of

(Testimony of E. C. Finney.)

the study and the administration of, the land laws of the United States, including the mining laws, the homestead laws, the laws pertaining to the Reclamation Service, and indeed all of those laws which had to be administered by that department; all the period from 1894 to March 18, 1921, the positions held by him were classified Civil Service positions; in 1910 and part of 1911 he was the chief law officer of the Reclamation Service of the Government; at the time he was appointed Assistant Secretary of the Interior he was a member of the Board of Appeals of that Department, which Board consisted of himself and two other members, all three of them lawyers, and the functions of that Board were to hear appeals involving law and facts and to make recommendations in the cases coming before it to the Secretary of the Interior, and also to perform such other duties as might be assigned to it by the Secretary. During his period of service in the Department from 1894 to 1921, prior to his own appointment, no man was ever appointed First Assistant Secretary of the Interior by promotion from within the Department; in all previous administrations the Secretary of the Interior and the First Assistant Secretary were appointed from outside, the appointments being known as political appointments. Before Mr. Finney was appointed First Assistant Secretary he had only come in contact twice with Albert B. Fall when the latter was Senator; the first time the witness was appearing before the Committee on Public Lands, of which Mr. Fall was

(Testimony of E. C. Finney.)

a member, and was introduced to him; the second time witness saw Senator Fall was when Mr. Franklin K. Lane was Secretary of the Interior and requested witness to see Senator Fall regarding an amendment to a pending homestead bill. Mr. Finney did not see Mr. Fall again until after he was appointed Secretary of the Interior. Witness was appointed First Assistant Secretary by President Harding and his appointment was confirmed by the Senate; he does not know exactly whether that appointment was made on recommendation of Secretary Fall to the President; of course, it was necessarily agreeable to [246—167-168] Mr. Fall but he does not know whether he made the original recommendations; he does know that the Secretaries are consulted always about their assistants. Mr. Finney at the time he testifies is still First Assistant Secretary of the Interior.

Prior to the time the witness became First Assistant Secretary his only acquaintance with Mr. Doheny was a casual meeting with him when he appeared as a witness before a Senate committee in 1917 and he saw Mr. Doheny a few moments in the Department while Mr. Lane was Secretary of the Interior, at which time he and Mr. Doheny merely greeted each other and shook hands. Before he became First Assistant Secretary he had transacted no business whatever with Mr. Doheny nor had he ever communicated with him, or seen him, except upon the two occasions above men-

(Testimony of E. C. Finney.)

tioned. During the period he has been First Assistant Secretary he has never seen Mr. Doheny.

Referring to his testimony on direct examination that upon an occasion the exact date of which he cannot fix, but between March 4 and May 11, 1921, Secretary Fall inquired of him with respect to some claims that were pending in the Department in connection with lands in the petroleum reserves; the Secretary mentioned at that time particularly the Honolulu Consolidated oil claim, the witness thinks possibly also the Midway, and some other claims, and the witness took to him the departmental files which had in them correspondence relating to any claims which had been asserted in those reserves, together with the map of the two reserves, so that the Secretary got a general idea of the situation. When Mr. Fall first became Secretary of the Interior the witness also certainly gave him information as to other matters; he always does that with a new Secretary; the information that he gave to Mr. Fall during his early days as Secretary, in acquainting him with the status of matters pending in the Department, was not confined to oil reserves by any means.

Within a month, or thereabouts, after Mr. Fall became Secretary of the Interior there was brought to his attention, by being sent over to him from the White House, a claim of the United Midway Oil Land Company on lands in Naval Reserve No. 1; also there appeared there in the Depart-

(Testimony of E. C. Finney.)

ment a Mr. McMurray, a lawyer from Oklahoma, representing that claimant, but Mr. Finney does not remember the exact date though it was prior to April 7, 1921, on which date the witness wrote to Secretary Fall the following memorandum, which was received in [247—169] evidence as Defendants' Exhibit "G":

DEFENDANTS' EXHIBIT "G."

"April 7, 1921.

Dear Mr. Secretary: Referring to case in Naval Reserve No. 1, California, called to your attention by Mr. McMurray, I have to advise as follows:

The United Midway Oil Company, which he represents, had claims in sections 1 and 12, at the extreme east end of said naval reserve. It drilled a well on section 12 at a cost of about \$100,000, but failed to get oil. There were other expenditures in the way of derricks, etc. All the work was done prior to 1910-11. The land has been withdrawn ever since that time. The company applied for a promise under section 18a of the leasing act, asking that it be given a patent or a lease to approximately 480 acres in section 1. This was denied by Secretary Payne, the Secretary of the Navy concurring.

Mr. McMurray has talked the matter over with me, pointed out the equities of his client, also pointed out that this section 1 adjoins on the south, section 36 owned by the Standard Oil Com-

pany, from which 40,000 barrels of oil per day are being produced, and that evidently a considerable part of this oil is coming from under section 1. Should it be determined that his client has equities which should be taken care of, three courses are possible:

(1) To submit to the President an offer of compromise, which would involve giving a lease to the company for a part or all of the land in section 1.

(2) Eliminate said section from the naval reserve.

(3) Under the authority of a clause in the naval appropriation act, copy attached, the Secretary of the Navy might permit the company to put down wells on the said section 1, as an offset to the wells on the Standard Oil section, upon such royalties as might be agreed upon.

If its lands had been outside of the naval reserve, this company would have been entitled, under section 19 of the act, to a prospecting permit for the same and a lease thereafter if it found oil. Being within a naval reserve, section 19 is not applicable. I am inclined to think that its equities might be recognized to the extent of authorizing it to drill a limited number of wells along the north line of section 1, on payment of the royalties fixed in the regulations. Our justification would be that it was an offset to drainage by the Standard. I think the Secretary of the

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(Testimony of E. C. Finney.)

Navy should be consulted, however, before any commitment is made.

Respectfully,

(Signed) FINNEY,
First Assistant Secretary."

The Section 19 mentioned in the foregoing memorandum refers to that section of the Leasing Act of February 25, 1920.

Thereupon the witness identified as having been received at the office of the Secretary of the Interior, addressed to Honorable A. B. Fall, the following letter, which as Defendants' Exhibit "H" was received:

DEFENDANTS' EXHIBIT "H."

"THE WHITE HOUSE,

Washington, April 20, 1921. [248—170]

My dear Mr. Secretary: I am sending you herewith a letter which the President has received from Mr. R. W. Dick, of the United Midway Oil Land Company, concerning this company's claim to certain oil lands in Kern County, California. I also enclose the papers on our files regarding this claim. With the return of the correspondence, will you not be good enough to let the President have a report, as well as your advice, on the matter?

Sincerely yours,

GEO. B. CHRISTIAN, Jr.,
"Secretary to the President." [249—171]

(Testimony of E. C. Finney.)

As regards how the papers referred to got to the White House, witness presumes the claimants, possibly having in mind Section 18a or Section 18 of the Leasing Act of February 25, 1920, which provided for certain action by the President, carried the matter there by letter or otherwise, in an attempted appeal by the claimants to the President of the United States, that it had not been acted on during the Wilson Administration and was a left-over when President Harding assumed office; this correspondence had been called to the attention of the Secretary of the Interior by Mr. McMurray and to the attention of the President by Mr. R. W. Dick, the witness does not recall the latter; while the United Midway claim was before the Secretary of the Interior in April, 1921, and at the time Mr. Finney wrote his memorandum to Secretary Fall, he did not have knowledge of what the Navy Department was doing with reference to arranging to lease a part of Section 1, but he learned of that later.

In May, 1921, to the best of Mr. Finney's recollection prior to the 11th of that month, Secretary Fall told him that there was under consideration a proposed plan for a transfer of the administration of the naval reserves to the Interior Department, and, just as in the case of the Midway, the Secretary asked the witness for information on the subject of the state of the law respecting oil lands of the United States both within and without the naval reserves, and he prepared a memo-

(Testimony of E. C. Finney.)

random discussing the two laws, the general Leasing Act of February 25, 1920, and the Naval Reserve Act of June 4, 1920, which memorandum is Plaintiff's Exhibit 52. The views expressed in that memorandum with regard to the state of the law and policy were Judge Finney's views; after that memorandum was prepared the letter of May 11, 1921 (Plaintiff's Exhibit 53), was prepared in the Interior Department, signed by Secretary Fall and handed in to Secretary Denby, and the initials "ECF" on the retained copy of that letter are in the handwriting of the witness and indicate that he either wrote or passed upon the letter; that is the custom⁴ of the Interior Department, for the officer, not signing the letter, who either prepared it or passed upon it before it goes to the officer who is to sign it, to indicate for the signing officer, by initials, his approval of that letter which bears the initials. Memorandum referred to in the last-mentioned May 11th letter is probably Exhibit [250—172] 52; he does not recall whether the "tentative form of letter for your signature if it meets with your approval" in the letter of May 11, 1922, Exhibit 53, is a draft of a letter for the Secretary of the Navy to use in transmitting the draft of the Executive Order to the President; he may have seen it at the time, or possibly it was attached to the letter as an exhibit, but he does not now recall it; the same is true with reference to "a form of Executive Order for the President's signature if it meets with your sugges-

(Testimony of E. C. Finney.)

tion of yesterday" mentioned in that letter. The officials of the Interior Department frequently draft Executive Orders for the President's signature in connection with public lands and such matters, and it is the usual practice in that Department when a proposed Executive Order is drafted for the official who prepared it to prepare at the same time a letter of transmittal addressed to the President.

At this point counsel for the plaintiff at the request of counsel for defendants produced, and the latter offered in evidence as Defendants' Exhibit "I," the draft of letter sent to the Secretary of the Navy by the Secretary of the Interior under cover of the latter's letter of May 11, 1921 (Exhibit 53), and therein referred to, which said Exhibit "I" reads as follows: [251—173]

DEFENDANTS' EXHIBIT "I."

"My dear Mr. President:

The Act of February 25, 1920 (41 Stat., 437), authorizes the Secretary of the Interior to lease producing wells in naval petroleum reserves, and authorizes the President to permit the drilling of additional wells or to lease the remainder or any part of any claim in such reserves, with preference right to the claimant or his successor. A clause in the appropriation act for the year ending June 30, 1921 (41 Stat., 812), authorizes the Secretary of the Navy to take possession of unappropriated lands within naval reserves, and to conserve, develop,

(Testimony of E. C. Finney.)

use, and operate the same "directly or by contract, lease, or otherwise."

To avoid conflict, delay, and duplication, it occurs to me that the matter may be best administered through one agency, and I have to suggest that the Secretary of the Interior be directed, under your supervision, to administer all of the various provisions of law cited relating to naval petroleum reserves heretofore created by Executive order, the oil and gas accruing to the United States from the operation of any wells in said reserves to be utilized by or for the Navy, in accordance with the provisions of existing law.

Under the authority vested in me by said appropriation act, I request and recommend that you take the necessary steps to impose this duty upon the Secretary of the Interior. The details incident to this transfer of authority and to the disposition of the oil and gas produced will be arranged co-operatively between the Interior Department and this Department.

Sincerely,

Secretary.

The President,
The White House."

The foregoing exhibit was undated and it was stipulated between counsel for the parties that the letter was never sent by the Secretary of the Navy to the President; that the draft of the Executive Order, as finally agreed upon by the two depart-

(Testimony of E. C. Finney.)

ments, was taken by Colonel Theodore Roosevelt, Assistant Secretary of the Navy, to President Harding and was not sent by letter.

The witness thereupon identified typewritten draft of the proposed Executive Order as made in the Interior Department upon which there appeared some interlineations in pencil and the same, without said interlineations as regards which counsel for the defendants stated there would be testimony hereafter, was thereupon received in evidence as Defendants' Exhibit "J" and reads as follows:

DEFENDANTS' EXHIBIT "J."

"EXECUTIVE ORDER.

Under the provisions of the act of Congress approved February 25, 1920 (41 Stat., 437), authorizing the Secretary of the Interior to lease producing oil wells within any naval petroleum reserve; authorizing the President to permit the drilling of additional wells or to lease the remainder or any [252—174] part of a claim upon which such wells have been drilled, and under authority of the act of Congress approved June 4, 1920 (41 Stat., 812), authorizing the Secretary of the Navy to conserve, develop, use, and operate, directly or by contract, lease, or otherwise, unappropriated lands in naval reserves; the conservation, development, use, and operation of oil and gas-bearing lands in naval reserves Nos. 1 and 2, California, naval reserve No. 3, Wyoming, and naval oil shale reserves in Colorado and Utah, is hereby committed to the Secretary

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(Testimony of E. C. Finney.)

of the Interior, under supervision of the President, and he is authorized and directed to perform any and all acts necessary for the protection, administration, and development of the resources of said reserves, subject to the conditions and limitations of existing laws or such laws as may be hereafter enacted by Congress pertaining thereto.

The White House,

May —, 1921." [253—175]

The witness repeated his testimony as given on the direct to the effect that after promulgation of the Executive Order of May 31, 1921, and under cover of letter, dated June 2, 1921 (Exhibit 54), there were transmitted to the Interior from the Navy bids which had been received but not opened for a lease of land in Section 1 of Reserve 1 and testified that said bids were opened in his office in Washington June 8, 1921, and a minute of the proceedings made, which minute he identified and which as Defendants' Exhibit "K" was read in evidence and is as follows: [254—176]

DEFENDANTS' EXHIBIT "K."

"DEPARTMENT OF THE INTERIOR,

Office of the Secretary.

Washington, D. C., June 8, 1921.

At 10 A. M. June 8, 1921, the first Assistant Secretary of the Interior, Hon. E. C. Finney, proceeded, after three days' public notice, to open bids at his office for the lease for oil producing purposes of a

certain strip of land within Naval Petroleum Reserve No. 1 in Kern County, California; these bids having been received by the Bureau of Engineering, Navy Department, on April 25, 1921, at its offices in Washington, D. C., and at Room 217 Post Office Building, San Francisco, California, in response to public advertisement; the opening of the bids having been postponed by order of the Secretary of the Navy; and the President having subsequently by Executive Order of May 31, 1921, transferred to the Secretary of the Interior the administration of this and other Naval Petroleum Reserves, in accordance with provisions of acts of Congress of February 25, 1920 (41 Stat., 437) and June 4, 1920 (41 Stat. 912).

The following persons were present when the bids were opened:

Hon. E. C. Finney, Assistant Secretary of the Interior.

Commander Stewart, representing the Secretary of the Navy.

J. H. Rosseter, representing Roy N. Bishop.

O. N. Beller, representing Charles J. Wrightsman.

J. F. McMurray, representing the United Midway Oil Co.

C. F. Whittier, President, United Midway Oil Co., who came in during the proceedings.

Thomas A. O'Donnell.

A. D. Fyfe.

James A. Garfield.

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Mr. Smith, of the Associated Press, who came in during the proceedings.

Harry S. Garner, who kept record for the Interior Department.

W. C. Mendenhall, U. S. Geo. Survey.

Secretary Finney first read the advertisement of the Navy Department inviting bids, as follows:

Sealed proposals will be received until noon April 25, 1921, at Room 217, Post Office Building, San Francisco, Calif., or at Bureau of Engineering, Navy Department, Washington, D. C., for a lease of a strip of land within Petroleum Naval Reserve No. One, Kern County, California, along the north side of Section 1-31-24, M. D. M. and along the east side of the northeast quarter of said section nine hundred feet wide, and to have drilled thereon twenty-two wells in two rows, properly and economically spaced, as rapidly as men, material and supplies therefor can be obtained.

Bidders must furnish evidence of their ability to begin promptly and prosecute diligently the work of drilling and producing. Bids must state when work will be started and the time for drilling the first and each succeeding well; the royalty that will be paid in crude oil delivered on the lease or the equivalent in fuel oil delivered at tidewater at the option of the Navy Department. [255—177]

Each proposal must be accompanied by a bond or a certified check in the sum of \$10,000 as a guarantee that the bidder will if his pro-

posal is accepted enter into contract and furnish satisfactory bond of —— (State amount) —— for the fulfillment thereof.

The right is reserved to reject any or all bids or to accept any bid, as the interests of the Government may require.

(Signed) EDWIN DENBY,
Secretary of the Navy.

Secretary Finney: We have a letter of June 22d from the Secretary of the Navy transmitting the sealed bids to this Department after the order of the President of May 31, 1921, which transferred the administration of reserves to this Department to be handled in co-operation with the Secretary or Acting Secretary of the Navy as follows:

NAVY DEPARTMENT,
Washington.

2 June, 1921.

My dear Mr. Secretary:

In view of the fact that the President has signed the executive order committing the Naval Petroleum Reserves to the Secretary of the Interior, with certain reservations, there are forwarded herewith a number of bids which were submitted to the Navy Department in connection with a proposal to drill twenty-two wells on Section 1-31-24, Naval Reserve No. 1. As you doubtless know the opening of these bids was held up pending the issuance of the executive order above referred to.

Inasmuch as action on these bids has been delayed for a considerable time it is presumed that

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the Department of the Interior will take immediate action thereon in order not only to protect the Government's interests in the matter, but also to release the \$10,000.00 checks of the unsuccessful bidders on this land.

The list of bids follows:

Roy N. Bishop.

Union Oil Company of California.

Pacific Oil Company.

Standard Oil Company of California.

Oil Operators Syndicate.

Coalinga Mohawk Oil Co.

Thos. A. O'Donnell.

Miocene Oil Company.

Spaulding Gas and Petroleum Company.

United Oil Company.

Chas. J. Wrightsman, Proposal No. 2.

Pan-American Petroleum and Transport Co.

While these bids have not been opened officially it should be noted that some of them were opened through inadvertence. A telegram was sent to Lieutenant Commander Landis, the Officer-in-Charge of Naval Petroleum Reserves in San Francisco, not to open bids, but through a delay on the part of the Postal Telegraph Company in sending the message some of the bids were opened. However, the contents of the bids were not divulged. [256—178]

Bids from the following were also received but were withdrawn later by request:

Louis Titus.

Charles J. Wrightsman, Proposal No. 1.

R. H. Anderson.

Before final action is taken on these bids it is requested that consultation thereon be had with the Secretary of the Navy as set out in the executive order referred to.

There is also enclosed herewith a copy of the proposal inviting bids for the lease of the afore-said lands.

Sincerely yours,

(Signed) CHAS. B. McVAY, Jr.,

Acting Secretary of the Navy.

Honorable Albert B. Fall,

Secretary of the Interior,

Washington, D. C.

On the 3d of June I received a letter from the Secretary of the Navy as follows:

NAVY DEPARTMENT,

Washington.

3 June, 1921.

My dear Secretary:

There is forwarded herewith a copy of a telegram from the Miocene Oil Company requesting the withdrawal of their bid for proposed lease on certain land in Section 1-31-24, Naval Petroleum Reserve No. 1. In view of the fact that three other bidders have already been permitted to withdraw their bids and to have their checks returned, it would seem only fair to allow the Miocene Oil Company the same privilege.

Yours sincerely,

(Signed) EDWIN DENBY.

Honorable Albert B. Fall,

Secretary of the Interior,

Washington, D. C.

So that out of the bids originally submitted four have already been withdrawn.

(At this point Mr. Thomas A. O'Donnell requested to be allowed to withdraw his bid, and made the following statement:

Mr. O'DONNELL.—I wish to state that I had spoken to the Secretary of the Navy personally about the privilege of withdrawing it, and neglected to put it in writing or in a telegram, my reason being that the delay has already been considerable and that I have had other matters taking up my time and attention, and on account of the uncertainty as to when definite action can be secured. [257—179]

Secretary FINNEY.—If you will put your withdrawal in writing and file it with the Department, the withdrawal will be granted in view of the fact that four other bidders have been allowed to withdraw their bids.

(Mr. O'Donnell then left the room for the purpose of preparing his application.)

Secretary FINNEY.—There is pending before the Department the application of the United Midway Oil Co., for a lease under the relief provisions of the oil and gas leasing act of February 25, 1920, claiming portions of Sections 1 and 12 under mineral locations alleged to have been made prior to withdrawal. The claim of this company has not been finally disposed of.

(The proceedings were halted at this point awaiting the arrival of Commander Stewart of the Navy Department. In the meantime Mr. O'Donnell pre-

pared and presented his written request for permission to withdraw his bid.)

Secretary FINNEY.—Mr. O'Donnell having filed a written request to be permitted to withdraw his bid, it is directed that in view of the fact that four other bidders have already been permitted to withdraw their bids and have their checks returned, the same privilege will be accorded to Mr. O'Donnell.

(At this point Commander Stewart *of the* entered the room and Secretary Finney briefly informed him as to proceedings already taken.)

Secretary Finney then proceeded to open the bids in the order in which they were listed in the letter from the Secretary of the Navy, reading aloud the contents of each bid. The following is the list of bids:

(A) Roy N. Bishop, Crocker Building, San Francisco, Cal. Bid accompanied by a certified check for \$10,000.

(B) Union Oil Co. of California, 1110 Union Oil Building, Los Angeles, Cal.

Secretary FINNEY.—(After reading bid of the Union Oil Co.) I find no check with this proposal, but find a bond for \$10,000 of the Hartford Accident & Indemnity Co.

(C) Pacific Oil Co. of California, San Francisco, Cal. Bid accompanied by a certified check for \$10,000.

(D) Standard Oil Co. of California, San Francisco, Cal. *Check* accompanied by a certified check for \$10,000.

(E) Oil Operators Syndicate, by J. P. O'Brien, 347 Mills Building, San Francisco, Cal.

Secretary FINNEY.—(After reading bid of the Oil Operators Syndicate): I find no check, but I find a bond for \$10,000.

(F) Coalinga Mohawk Oil Co., 403 American National Bank Building, San Francisco, Cal. Accompanied by a certified check for \$10,000. [258—180]

(G) Spaulding Gas & Petroleum Co., Taft, Cal. Accompanied by a draft on New York for \$10,000.

(H) United Oil Co., Los Angeles, Cal. Accompanied by a certified check for \$10,000.

Secretary Finney also read a copy of a letter of April 20th from the General Petroleum Corporation addressed to the United Oil Co., and submitted by them with their bid, agreeing to store and transport oil under certain conditions in case the United Oil Co. should be awarded the lease.

(I) Wrightsman Oil Co., 120 Broadway, New York City. By C. J. Wrightsman, President, Proposal No. 2. Accompanied by a certified check for \$10,000.

(J) Pan-American Petroleum Co., 120 Broadway, New York City. Accompanied by a bond for \$10,000 of the Fidelity & Deposit Co. of Maryland.

Mr. Finney also read a letter from Mr. Doheny which accompanied the bid.

The bids proposed various percentages of payment depending upon quality of oil, amount of production, and other specified conditions, and cannot

(Testimony of E. C. Finney.)

be readily displayed in tabular form for comparison.

After completing the opening of the bids Secretary Finney explained again for the information of those who had not been present during the entire proceeding that five bids had been withdrawn, and named those listed. He then said:

'These bids have all been noted and lettered in the order in which they were listed by the Navy Department, and the matter will be taken under consideration by Secretary Fall in cooperation with and after consultation with, the Secretary of the Navy. Secretary Fall had a hearing of coal operators this morning else he would have been present personally. He accordingly asked me to open the bids in the presence of such gentlemen as wished to be here, and to tell you that he would take the matter under immediate consideration.'

(Whereupon at 11:55 A. M. the proceedings closed.)" [259—181]

The proceedings set forth in the foregoing exhibit were had as therein narrated and thereupon the witness, prior to leaving Washington, as he did a few days thereafter, sent a copy of those proceedings, together with abstract of the bids, to Secretary Fall with the following memorandum (Defendants' Exhibit "K-a"):

(Testimony of E. C. Finney.)

DEFENDANTS' EXHIBIT "K-a."

June 10, 1921.

Dear Mr. Secretary:

Herewith is abstract of bids on Section 1, Naval Reserve No. 1, California, prepared by Mr. Mendenhall, of Geological Survey.

I also attach a copy of memorandum of the proceedings had when I opened the bids.

The bids themselves and copy of the Navy's proposal are in the hands of Mr. Mendenhall, and it may be that when you look over the bids you will wish to confer with Mendenhall and have him explain the details of some of them.

FINNEY."

Mr. Finney was absent from Washington about thirty days and when he returned he learned from Secretary Fall that action had been taken both on the bids referred to in the foregoing and on the United Midway claim to Section 1 and Section 12 which had been the subject of his April 7, 1921, memorandum. Thereupon there was offered in evidence as Defendants' Exhibit "L" the following communication dated July 8, 1921:

DEFENDANTS' EXHIBIT "L."

"My dear Mr. President:

On April 20th, through your Secretary, you forwarded to me papers in the case of the application of the United Midway Oil Land Company who were asking adjustment, through yourself, of their claim to oil lands within naval reserve No. 1, situated in Section 1 and 12 and approximating 1271.91 acres.

On June 1st, I wrote you that I was not as yet ready to report as I was awaiting bids which had been advertised for by the Navy Department upon a portion of this same land, but that I thought the parties had some character of equity which might entitle them to a drilling permit upon equal terms with any one else who might bid under the Navy offer.

Immediately upon receipt of your letter of April 20th, I notified Secretary Denby and as the advertisement for bids by the Navy was then in course of publication, the latter Department, disregarding entirely any claim of the Midway Company suggested that a telegram be sent directing the discontinuance of the publication for bids for ten days, allowing me time in which to consider the Midway claim.

This the Navy saw fit not to do but continued the advertisement and received various bids based upon the drilling of twenty-two wells in the strip nine hundred feet wide across the Northern and a portion of the Eastern boundary of the lands in dispute.

You directed me to proceed to handle the Naval Reserve lands for the Navy and these bids were finally turned over to me after my letter to you of June 1st.

I immediately referred the bids to our experts to ascertain which was the best bid. This was both for the purpose of allotting the bid and of having information to guide me in the adjudication of the Midway claim if I should conclude [260—182] that they had an equity entitling them to any relief at your hands.

My experts reported that the bid of the Pan American Company, known as the 'Doheny' bid, was the best, either at 50% royalty should the wells be completed within six months; or 55 1/2% royalty, the wells to be completed within eight months, or 57 1/2% royalty, the wells to be completed within a twelve months period.

Admiral Griffin of the Navy, called into consultation, seemed to agree that the 'Doheny' bid was the best and to prefer the 50% bid.

I notified Mr. Doheny that his bid for twenty-two wells on a 50% royalty, wells to be completed within six months, was accepted.

Commander Stewart later came into my office, accompanied by Admiral Griffin, and announced that the Navy preferred the twelve months drilling of the twenty-two wells at 57 1/2%.

I notified both officers that I thought it my duty to recommend to you the granting of a drilling permit upon similar terms and upon the same acreage just South of the strip advertised by the Navy Department, and bid in by 'Doheny,' is the Midway Company, in settlement of their claims for some character of oil equity upon 1271.91 acres in Sections 1 and 12 of the Naval Reserve.

These gentlemen strenuously objected to any drilling permit being granted the Midway people within the Reserve, but insisted that I should allow them in exchange for any rights which they might have, some land entirely outside the boundaries of the Reserve.

Oil lands outside the Reserve to which there is no

private claim or lease by the Secretary of the Interior, a portion of the proceeds going to the Reclamation fund and a portion to the State in which the lands are located.

Thus my position is that of a Trustee for the Reclamation fund and for the State in the one instance, and a Trustee for the Navy for the public lands upon which there is no private claim within the Naval Reserve.

Holding the view which I did hold, as the Midway Company having some equity, but being desirous of adjudicating the matter, if possible, to the end that the Navy might have no possible objection. I called upon Colonel Doheny, head of the Pan American Company, by telegram, stating the facts to him and that he was entitled to his lease and would have it executed under one of his bids, but asking if it were possible for him to assist me in an adjustment of the Midway claims, by agreeing to surrender eight wells out of the twenty-two which were advertised by the Navy and allotted to him under his bid; he retaining the lease upon the other fourteen.

I thought that I was imposing upon Mr. Doheny and even at the insistence of the Navy officials was not justified in doing so except through a personal appeal based upon our long-time acquaintance and my knowledge of his patriotism and sense of justice.

I received an immediate favorable response and I have had the leases drawn to himself of the fourteen wells, and to the Midway Company for eight wells which he surrenders.

These leases, therefore, will be executed to the two parties if you approve the Midway settlement,

rather than to one, the Pan American (Doheny), upon exactly the terms of the Doheny bid which the Navy admits to be the best and upon identically the same land and under the same conditions that the Navy advertised, that is, all drilling will be confined to the 900' strip offered by them and described in their advertisement.

I am herewith enclosing you full report on the Midway case with my conclusions and recommendations in the premises to you.

If you approve I will sign the leases to-day and the matter will thus be settled, I hope to the satisfaction of everyone concerned.

The Midway people have quitclaimed to the United States all land upon which they had theretofore asserted any claim, that is to any, a total acreage of 1271.91 acres, and through this lease proposed they will be entitled to the occupation of fifty-two plus acres upon which to drill eight wells to be completed within eight months and upon which they are to pay a royalty of 55½% of all oil extracted and to pay for the Navy's proportion of all gas produced.

Very sincerely yours,

(Signed) ALBERT B. FALL.

Hon. Warren G. Harding,

The President,

White House." [261—183]

Thereupon as Defendant's Exhibit "M" there was offered and received in evidence letter dated July 8, 1921, from the Secretary of the Interior to the President of the United States which, omitting

details of the claim therein referred to and description of the lands claimed, reads as follows:

DEFENDANTS' EXHIBIT "M."

"My dear Mr. President:

Referring to the letters of your Secretary, Mr. Christian, of April 20 and June 10, and to my report of June 1 concerning the application of the United Midway Oil Land Co. for compromise under section 18a of the mineral leasing act of February 25, 1920 (41 Stat. 437), involving certain land in naval reserve No. 1, I have the honor to submit, in compliance with your direction, the following report and recommendation: * * *

On February 26, 1921, the applicant filed with the President its petition, requesting him to direct a compromise and settlement of its claim. The President called upon Secretary Payne for a report in response to which a copy of the Secretary's ruling of February 24, above referred to, was transmitted to the White House. No further action was taken by President Wilson, and on April 20, 1921, the matter was forwarded by the White House to the department for report and advice. On June 1, 1921, a preliminary report was submitted to you. Under date of June 10, 1921, you advised me that you would be glad to act in the matter when I should send you my final recommendation. An examination of the record discloses the following facts:

1. The application for compromise under section 18a was filed prior to the expiration of 12 months from the date of the approval of the leasing act..

* * *

(Testimony of E. C. Finney.)

RECOMMENDATION.

In view of the equities apparent in this case I am of the opinion that this application is entitled to some relief. Mr. Doheny, whose bid to drill the offset wells on the land covered by these claims, referred to in the foregoing report, I had concluded to accept, has offered to waive his claim under his bid to the west 2,550 feet, of the 900-foot strip along the north line of said section 1, to the end that the United Midway Oil Land Co. may receive a lease therefor in settlement of its claims. The company agrees to this proposition. I therefore respectfully recommend that you authorize and direct a compromise of these claims and the issuance of a lease to the United Midway Oil Land Co. of the west 2,550 feet of the 900-foot strip above referred to with the privilege of drilling thereon eight wells to commercial production under the terms and conditions set out in the accompanying copy of lease.

Sincerely,

ALBERT B. FALL.

The President,

The White House.

THE WHITE HOUSE,

July 8, 1921.

Approved:

WARREN G. HARDING. [262—184]

Upon the return of the witness from his trip west, which began about June 15, 1921, Secretary

(Testimony of E. C. Finney.)

Fall told him the substance of what had been done, as shown by the foregoing exhibits, and later he saw copies thereof in the files.

Explaining the use of the term "Acting Secretary" to exhibits signed by him and heretofore put in evidence, as well as any appearing in the evidence hereafter, Judge Finney stated that the law with respect to the position which he holds provides that the First Assistant Secretary of the Interior shall become Acting Secretary of the Department during the absence of the Secretary, so that automatically whenever the Secretary was absent he became Acting Secretary and in the absence of the Secretary the Acting Secretary legally has all the powers in connection with the administration of the Department that the Secretary has under the law.

The witness thereupon identified letter dated July 30, 1921, bearing his signature as Acting Secretary, and addressed to the Secretary of the Navy, as a letter prepared in the Bureau of Mines for his signature, and he also identified letter from the Acting Secretary of the Navy to the Secretary of the Interior dated August 15, 1921, as a reply to the July 30th letter, and these two communications were thereupon read in evidence as Defendants' Exhibits "N" and "O," respectively, and are as follows: [263—185]

DEFENDANTS' EXHIBIT "N."

"July 30, 1925.

The Honorable,

The Secretary of the Navy.

Dear Mr. Secretary: The executive order of May 31, 1921, committed to the Secretary of the Interior the performance of any and all acts for the protection, conservation and administration of oil and gas produced on the Naval Petroleum Reserves. Under the leasing act of February 25, 1920, this Department is authorized to perform similar duties on oil and gas produced on the public domain. In connection with this act the supervision of drilling, the production and gauging of oil, the metering of gas, and the computation of royalty money have been delegated to the Bureau of Mines.

At the time the Bureau of Mines prepared its estimate for funds to carry on this work, it was not realized that the Bureau would be called upon to supervise the production and drilling on the Naval Reserves, and no funds were requested for this purpose. At the present time approximately 12,000,000 barrels of oil are being produced from oil wells on the public domain and the Bureau needs all of its funds for handling oil produced on Government lands outside the Naval Reserves.

The Bureau of Mines has established a field office in Bakersfield, California, and can, without addition to its present force, supervise the drilling of wells on the Naval Petroleum Reserves. The force, however, is not adequate to gauge the oil

on Naval Reserve No. 2 and to compute its value. Naval Petroleum Reserve No. 2 is now producing about 8,800 barrels per day, all of which oil must be gauged in order to determine the royalty oil due the United States.

Attention is called to the fact that leases have been granted to the United Midway Oil Company and the Pan American Petroleum Company for the drilling of 22 additional wells in Naval Petroleum Reserve No. 1 and it is probable that these wells will produce several thousand barrels of oil in the near future.

In view of the fact that the royalty rate on these wells is $55\frac{1}{2}\%$ it is very important that the Government have a close check on this large quantity of oil.

It is probable that the Navy Department will soon desire to take the royalty oil from Naval Reserves in kind, for which it can trade with the oil companies and receive thereby an equivalent amount of fuel oil on the Pacific Coast. In order that the interests of the Navy and the Government may be properly protected in this matter, the Bureau of Mines needs additional employees and equipment. The Bureau has no funds available for this purpose, and I am therefore requesting you to allot the sum of \$5,500 for the remainder of this fiscal year to provide for this additional sum in the regular Bureau appropriation for the fiscal year starting July 1, 1922.

Respectfully,

E. C. FINNEY,
Acting Secretary."

(Testimony of E. C. Finney.)

DEFENDANTS' EXHIBIT "O."

"15 August, 1921.

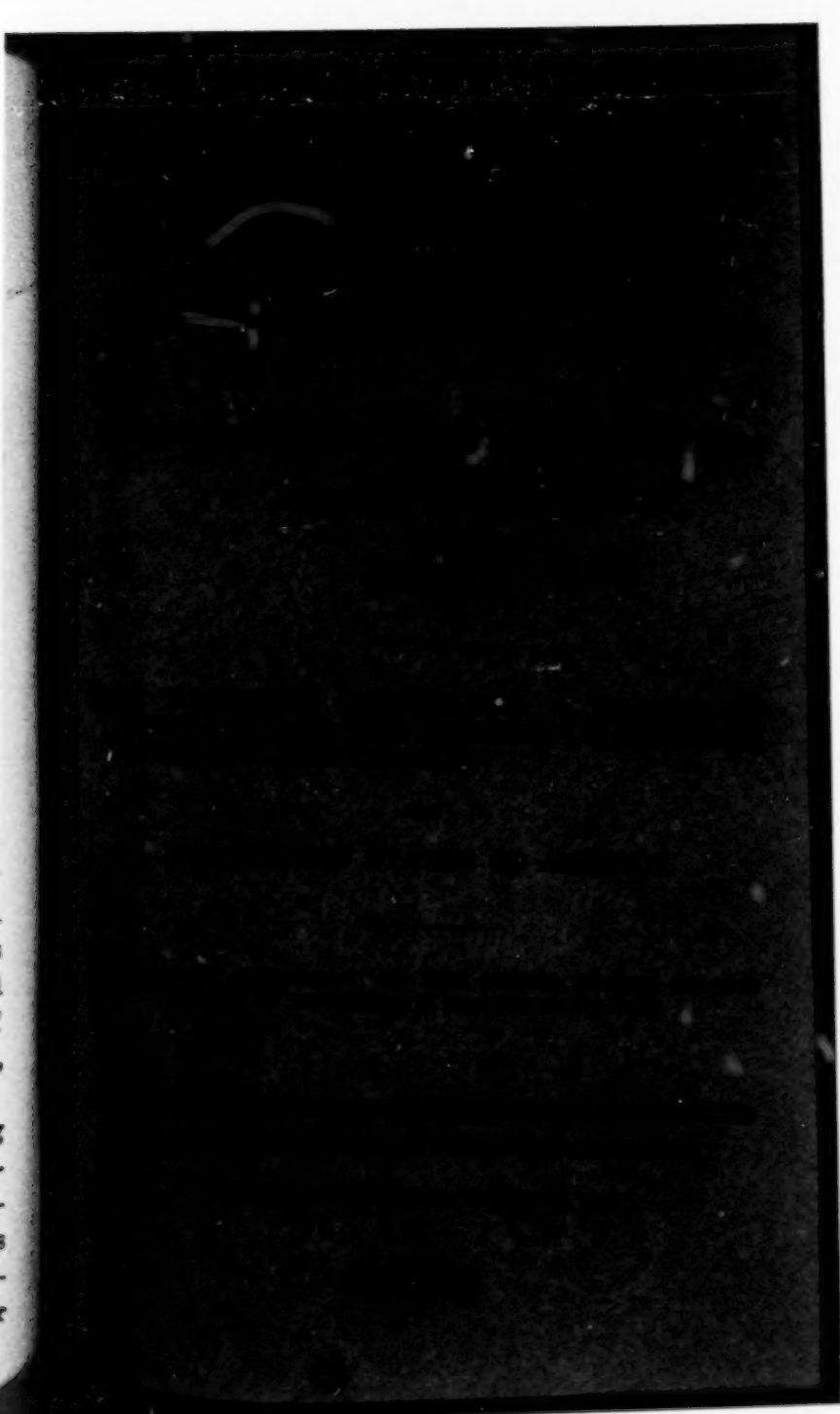
My dear Mr. Secretary: I am in receipt of your letter of 30 July, 1921, in which you requested the Navy Department to allot to the Department of the Interior the sum of \$5,500 for the remainder of this fiscal year to provide for the protection of the interest of the Navy Department and of the Government in the Naval Reserves. In view of the fact that the Bureau of Mines has no funds available for this purpose at the present time, I am taking the necessary steps to have transferred to your Department the sum requested.

Sincerely yours,

(Signed) THEODORE ROOSEVELT,
Acting Secretary of the Navy." [264—186]

The witness states that at the time of the transactions which are the subject of his testimony F. B. Tough was the officer in charge of field operations of the United States Bureau of Mines in connection with oil and gas production and E. P. Campbell was the local officer in charge of the California fields with offices at Bakersfield, California.

As regards instances, other than those relating to the naval reserve lands, where the Interior Department carried on functions for other departments, Mr. Finney stated that according to his knowledge the Interior Department carried on certain work during the war and since the war for



(31,722)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 999

PAN AMERICAN PETROLEUM & TRANSPORT
COMPANY AND PAN AMERICAN PETROLEUM
COMPANY, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

VOLUME II

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No. 4651

**United States
Circuit Court of Appeals**

For the Ninth Circuit.

Transcript of Record.

(IN THREE VOLUMES.)

PAN AMERICAN PETROLEUM COMPANY, a
Corporation, and PAN AMERICAN PE-
TROLEUM AND TRANSPORT COM-
PANY, a Corporation,

Appellants and Cross-Appellees,

vs.

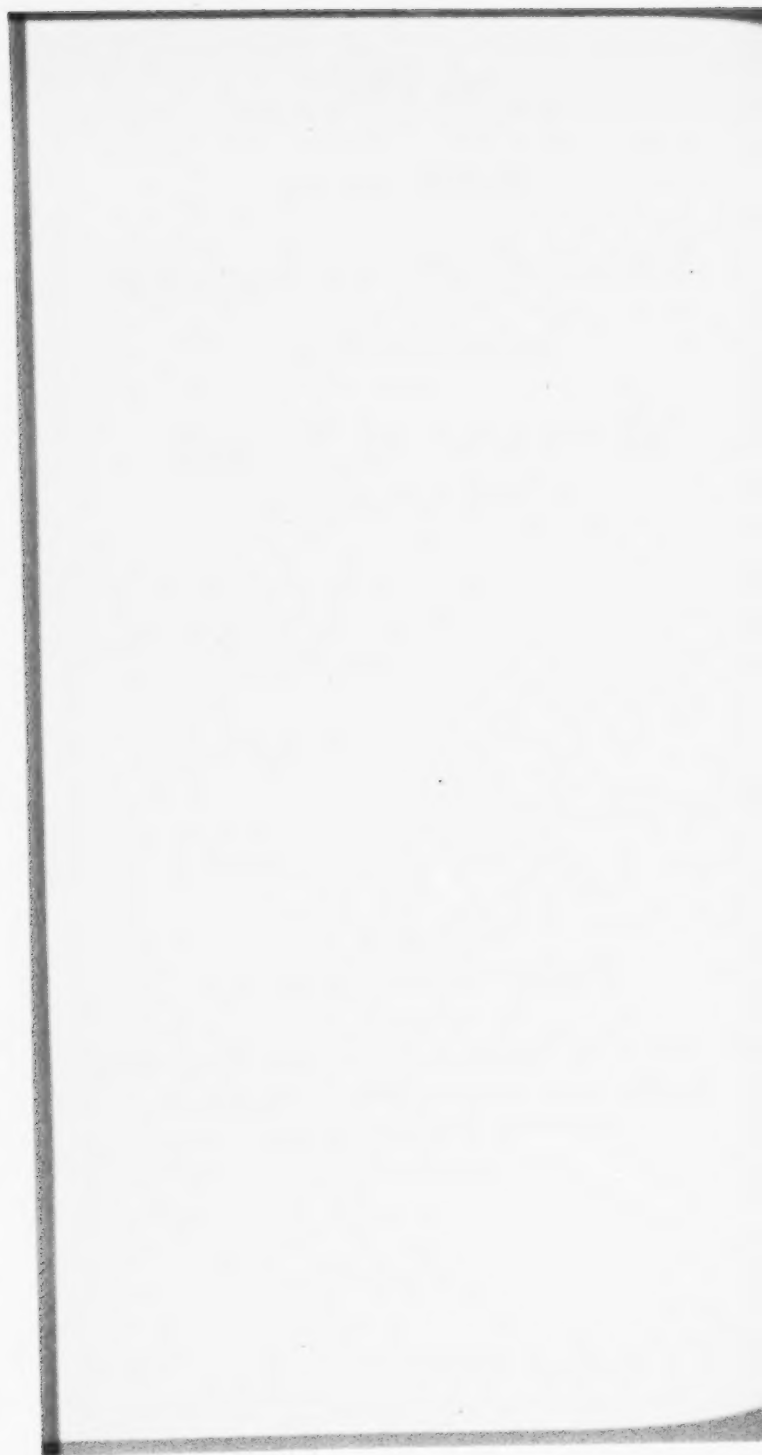
UNITED STATES OF AMERICA,

Appellee and Cross-Appellant.

VOLUME II.

(Pages 481 to 1024, Inclusive.)

Upon Appeal and Cross-Appeal from the United States
District Court for the Southern District of
California, Northern Division.



(Testimony of E. C. Finney.)

the Army and Navy in connection with the promotion and manufacture and production of helium gas in Texas with experimental plants dealing with helium; experts from the Bureau of Mines performed all or a part of the work and the Interior Department was reimbursed by a transfer of funds from the Navy. In Alaska there was for a year or two a Navy coal mine operated in experiment to see whether coal fit for Navy use could be found there; there was a naval officer on that work for awhile but part of the time that work was performed by officers of the Interior for the Navy. The Interior Department co-operates with other departments than the War and Navy Departments; its officials have performed service for the Department of Justice, to identify claims and lands. There is more or less cooperation between the various executive departments. For the Interior Department the Agricultural Department has sent men out to examine reclamation projects and make reports thereon.

Secretary Fall left Washington for the west on July 31, 1921; before he left he and the witness had a conversation from which the witness learned that the Secretary was to take up oil matters out on the Pacific Coast; this conversation was between the Secretary and the witness or among the Secretary, Dr. Bain and the witness; the Secretary stated that he was going to confer with some oil men on the Coast with respect to the disposition of royalty oil; Secretary Fall was absent from

(Testimony of E. C. Finney.)

Washington on that trip until late in October.

There was thereupon read in evidence as Defendants' Exhibit "P" letter dated Mitchell, Nebraska, September 24, 1921, from the Secretary of the Interior to the President of the United States, so much thereof as relates to naval oil reserve matters reading as follows: [265—187]

DEFENDANTS' EXHIBIT "P."

My dear Mr. President:

"As I am now shortly approaching the termination of the inspection trip which I had mapped out before leaving Washington, I will, as shortly as possible, give you some idea of what I have been doing.

"I arrived at San Francisco on August 4th, direct from Washington, where I at once summoned in consultation Commander Landis who has been representing the Navy in the matter of Naval Oil Reserves. I had Mr. Campbell, the representative of the Bureau of Mines who checks our oil in the Bakersfield District, and later arranged a conference between Commander Landis, Campbell and myself. I then went into consultation with Mr. Paul Shoup, and other representatives of the large operators, taking up the question of providing storage for oil for the Navy. Of course, I made no definite or even tentative contract but did secure a promise from the operators, particularly from Mr. Shoup, of the Pacific Oil Company, one of the very large producers, to the effect that

(Testimony of E. C. Finney.)

his company would enter into a contract with the United States to construct two large concrete reservoirs on the California Coast, at places to be selected by the Navy, each of seven hundred fifty thousand barrel capacity, adjacent to oil lines where ships could be readily and easily cargood.

"These tanks will be constructed for the United States to be paid for in oil at current prices, whenever we may desire to enter into a contract.

"Of course the price of construction to be agreed upon prior to contract.

"I also had an offer from one or two other companies to do the same thing, so we have the assurance that the Navy can at any time when it may notify me of its desire to do so, secure storage capacity for at least one million five hundred thousand barrels at one or more places on the coast, the location to be selected by them.

"This will obviate the necessity of asking Congress for authority to expend money in such construction as we have now authority to exchange crude oil for fuel oil and the companies will construct the tanks and fill them with fuel oil, we paying in crude oil for both fuel oil and the tanks in which it is stored.

"With very high regard, I am

"Sincerely yours,

"ALBERT B. FALL."

[266—188]

As regards letter dated August 27, 1921, from the American Oil Engineering Corporation, signed

(Testimony of E. C. Finney.)

by B. T. Dyer, Plaintiff's Exhibit 55, referred to on the direct examination, witness testified that he has not a copy of the letter from Mr. Dyer to Secretary of the Navy Daniels dated September 27, 1920, and as to whether there was any action taken by Secretary Daniels or anybody else in the Navy Department on the 1920 proposition of the American Oil Engineering Company referred to in said Exhibit 55 Mr. Finney can only say that he does not know of any leases or contracts that were made by Secretary Daniels and that he knows there had been no leases made and no disposition of the land, and the matter was still open, when the said Exhibit 55 was before the witness in the fall of 1921. When Judge Finney wrote his memorandum of October 22, 1921, to Secretary Fall (Exhibit 56), in which he stated that in his opinion "the plan outlined in the letter of the American Oil Engineering Corporation is not feasible or advisable," he does not recall that he had taken that matter up with naval officials at all; and after he sent up to Secretary Fall the American Oil Engineering Corporation's letter with his memorandum of October 22, 1921 (Exhibit 56) he does not know what disposition was made of it.

Thereupon counsel for the plaintiff in open court in response to an inquiry by counsel for the defendants stated that they had not been able to find the inclosures with Plaintiff's Exhibit 55 and also that they have not been able to find the letter

(Testimony of E. C. Finney.)

from the writer of that exhibit sent to the Secretary of the Navy in 1920.

Referring to the conference on the subject of naval petroleum reserves in the office of Secretary Fall in October 1921, about which he testified on direct, Secretary Finney on cross-examination stated that he cannot fix the exact date of the conference but it was in the latter part of October, some time after the 15th, subsequent to the time when the Secretary returned to Washington, which was on October 17th; the witness went to the Secretary's office while the conference was in progress carrying a map there of the two reserves which the Secretary desired to have and he may have been there a few minutes; there were present Admiral Robison, Dr. Bain, Mr. Ambrose and Secretary Fall.

Some time in November, 1921, Mr. Finney learned of the plan to [267—189] have Dr. Bain visit the west and take up with oil companies the matter of the possibility of exchanging royalty oil for fuel oil and storage in tanks to be provided. It is a little hard for him to remember when he learned of the plan to lease and drill the remaining unleased lands in Reserve No. 2; he always has been of opinion that No. 2 was an impossible reserve because of the large number of privately owned claims and wells that exist there; he has been to the reserve personally and also talked with Bureau of Mines officials and with Dr. Mendenhall with respect to that reserve at various times and

(Testimony of E. C. Finney.)

has never entertained the opinion that No. 2 was a feasible reserve, so it is hard to tell when he first got Secretary Fall's point of view or the Bureau of Mines' point of view; he knew of the telegrams of November 14, 1921, sent to the various permittees or lessees in Naval Reserve No. 2 shortly after they were sent out, being advised by the Secretary or his assistant, Mr. Safford, whose initials appear on them; that was necessary in order that he would know what to do when applications came in from these companies for the additional leases; he does not think that at the time he knew that the sending out of those telegrams was pursuant to the policy that was advised by the Bureau of Mines and agreed upon by the representatives of the Navy at the time of the October conference but he thinks that he knew it had been determined to lease up the preference right claims in No. 2 in order to save the oil from being drained out by private operators and to provide oil for the contemplated exchange; he must have known that much; he cannot recall all of the details and does not think he was advised as to all of them.

Regarding the leases which were given to the various lessees named in his direct, following the sending out of the November 14, 1921, telegrams, there was no advertising for bids for those leases; they were all issued to people who had either made mining locations or acquired them by purchase and who had been given a preference right to the lease or producing well under Section 18 of

(Testimony of E. C. Finney.)

the Leasing Act of February 25, 1920, which act further provided that if any other lands within the claim were leased the owner of the wells and the location should have the preference; all of those leases were upon the Interior Department's regulation royalties, set forth in regulations promulgated by the Department of the Interior subsequent to the enactment [268—190] of the Act of February 25, 1920, and the royalties prescribed in those regulations, for leases to be granted under the provisions of that act only, are what in this case have been referred to as "regulation royalties." These royalties are applicable to relief leases under Section 18 given under these preference rights, and the regulations contain other royalties as to other kinds of land; the regulations thus promulgated really provide for a higher royalty than the minimum provided for in the act of February 25, 1920.

Dr. H. Foster Bain was Director of the Bureau of Mines during all of the time being inquired about in this case and he was in that bureau under the Wilson administration part of a year; in that bureau there is a division designated as the Petroleum Division, of which the A. W. Ambrose mentioned in the witness' testimony was chief; Mr. Ambrose had been an employee of the department for a number of years prior to 1921, having had experience as an employee in the field and being then later called to the Washington office where he served for several years; prior to this trial Mr.

(Testimony of E. C. Finney.)

Ambrose voluntarily resigned to go into private employment; Dr. Bain is still Director of the Bureau of Mines.

As to the applications of the Pan American and the United Midway Company, or the latter company's assignee, Ramsey, for relief from the alleged burden of the royalty on their July, 1921, leases in Section 1, regarding which Mr. Finney testified on his direct examination, the first he heard of the matter was when there came to his office in Washington Mr. J. J. Staygers, an attorney of that city, who spoke for the United Midway Company, and Mr. J. J. Carter, who spoke for the Pan American Company; the latter had formerly been in the Interior Department and Mr. Finney had known him for many years; these gentlemen, in a conversation with Mr. Finney in his office, presented to him orally the grounds upon which they claimed that their principals were entitled to the relief they asked, stating the number of wells that had been drilled, the approximate production per well, which was very small, and representing that taking into consideration the cost of the well and the cost of operations they not only were not making any money but were losing money at 55½ per cent royalty, and that they thought it would only be fair and equitable to reduce the royalty; he does not remember that they fixed any [269—191] figure, they just asked for reduction of royalty; the conversation on this subject was participated in by Mr. Staygers, Mr. Cotter and the witness;

(Testimony of E. C. Finney.)

after Cotter and Staygers had made it clear to Mr. Finney what they were seeking he told them he did not think the Department would be able to grant their request, but suggested that it be put in writing, and a few days after that interview these gentlemen filed with him the written applications dated November 22 and November 23, 1921 (Exhibits 31 and 32). As to other talks with Staygers and Cotter subsequent to the filing of these exhibits, Mr. Finney believes they were in the office on two different occasions and the last time there was some discussion about the possibility of extending them relief by indirection; if royalties could not be reduced that it could be obtained by giving an additional lease at a lower royalty which would make a lower average on all the land they would then have under lease; this was discussed the second time that there was a conference between Staygers, Cotter and the witness; it is quite likely that at that time the map of the reserve was looked at, Mr. Finney always had a map of the two reserves in his room and in discussing any particular tract of land would refer thereto, and thinks he probably did on this occasion. Before any action was taken on the Staygers and Cotter applications, the witness talked to Secretary Fall about it before the latter left for the West; the applicants were not notified formally or in writing of the Department's action until December; the leases are dated December 14, 1921, and the first information given the applicants with respect

(Testimony of E. C. Finney.)

to the Department's action was at about that time. After Mr. Finney had talked with Messrs. Cotter and Staygers he talked to Secretary Fall on the subject prior to the time that the latter left for the West on December 1, 1921; the first time he talked with the Secretary he probably just told him of the verbal request, he recalls this because he had stated to Cotter and Staygers that he didn't believe there could be or should be a reduction in royalties as they requested, stating that these royalties had been fixed on competitive bidding and the Department would hardly be justified in reducing royalties so fixed; and he thinks he told the Secretary about the same thing and the Secretary agreed with that view. A few days later the written applications came to the hands of the witness and he then spoke to the Secretary again about the applications for additional lands, [270—192] briefly telling him in substance of the discussion which he, Mr. Finney, had had with Staygers and Cotter with regard to additional leases which would bring the average royalty down, and the Secretary orally agreed to extending that relief or authorized it.

Prior to November, 1921, the persons and companies to whom were addressed the Secretary of the Interior's November 14, 1921, telegram had received leases for producing wells in Naval Reserve No. 2 pursuant to claims which they had filed under the Act of February 25, 1920; those leases had been granted by Secretary of the Interior John Barton

(Testimony of E. C. Finney.)

Payne of the Wilson administration; as regards how they were selected for the additional leases which resulted from the November 14, 1921, telegrams, the statute provides that if additional leases were made the President might have the authority to lease either additional wells or the remainder of the areas of the mining locations upon which the wells were located. So that they had a preferential right in case leasing was to be done. Under Section 18 of the act the President may in his discretion make area leases within limitations prescribed in the act to those persons who have a preferential right, and the persons to whom the aforementioned telegrams were sent had a preferential right. There is no record of any kind showing any action of the President of the United States on those leases and there was no competition for those leases which were granted to those nine concerns. All of these leases, made subsequent to and resulting from the November 14, 1921, telegrams, were in Naval Reserve No. 2, and they were in the naval reserve.

Returning to the subject of the applications of Ramsey, by Staygers, and the Pan American Company, by Cotter, made in November, 1921, for the relief about which the witness has testified, before any action was taken thereon the Navy Department and the Interior Department had concluded to seek leases on three other sections in Naval Reserve No. 1, these sections being described as Section 25, T. 30 S., R. 23 E., Section 6, T. 31 S., R. 24 E., and Section 2, T. 31 S., R. 24 E.

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(Testimony of E. C. Finney.)

Mr. Finney identified, it having been sent out under date of November 30, 1921, by Dr. Bain, letter, together with three pages attached thereto, and the same was offered in evidence as Defendants' Exhibit "Q," and reads as follows: [271—193]

DEFENDANTS' EXHIBIT "Q."

"November 30, 1921.

Pan American Petroleum & Transport Company,
Security Building,
Los Angeles, California.

Gentlemen:

The Department may decide to lease certain tracts in section 25, T. 30 S., R. 23 E., Sec. 6, T. 31 S., R. 24 E. and Sec. 2, T. 31 S., R. 24 E., and you will find enclosed plats of the well locations, together with the terms of the bid required by the Department.

It practically amounts to a flat bid for that portion of the average production per well above 20 barrels in one tract and 50 barrels in the other two tracts. Your attention is called to the fact that the Department will expect an exchange of the royalty oil for fuel oil at tidewater points.

I am inviting you to submit bids on any one or all of these three tracts, the bids to be in Washington by December 31st, 1921, so that they may be considered in connection with the awarding of leases.

Yours very truly,

H. FOSTER BAIN,
Director." [272—194]

(Testimony of E. C. Finney.)

It was agreed by counsel that the three pages attached to the foregoing were headed "Leases to be given in Naval Reserve No. 1," and described the tracts in sections 2, 6 and 25 to be leased, and set forth the royalties, and provided, in substance, that the royalties were as prescribed for the wells of the lower productivity and that bidders shall state what royalty they offer on wells above a certain number of barrels a day production.

Under the above-quoted call for bids dated November 30, 1921, no leases were made to the lands described in said call in Section 6 or in Section 25 for the reason that no satisfactory bids were received for those lands; he has not with him the bids which were received for the lands in those two sections and thereupon counsel for the defendants called upon counsel for the plaintiff to produce the same and counsel for the plaintiff stipulated that the same would be obtained and produced later in the trial.

As regards Section 2, located directly below Section 35 which is owned by the Pacific Oil Company, bids were received by the Department late in December, 1921, one of said bids being dated New York, December 28, 1921, from the Pan American Petroleum Company, which, having been identified by the witness, was received in evidence as Defendants' Exhibit "R," and reads as follows: [273—195]

DEFENDANTS' EXHIBIT "R."

"New York, N. Y., December 28, 1921.

"The Secretary of the Interior,

"Washington, D. C.

"Sir:

"In response to letter of the Director of the Bureau of Mines dated November 30, 1921, the Pan American Petroleum Company herewith proposes to drill eighteen wells on the tract of land in Section 2, Tp. 31 S., R. 24 E., Naval Reserve #1, California, described as follows:

" 'A tract 5280 feet east and west by 1173 feet north and south along the north border of Sec. 2, Tp. 31 S., R. 24 E., bounding Sec. 35, Tp. 30 S., R. 24 E. on the North; Sec. 3, Tp. 31 S., R. 24 E. on the West; and Sec. 1, Tp. 31 S., R. 24 E. on the East,'

and to pay to the United States on all production therefrom not exceeding 50 barrels per well per day as set forth in said letter of November 30, and on the portion of the average production per well per day exceeding 50 barrels, for oil less than 30 degrees Baume thirty-five per cent (35%) and for oil 30 degrees Baume or over forty-five per cent (45%), or as follows:

Oil less than 30 degrees Be.	Oil 30 degrees Be. & Over
---------------------------------	------------------------------

On that portion of the average
production per well not ex-
ceeding 20 barrels per day

for the calendar month....12-1/2%

12-1/2%

On that portion of the average
production per well of more

(Testimony of E. C. Finney.)

Oil less than 30 degrees Be. Oil 30 degrees Be. & Over

than 20 barrels and not more
than 50 barrels per day for
the calendar month.....14-2/7% 16-2/3%

On that portion of the average
production per well over 50
barrels per day for the calen-
dar month3. % 45%

On gas and casinghead gaso-
line, as given in the regula-
tions.

“We agree, if required, to exchange fuel oil for
royalty oil on the basis proposed.

“If awarded this lease we will agree to complete
the eighteen wells in nine (9) months instead of
fifteen (15).

“Respectfully,

“PAN AMERICAN PETROLEUM COM-
PANY.

“By JOS. J. COTTER.” [274—196]

The witness has not with him the other bids that
were received on Section 2 in response to the No-
vember 30, 1921, call, but counsel for the plaintiff,
having been requested so to do, agreed to produce
them.

When these bids were received, up to December
31, 1921, they were opened by the witness, and then
having looked into the state of the record with re-
gard to Section 2, on which satisfactory bids had
been received, he found that that record showed
a pending and undisposed of claim made by White

(Testimony of E. C. Finney.)

and Coffin and he advised Mr. Cotter of the Pan American Company, as well as representatives of other bidders, that action of the Department would have to be deferred until that claim could be disposed of; subsequent to his conveying that information he received, under date of January 5, 1922, the following telegram (Defendants' Exhibit "S").

DEFENDANTS' EXHIBIT "S."

"Los Angeles, Cal., Jan. 5, 1922.

Honorable E. C. Finney,

Acting Secretary of the Interior,

Washington, D. C.

We have quitclaim contract from White and others covering Section Two on part of which we submitted bid. Am returning to Washington to take matter up with you. This will eliminate necessity for delay which you expected.

J. J. COTTER."

Thereafter, in the month of January, 1922, Mr. Cotter called at the office of the witness and told him that the Pan American Company had acquired title to the White and Coffin claims to Section 2 and was prepared to turn the title over to the Department for a consideration, which was this: The Pan American Petroleum Company's bid was the highest and best bid on the double line of wells on the north side of Section 2 and Mr. Cotter proposed that if award was made his company under that bid and his company was given a lease for the remainder of Section 2, it would relinquish to the United States the White and Coffin mining titles.

(Testimony of E. C. Finney.)

After discussing the matter with Cotter, Mr. Finney asked him to put the proposition in writing and he received from Mr. Cotter the following communication, which was read in evidence as Defendants' Exhibit "T": [275—197]

DEFENDANTS' EXHIBIT "T."

"February 1st, 1922.

"The Secretary of the Interior,

"Washington, D. C.

"Dear Sir:

"Pursuant to the request of the Department on December 28, 1921, we submitted bid for lease on a strip of land 1173 ft. wide across the north side of Section 2, Tp. 31 S., R. 24 E., M. D. M., California.

"On February 23, 1911, R. J. White filed mineral application No. 03022 for the Red Top Nos. 1, 2, 3 and 4 Placer claims, which claims were located January 1, 1907, based upon discovery of large and valuable deposits of Fuller's earth upon each of said claims at and prior to the date of location, which date was prior to any withdrawal of the lands. This claim embraced the whole of Sec. 2.

"This application is still of record, no hearing has ever been had respecting claimants right to title to this land, and he is presumably entitled to a patent under the placer mining laws.

"Therefore it appears that it will not be possible for the Department to lease the strip of land above mentioned until and unless some disposition is made of said mining claim. In order to avoid the delay incident to trying out this matter in the Department

(Testimony of E. C. Finney.)

and possibly in the courts the undersigned company which is in position to have filed with the Department quit claim deed to said mining claim covering all of said Section 2 hereby makes the following proposition:

"If the Department will accept our above mentioned bid for lease on said 1173 ft. strip across the North side of the Section we will deliver to the Department in connection therewith quit claim deed to said mining claim covering all of said Section, provided that the Department will issue to us lease for the remainder of said Section at the Department's regulation royalty rates, 12-1/2 to 20%.

"Respectfully,

"PAN AMERICAN PETROLEUM COMPANY.

"By JOS. J. COTTER." [276—198]

The witness then identified the following intra-departmental correspondence on the subject of Section 2, the claims thereon, and a compromise thereof, which correspondence, consisting of letters and memoranda, was read in evidence as Defendants' Exhibit "U" and in substance is as follows:

Exhibit "U-1," letter dated January 3, 1922, addressed to the Secretary of the Interior and signed William Spry, Commissioner of the General Land Office, setting forth facts relating to the White and Coffin claim, their offer made to the Secretary of the Navy to compromise the same, and the Secretary of the Navy's letter to the Secretary of the

(Testimony of E. C. Finney.)

Interior of June 28, 1921, forwarding same; Commissioner Spry concluded his letter by stating that in the event a compromise by granting a lease is made the same might be made under the provisions of the act of June 4, 1920.

Exhibit "U-2" is dated Bureau of Mines, February 4, 1922, headed "Memorandum to Secretary Fall," signed H. Foster Bain, Director, who stated that there had recently been submitted to several California oil companies invitations for bids for leases in Sections 2, 6 and 25; satisfactory bids had been received on Section 2 and it is probable that the Department will grant a lease to that area in the near future; half of the lease proposed for Section 6 lies within a temporary reserve to be arranged with the Pacific Oil Company and in view of this and of additional information gathered while in California, it is recommended no lease be granted to the 18 wells in that section. Bids received for the south line of Section 25 were hardly satisfactory and it is recommended that this area be not leased. This memorandum is endorsed: "Recommended, Feb. 8, 1922, E. C. Finney, Acting Secretary." Mr. Finney testifies that that indicates his approval of the recommendation made by Director Bain in his memorandum, Exhibit "U-2." As part of the same exhibit there was read the next paper on the subject, dated Bureau of Mines, February 6, 1922, and signed E. A. Holbrook, Acting Director, the witness Finney testifying that Mr. Holbrook was the Assistant Director of the Bureau

(Testimony of E. C. Finney.)

of Mines and was Acting Director in the absence from the city of Director Bain. Mr. Holbrook's memorandum was addressed "to Secretary Finney" and reported that bids were received for lease on 18 wells located along the north line of Section 2, T. 31 S., R. 24 E., Naval Reserve No. 1, from General Petroleum Corporation, R. D. Clarke, Pan American Petroleum Company, Standard Oil Company, White and Coffin, Associated [277—199] Oil Company, Pacific Oil Company and W. R. Ramsey; the bids were analyzed and it is stated that the four highest bids are those of the Pan American Petroleum Company; it is further stated that in view of the Fuller's earth claim on this section "it is very evident that a lease cannot be awarded to this company within two or three months of the date which they have specified. The Pacific Oil Company, while bidding as high as the Pan American Petroleum Company, has a slower drilling campaign and has no equity in the Fuller's earth claim. The Pan American Petroleum Company agrees to complete the 18 wells in the 9 months. Inasmuch as the Pacific Oil Company has three offsetting wells located along the south line of Section 35, the rapid drilling campaign proposed by the Pan American Petroleum Company is very attractive to this Department in order to avoid additional loss by drainage from the offset wells. The Department therefore must consider the comparative value of the bids of the Pan American Petroleum Company and W. R. Ramsey, Mr. J. W. Staygers, represent-

(Testimony of E. C. Finney.)

ing W. R. Ramsey, has today withdrawn his bid by wire, so obviously the Pan American Petroleum Company has the best bid, providing a compromise can be effected for the mining claim this company now holds on Section 2. In view of the above facts, it is recommended that the Department grant the lease for 18 wells along the north line of Section 2 to the Pan American, based upon the offer made in their bid. Mr. Bain has been advised by a representative of" that company that they will be willing to turn over to the Government a quitclaim deed to Section 2 provided they would get in exchange a lease to these 18 wells at a royalty as bid and a lease on the remaining portion of the north half of the section at Government's sliding scale royalty. The Holbrook memorandum concluded: "I think the Department should attempt to make such a compromise with the Pan American Petroleum Company."

The next paper, part of Defendants' Exhibit "U," and relating to the same subject as those last introduced, was identified by the witness as a memorandum from him to the Secretary of the Interior dated February 6, 1922, and reading: [278—200]

DEFENDANTS' EXHIBIT "U."

"Dear Mr. Secretary:

Referring to attached memorandum from the Director of the Bureau of Mines, which finds the bid of the Pan American Petroleum Company to be the best bid submitted for the drilling of 18 wells on

the north line of Sec. 2, T. 31 S., R. 24 E., I have to advise you that after bids had been called for it was discovered that the entire Sec. 2 was covered by a mining claim located in 1907, long prior to any withdrawal, as a fuller's earth placer mining claim; that the title of the locators was acquired by R. J. White, who filed application for mining patent therefor, and this said application is still pending and uncanceled, and that so long as this mining application is of record and undisposed of this Department would be without authority to lease or dispose of the lands to anyone else. The record was in California in the hands of the Field Division of the Department of the Interior and the Department of Justice, and no action thereagainst had been taken. As you know, to clear the record it would be necessary to prefer charges against the application, to prove that the location was invalid or that the law had not been complied with. Under our practice, this would involve the ordering of a hearing and taking of testimony, the right of appeal from the local office to the General Land Office, and to Secretary of the Interior; also if decision were adverse, the mineral applicants might carry the matter into the courts, and tie the land up for months or years. If they were successful, they would obtain a patent for the entire section, which patent, in my judgment, would carry with it the right not only to fuller's earth but to all other minerals in the land, including oil and gas. Meanwhile, during any proceedings which might be had in this Department or the court, the land would be drained of its oil by the wells on adjoining patented land. The Pan

(Testimony of E. C. Finney.)

American Petroleum Company, learning of this situation, has secured from the mineral applicant a quitclaim deed to the United States to all of Sec. 2, which they agreed to surrender and turn over to the United States, compensating the mineral applicants, upon condition that the bid of the Pan American Petroleum Company, which, as stated is the best bid received, in any event be accepted and an additional area in the north part of Sec. 2 be leased to them at regulation royalties. This seems to be the only practicable solution of the difficult situation in which this Department finds itself with respect to said Sec. 2. If not accepted, protracted litigation in the Department and the courts will ensue and the Government meanwhile suffer the loss of the oil and gas beneath the land by drainage.

Respectfully,

FINNEY." [279—201]

The witness testified that the name "Finney" to the above is in his handwriting and he identifies on that paper just to the left of his name a notation reading: "Approved, Fall," as in the handwriting of Secretary of the Interior Albert B. Fall.

The final paper constituting part of Defendants' Exhibit "U" is a letter dated February 7, 1922, from the witness, signed E. C. Finney, First Assistant Secretary, to the Commissioner of the General Land Office, in which it is stated that on the recommendation of the Bureau of Mines and the law officers of the Department the Secretary found the bid

(Testimony of E. C. Finney.)

of the Pan American Company to be the best submitted for the drilling of 18 wells on the north line of Section 2; he also in consideration of the surrender to the United States of all claims to that section under mineral application filed by R. J. White, by the Pan American Company, which had purchased that claim, and which offered to surrender it to the United States in consideration of a lease for all of Section 2, had decided (1) to award to the Pan American Company a lease for the 18 offset wells at the royalty and under the conditions specified in its bid; (2) to award to said company a lease to the remainder of the north half of Section 2 at the regulation royalty for oil and gas produced therefrom. All papers, including the quitclaim referred to, are transmitted to the General Land Office and the Commissioner is directed, in cooperation with the Bureau of Mines, to prepare the necessary lease or leases in accordance with the award.

The witness was then interrogated about the fact that from the above papers regarding Section 2 it appeared that under date of February 1, 1922, the Pan American Company, by Cotter, proposed to surrender the White and Coffin claims in consideration of, first, the award to it under its bid of December 28, 1921, of a lease to that strip along the north half; and, second, a lease on the basis of the regulation royalties of all the remainder of Section 2; whereas it appears that the action taken was to lease to that company in consideration of the quitclaim not all the remainder of Section 2 but only the rest of the north half, and being asked how that

(Testimony of E. C. Finney.)

was reached he answered that "it was regarded as a compromise or settlement. We tried to drive as hard a bargain with them as we could." Asked who tried to drive as hard a bargain as [280—202] could be driven, he answered: "I did for one, and the Bureau of Mines"; that he and representatives of the Bureau of Mines talked with Cotter once or twice about the matter; that Cotter was endeavoring to get a lease to all of the remainder of Section 2 for his quitclaim deed and witness and the Bureau of Mines were endeavoring to give him a lease for as small a portion as they could; the result was that the bargain driven is the one represented by the lease under which the company got only the strip that the witness offered to give it.

Going back in the testimony in point of time to November and December, 1921, the witness repeats that when Mr. Doheny's letter to Mr Fall dated November 28, 1921, was received in the office of the Secretary the notation at the top thereof in Mr. Safford's writing, consisting of the name "Finney," indicates that that letter was routed to the witness; Secretary Fall's office was on the sixth floor of the Interior Department Building and Mr. Finney's on the fifth floor; the routing he speaks of means that Safford, knowing Mr. Finney's connection with these matters, had sent that letter down to his office where, according to his recollection, he read the letter and saw that it was nothing with which he had to deal and he returned it either to Safford or to the Secretary, probably to Safford; the next time that he saw Mr. Doheny's letter of

(Testimony of E. C. Finney.)

November 28th it was brought to his office by Dr. Bain personally some time in November and Bain asked him to write Cotter, which he did as shown by his letter to Cotter dated December 16th (Exhibit No. 67); when the November 28th letter first came to him it was unaccompanied by any note or message save the word "Finney" written at the top; he does not recall seeing any other note or paper attached to the letter and Dr. Bain came to him with it about December 16th; nothing was said to the witness by Dr. Bain or Mr. Safford or Mr. Fall at any time about keeping that letter or its contents secret; when it last left Mr. Finney's desk on or about December 16th it was still in the hands of Dr. Bain and he did not hear of that letter again until the Senate Committee hearings early in 1924 when he read it in the report of those hearings. There is no record known to him in the Department of any action having been taken on Mr. Doheny's letter of November 28, 1921, except this, first, a letter from Secretary Fall to Admiral Robison dated November 29, 1921; and, second, Mr. Finney's letter to Mr. Cotter asking him when next in Washington [281—203] to see Dr. Bain about the subject matter of the Doheny letter.

The Secretary of the Navy's letter dated October 25, 1921, Exhibit 24, was brought to Mr. Finney's attention some time in November, 1921. At the same time there was called to his attention Secretary Fall's letter of October 30, 1921, bearing the same exhibit number. These were probably called to the attention of the witness just before Secretary

(Testimony of E. C. Finney.)

Fall left for the west on December 1st so that he would be informed as to the situation. The witness knew of the letter of November 8, 1921, from Secretary Fall to the Secretary of the Navy (Exhibit No. 25) some time before the first of December. As to the letter from Secretary Denby to the Secretary of the Interior dated November 10, 1921 (Exhibit No. 26), in which the specifications requested by Exhibit 25 were given, and the letter of November 15, 1921 (Exhibit No. 28), from Secretary Denby to Secretary of the Interior, specifying points at which the Navy wanted fuel oil delivered, these letters were all routed to the Bureau of Mines which Bureau was dealing directly with the subject matter and with the Navy's representatives and they were probably called to his attention by that Bureau. There was received at the Interior Department while Mr. Fall was away from Washington letter signed by Assistant Secretary of the Navy Roosevelt, addressed to the Secretary of the Interior, dated December 9, 1921, relating to the plans for the first Pearl Harbor project, and witness immediately, under date of December 10, 1921, Exhibit 63, replied to it, and in his letter called attention to the existing uncertainty as to the desires of the Navy in connection with royalties from the naval reserves, and this was followed by a letter to the Secretary of the Navy signed by the witness, Exhibit 65, as regards which he cannot tell the details of the arrangements which had been made, spoken of in his said letters of December 10 and 14, under which crude oil was to be exchanged with

(Testimony of E. C. Finney.)

four pipe-line companies, described as contractors in his letter of December 10th, for fuel oil delivered by them at tidewater; that letter was prepared for him by the Bureau of Mines which looked after those details; the witness knows that there had been an arrangement with some of the said companies because later on he notified the Standard and the different oil companies out here in California of the change; in other words, of the change from taking royalty oil for fuel oil for current use to the plan [282—204] to exchange royalty oil for storage oil in tanks, and he signed or wrote letters and telegrams to those various companies advising them of the change in the arrangements, and those are the parties referred to as contractors and as four pipe-line companies; the witness thinks he knew that these companies thus referred to were the Standard, the Union, the Associated and General Petroleum Companies, though he cannot recall definitely all of the names, but knows the Standard was one and the Associated was one. Judge Finney does not know of any advertisement, either by newspaper or letters, upon which that arrangement was or those contracts were made with those four pipe-line companies prior to November or December, 1921; as to whether he knows as a matter of fact that this exchange arrangement, provided for delivery by the Government to these four pipe-line companies in the field of crude oil and their delivery from time to time and from place to place at tidewater of fuel oil, was entered into without competition, the witness can only say that he does not know

(Testimony of E. C. Finney.)

of any advertisement or any call for bids in connection therewith and found no such evidence in the records.

Referring to memorandum dated November 30, 1921, Exhibit 60, signed by the witness, in which occur the words "By direction of the Secretary," as stated in his direct examination the presence in the memorandum of the words quoted indicates to Mr. Finney that that memorandum was sent by him to the Bureau of Mines by direction of Mr. Fall. The witness testified again, as he has already done, that Secretary Fall left Washington December 1, 1921, and remained away until late in January, 1922; during that time the witness saw Admiral Robison on several occasions and recalls at least one conversation with the Admiral over the telephone some time between the 5th and 10th of December which conversation he refers to in his letter of December 6, 1921, to the Director of the Bureau of Mines, Exhibit 61; his recollection is that the first information he had of the opinion of the Solicitor for the Navy Department referred to in Exhibit 61 was in a telephone message from Admiral Robison and he probably wrote his letter of December 6th (Exhibit 61) to the Bureau of Mines the same day or the following day; that letter specifically recalls the directions given the Bureau of Mines in Judge Finney's previous memorandum of November 30th (Exhibit 60), and the procedure outlined in that November 30th memorandum [283 — 205] had been communicated to the Bureau of Mines by di-

(Testimony of E. C. Finney.)

rection of Mr. Fall, which fact the witness fixes by the use therein of the words "By direction of the Secretary"; when Admiral Robison telephoned the witness on December 5 and 6, 1921, advising him, first, what the legal department of the Navy had decided, and, second, what the Secretary of the Navy now desired, Mr. Finney wrote his letter of December 6th (Exhibit 61); before he sent that letter of December 6th, recalling the November 30th instructions, he did not in any way communicate with Secretary Fall; the basic reason for his letter of December 6th (Exhibit 61) was the request or direction of Admiral Robison who told him that the Secretary of the Navy had approved that procedure.

There next crossed in the mail between the Navy and Interior Departments Acting Secretary Finney's letter of December 14, 1921 (Exhibit 65), and Secretary Denby's letter of the same date (Exhibit 66), and then between that time and the end of December, 1921, "We asked the Navy—or specifically Admiral Robison—to furnish us additional copies of blue-prints concerning the Pearl Harbor project," and also specifications; this was preparatory to Director Bain's trip to the west and the blue-prints and specifications requested were taken by Mr. Bain when he went west.

Thereupon there was received in evidence Defendants' Exhibit "V," being a letter dated December 15, 1921, from Admiral Robison to Mr. Finney; Defendants' Exhibit "W," letter dated December 17, 1921, from Mr. Finney to Admiral Robison;

(Testimony of E. C. Finney.)

Defendants' Exhibit "X," letter from Commander Hepbourn, Acting Chief of the Bureau of Engineering, Navy Department, to Mr. Finney, dated December 24, 1921; Defendants' Exhibit "Y," letter dated December 29, 1921, from Mr. Finney to Commander Hepbourn; Exhibit "Z," letter dated December 29, 1921, from Mr. Finney to Admiral Robison; Defendants' Exhibit "AA," letter dated December 28, 1921, from Admiral Robison to the Secretary of the Interior; Defendants' Exhibit "BB," a letter dated December 30, 1921, from Mr. Finney to Admiral Robison; consisting of correspondence by which, in substance, the Interior Department requested the Navy Department for blue-prints and specifications for the Pearl Harbor storage project, and the Navy Department transmitted to the Interior Department a stated number of copies of blue-prints, specifications, and of a drawing which "will be useful to prospective bidders as it gives further [284—206] information"; during this period Admiral Robison informed the witness that the Navy Department was about to detail an engineering officer from its Bureau of Yards and Docks to act with the Interior Department in connection with the Pearl Harbor project, but as the services of this officer could not be used until Dr. Bain returned from the west, the witness so informed the Navy.

In January or early in February, 1922, Director Bain and Secretary Fall having both returned to Washington, there was a conversation in the Secretary's office participated in by the Secretary, Dr.

(Testimony of E. C. Finney.)

Bain and the witness regarding the further steps to be taken in the Pearl Harbor project matter; at the time of this conversation the invitations for bids had not yet been sent out but Director Bain for his bureau was working on the matter and Secretary Fall said to Mr. Finney and to Director Bain, in substance, that he was going to be engaged in other business or affairs and that he wanted the witness and Bain to handle this Pearl Harbor project matter. Thereafter it came to the knowledge of the witness that on February 15th Director Bain sent out the first draft of the proposals for bids; Mr. Finney has a faint recollection that before that letter went out Bain talked with him about the specifications, at any rate they went out accompanied by the letter under Bain's signature (Exhibit 73). By the term "specifications" as here used the witness means the terms and conditions of the invitation for bids as distinguished from the Navy Department's specifications for construction. Before this letter of February 15th was sent out the witness thinks Director Bain informed him in a general way that while on the Pacific Coast he had conferred with Storey and McLaughlin and witness thinks Bain mentioned Shoup; some of the executives of the large oil companies out here; he does not remember all of their names, it was just a general conversation in which Bain did not go into details; he understood that Dr. Bain had discussed the matter in a general way with representatives of several oil companies on the Pacific; he did not understand that Bain had

(Testimony of E. C. Finney.)

stated anything specific to them in the form of worked out plans; before Bain left Washington the witness knew that Bain was taking with him the Navy specifications, but what he is referring to in saying that he does not understand that Dr. Bain stated anything specific to the representatives of the oil companies while he was on the Pacific Coast in the form of [285—207] worked out plans is the later invitations which were sent out by the Department of the Interior containing the details and conditions of the bidding. The talk between Director Bain and the witness about the general result of the former's trip to the Pacific Coast was all prior to the time when Mr. Storey and Mr. Sutro called on the witness; they did not come in until March. After Director Bain's letter of February 15th, the first request for bids, had left the Department, and in Dr. Bain's temporary absence from the city, there came to Mr. Finney's attention Admiral Gregory's objection to a cost-plus form of contract and immediately it was brought to his attention Mr. Finney spoke to Secretary Fall, and then with Ambrose's help prepared and sent out the telegrams of February 17, 1922 (Exhibit 80). When he spoke to Secretary Fall at this time he mentioned to the Secretary the objection made to the cost-plus plan and Secretary Fall said, in substance, that he agreed with Admiral Gregory. During the period intervening between the sending out of the invitations for bids in their first form on February 15th and in their final form under date of March 7th, the

(Testimony of E. C. Finney.)

witness was under the impression that Director Bain was co-operating and conferring with the officers of the Navy Department, Admiral Robison, Admiral Gregory, and Lieutenant Keating, though he cannot give any specific instances; the fact, stated in substance, is that as regards the form of the conditions for bids that was largely left with Director Bain and his assistants; as regards the engineering or construction details, his understanding was that the Navy was looking after that, and as regards the legal form of what went out Mr. Finney gave his particular attention to that as he thought he was a little better qualified along that line than in engineering. During the interval between February 15th and March 7th, 1922, Mr. Dunn and Mr. Cotter came in on one occasion and spoke to the witness with regard to cost-plus plan, Dunn said he favored that plan, or, rather, he said they did not have definite information sufficient to act on under the other plan. Mr. Dunn was introduced to the witness as the head of the J. G. White Company by Dr. Bain; Mr. Finney had known of the White Company for years; during the conversation to which he refers Mr. Dunn was urging the Government to accept bids on the cost-plus-a-fixed-fee plan, and Mr. Finney informed him that the Government's position as advocated by Admiral Gregory, concurred in by the Interior Department, [286—208] was a lump sum plan; in respect to that aspect of the matter the Interior Department were acting and doing just what the Navy Department had asked them to do.

(Testimony of E. C. Finney.)

When on April 15, 1922, bids were opened in the circumstances stated by the witness on his direct examination, the minutes read in evidence by counsel for the plaintiff were made by a stenographer designated by the witness for that purpose; there were several representatives of bidders present; there was no objection or protest made at that time by any representative of any bidder against the consideration of Proposal B of the Pan American Company and he does not recall that they received at any time in the Department any protest to consideration of Proposal B; there were only the telegrams, already read in evidence, in respect to the whole matter, from persons who wanted to get in on the competition; after the bids were opened and the witness had read to those present the substance of all proposals received, the Standard Oil proposal, the Associated Oil proposal, the Pan American A and B Proposals, no person, interested or otherwise, protested against the Government's consideration of Proposal B. When the representatives of the bidders who were present retired from the room the witness turned over all the proposals to Dr. Bain and Mr. Ambrose, with instructions, in substance, to examine them carefully, make an abstract of them, and return them to the witness with a report and recommendation; he did not tell Dr. Bain or Mr. Ambrose, or give them any instructions, about what their recommendation should be; he had at that time no instructions whatever from Secretary Fall as regards what their recommendation

(Testimony of E. C. Finney.)

should be; he had not prior to the time Secretary Fall left Washington on April 13, 1922, received any instructions from him as to what consideration any of these bids should receive; it is a fact that when Secretary Fall left Washington he left in the hands of the witness and Dr. Bain the matter of opening these bids and giving them consideration without any restrictions being placed on the witness and Bain at all.

On Monday, April 17, 1922, Mr. Ambrose brought to the witness his "Memorandum to Secretary Finney" containing abstract, report, and recommendation (Exhibit 119), and the witness called Admiral Robison over to his office and the three of them, Ambrose, Admiral Robison, and the witness, went [287—209] over the matter and the Ambrose report and recommendation and the witness recollects sending to Mr. Fall, that afternoon, after the conference, a telegram, copy of which has been read in evidence as Plaintiff's Exhibit No. 120, but he has been unable to find a copy of that telegram in the Department's files; in the year 1924 the files of the office of the Secretary of the Interior and the Bureau of Mines were placed at the disposal of representatives of the Senate Committee and those representatives were engaged in going through the files for many weeks and they took many of the files up to the Senate Committee.

Subsequent to the time that bids were opened on April 15th and up to the time of the sending by the witness of telegram to Secretary Fall on April 17th,

(Testimony of E. C. Finney.)

Exhibit 120, he had not sent anything to Mr. Fall regarding these bids and their relative merits; according to his best recollection that telegram was dictated by him in the presence of Ambrose and Robison; in it he states that "In opinion Ambrose, Robison and myself Pan American alternative bid best offered and should be accepted," and he said nothing about Bain's opinion because Bain was away at the time; before any word was sent to Secretary Fall a concurrence of opinion was expressed in that conference by Admiral Robison, Mr. Ambrose and the witness.

He has not been able to find in the Department's files copy of the telegram of April 18, 1922, from Secretary Fall, addressed to "Finney-Safford, Interior Department, Washington, D. C.," Plaintiff's Exhibit 121, but if he received that telegram from Secretary Fall he naturally would call it to Admiral Robison's attention, but his memory is not very clear as to whether he did so before he signed the letter of April 18, 1922, to the Pan American Company (Exhibit 122). He handled hundreds of matters during that year relating to lands and leases and contracts and does not recall all of those details. It is highly probable, if he received that telegram, that he would have advised Robison of its contents, but he cannot say positively that he did; he did confer with Robison and Ambrose on the 17th and had Robison's opinion then; it is extremely likely, highly probable, that he did consult Secretary Fall by wire and got an answer from him on the

(Testimony of E. C. Finney.)

18th, but he has not been able to find any copy of those telegrams in the files lately; he heard them read, however, as part [288—210] of the plaintiff's direct examination of him, and he has no question but that that telegraphic correspondence did take place, he really believes it did take place, because it is in accordance with what he did in other things; he hasn't a doubt in the world that if he received the telegram from Mr. Fall dated April 18th (Exhibit 121) he followed the suggestion contained therein and did consult Robison and Denby before writing his letter of award of April 18, 1922, to the Pan American Company, because he always carries out the orders of his superior. Mr. Finney recalls a statement given out to the press on April 18, 1922, headed "Memorandum for the Press. Immediate release. April 18, 1922," the last page of which relates to naval reserves in California, and he thinks that was written by himself in conjunction with Admiral Robison of the Navy and Director Bain of the Bureau of Mines; the words "Immediate release" which appear at the head of that memorandum meant that the newspapers were privileged to publish the information therein contained right away. Thereupon the said memorandum was received in evidence as Defendants' Exhibit "CC" and the same reads as follows: [289—211]

DEFENDANTS' EXHIBIT "CC."

"MEMO FOR THE PRESS.

April 18, 1922.

IMMEDIATE RELEASE.

The Secretary of the Navy authorizes the following:

For more than a year the Secretary of the Interior and the Secretary of the Navy have had under consideration the handling of the two Naval Reserves in California, and the Naval Reserve in Wyoming, the latter known as the Teapot Dome, with the idea of working out a policy which would secure the greatest conservation and use for the Navy of the oils in such reserves, prevent drainage by wells of private owners on adjoining lands, and secure to the Navy an available storage of fuel oil at convenient points readily accessible wherever and whenever needed. It was found that oil was being drained from all of these reserves in very large quantities, amounting to millions of dollars of loss up to the present time, by wells on adjoining lands, and that in all probability within a few years the Government reserves would be depleted. It was also ascertained that the storage of fuel oil in suitable tanks resulted in practically no loss—certainly not exceeding one-tenth of one per cent per annum. The Naval Reserves in California can be reached through existing pipe lines, and a large portion of the lands have been leased under preference rights granted by the general oil leasing act. The principal problem there was the exchange of the crude oil, which in its natural state is unfit for use by the

Navy for fuel oil, in proper and available storage. With respect to the Naval Reserve in Wyoming, known as the Teapot Dome, same was not available for Naval use or for exchange for fuel oil, for the reason that the field lies in the interior and is not connected by pipe line with any point on the sea coast or with the existing pipe line systems of the country. While there are no wells within the limits of the reserve, it was found, after a careful recent geologic study that the reserve was being drained from wells on nearby lands, and in addition the Government was faced with a number of asserted claims within the reserve under the mining law. Moreover, the famous Salt Creek oil field, lying immediately contiguous to the Teapot Dome, and which has been leased under the general leasing act, was without adequate pipe line and refinery facilities, and independent producers have been unable to dispose of more than forty per cent of the possible production of existing wells. Furthermore, competition was absent from the field through lack not only of pipe line and refining facilities, but of companies. Therefore after careful consideration, the Secretary of the Interior, with the complete concurrence of the Secretary of the Navy, invited and considered proposals from a number of prominent oil companies and individuals for the development of the Wyoming Naval Reserve, with the accompanying guarantee of the construction of adequate pipe line facilities from the field to Atlantic and Gulf of Mexico points through connection with existing pipe lines. It was also desired that pro-

vision be made for the exchange of the crude oil produced for fuel oil for naval purposes, in such manner and at such points as might be designated by the Navy. After full consideration of all the offers submitted, a contract was approved by the Secretary of the Interior and the Secretary of the Navy with the Mammoth Oil Company a Delaware corporation, H. F. Sinclair, President. The contract is in the form of a lease, with graduated royalties up to 50% for the entire area of Naval Reserve No. 3 in Wyoming.

The contract provides for the drilling of at least twenty wells within a limited time, for the construction of a pipe line from the field to existing pipe lines in Missouri, for the exchange of crude for fuel oils, the latter for Naval purposes, for the delivery of Navy specified bunker A oil at any point named in the contract from Guantanamo, Cuba, to the northeast corner of the United States. It provides for a [290—212] line of credit under which exchange for the crude oil ample storage for all the produce is to be provided without cash outlay by the Government at any point fixed by the Navy Department along the Coast described. It provides that the lessee shall at such or any other points, at his own expense, and without obligation on the part of the Navy, provide gasoline, kerosene, lubricating and cylinder oil at market prices.

It provides prior right of transportation for all Governmental oils from not only the Teapot Dome but from the Salt Creek field, even prior to the uses of the pipe line by the lessee. It makes the pipe

line when built a common carrier for all Governmental oils. The pipe lines already constructed, with which the new pipe line will connect, involve a present investment of \$115,000,000, and the present contract calls for an investment on the part of the lessee of not less than \$26,000,000 in addition. Furthermore, the contract will bring about immediate competition in the Salt Creek field, and will add from 40 to 60 cents per barrel to the present prices of Governmental royalty oils, now amounting to more than 5,000 barrels per day. This is secured by an option given the Government to sell royalty oil on basis of mid-continent prices if and when desired. This production at present is but 40% of the capacity of existing wells which will immediately be raised to 100%, yielding to the Government for Reclamation, State and Treasury purposes, approximately 12,000 barrels of oil per day, with an added price over and above that which the Government and the independent producers are not receiving of more than \$6,000 per day. Before the contract was approved the Mammoth Oil Company presented to the Secretary of the Interior deeds to the United States for all outstanding claims of title of every character in Wyoming Naval Reserve.

NAVAL RESERVES IN CALIFORNIA.

Proposals from a number of oil companies for the handling and exchange of crude oils in the Naval Reserves in California for fuel oil in storage at Pacific Coast points designated by the Navy, were received by the Department of the Interior Saturday, and an award of contract was today authorized

to the Pan American Petroleum Company, the best and lowest bidder. This involves the exchange of the Navy's royalty oil from the reserves for fuel oil in storage at points designated by the Navy on the Pacific Coast, in storage, of the type selected by and approved by the Navy Department.

As stated above, the losses from drainage in these reserves have been enormous, running into many millions of dollars. The approval of this contract will enable the Government to save the remaining oil in these reserves and exchange it for fuel oil in storage for the benefit of the Navy. It was further stated to be the policy of Secretary Fall upon expiration of existing contracts with the Shipping Board to offer the Government royalty oils in Wyoming and Montana outside Naval reserves for sale with the principal object of bringing a third competitor into the field with refineries and pipe lines, thus insuring competition and the highest securable prices for Government oils."

Thereupon there was offered and received in evidence as Defendants' Exhibit "DD" telegram dated Washington, April 18, 1922, 5:21 P. M., reading as follows: [291-213]

DEFENDANTS' EXHIBIT "DD."

"Albert B. Fall,

Secy. of Interior,

Three Rivers, N. M.

Press statement prepared along lines suggested in your three telegrams, and with concurrence Admiral Robison Bain and ourselves have awarded

California Reserve contract to Pan American Company and included notice thereof in press statement; also your policy with respect to disposition royalty oils after expiration Shipping Board contract included in announcement. Kendrick resolution received but no answer yet *made but will prepare answer along lines indicated in your telegrams and in statement.*

FINNEY SAFFORD."

There was next received in evidence as Defendants' Exhibit "EE" telegram dated Washington, 4:23 P. M., April 19, 1922, reading as follows:

DEFENDANTS' EXHIBIT "EE."

"Hon. Albert B. Fall,
Three Rivers, N. M.

So far as we have been able to learn reaction to making public contract has been favorable. Kendrick has introduced and Senate Lands Committee referred here for report bill proposing to grant to State of Wyoming five per cent or royalties on oil and gas in Wyoming naval reserve. Mondel stated verbally that he intends to introduce bill granting state same percentage of royalties in naval reserves as are granted to state on lands outside reserve. We will not report on any such bill until advised as to your wishes; have not consulted Secy. Navy but anticipate he will object. Awarded Calif. oil exchange contract to Pan American Oil Company, lowest and best bidder; contract will be ready for execution tomorrow. President has written you personal letter stating he is immensely pleased that

(Testimony of E. C. Finney.)

you have been able to accomplish such gratifying results, referring to your letter of April eight in which you detail savings in administration affairs of the Interior Department through economies and increased efficiency.

FINNEY SAFFORD."

Mr. Finney testifies that the reference to the President's personal letter made in the above telegram had no relation whatever to the oil reserves.

Thereupon there was received in evidence as Defendants' Exhibit "FF" telegram dated at Washington, 11:30 A. M., April 20, 1922, reading as follows:

DEFENDANTS' EXHIBIT "FF."

"Hon. Albert B. Fall,

Three Rivers, N. M.

Pan American Oil Company of opinion that Secy. Navy should be made specifically and directly party in and to contract otherwise feel that question of right of delegation must be submitted to their attorneys for opinion involving delay. Shall we comply with their wish or shall we follow exact wording in that respect of Wyoming contract by you.

FINNEY SAFFORD." [292—214]

There was then received in evidence telegram dated Three Rivers, N. M., April 22, 1922, which was marked Defendants' Exhibit "GG" and reads as follows:

DEFENDANTS' EXHIBIT "GG."

"Finney, Safford,
Interior Department,
Washington, D. C.

Think it very well make Secretary Navy and Secretary Interior both directly parties to contract with Pan American; this on entirely different basis Teapot contract to purely exchange oil for construction involving large amounts; the other handling of the entire Teapot field.

FALL, Secretary."

Thereupon there was offered and received in evidence as Defendants' Exhibit "HH" telegram dated Washington, D. C., 4:08 P. M., April 20, 1922, reading:

DEFENDANTS' EXHIBIT "HH."

"Hon. Albert B. Fall,
Three Rivers, N. M.

Ambrose will reach Three Rivers Sunday Monday for conference with you.

FINNEY,
SAFFORD."

There was next received in evidence telegram dated Three Rivers, New Mexico, April 23, 1922, Defendants' Exhibit "II," which is as follows:

DEFENDANTS' EXHIBIT "II."

"Finney, Acting Secretary,
Washington, D. C.

Ambrose arrived. Have consulted reference all

(Testimony of E. C. Finney.)

contracts. As to both contracts go ahead. New appointment to be made by you.

FALL, Secretary."

The witness testifies that the reference to "New appointment to be made by you" has no relation to the matters involved in this case.

(It was stipulated by counsel for plaintiff and defendants that the telegraphic correspondence represented by Plaintiff's Exhibits 120, 121 and 123 and Defendants' Exhibits "DD," "EE," "FF," "GG," "HH" and "II," actually took place between the parties and that the times indicated in said exhibits are correct.)

Mr. Finney, continuing, testified that prior to the time of the arrival of Mr. Ambrose at Three Rivers, New Mexico, which, as indicated by the telegram last above quoted, Exhibit "II," was on April 23, 1922, Mr. Cotter of the Pan American Company had had a conference with the witness on the subject of making the Secretary of the Navy directly a party "in and to" the contract, [293—215] which was to be made with that company; at that time the contract was in process of being drafted; there was at that time in the employ of the office of the solicitor of the Department of the Interior an attorney by the name of J. McG. Williamson, who it is possible may have been consulted in reference to the drafting of this contract by the Bureau of Mines, but Mr. Finney does not recall having a talk with Mr. Williamson regarding the language of the contract; he does not deny having discussed the

(Testimony of E. C. Finney.)

language to be used in the contract with Mr. Williamson, he simply does not remember it. As to the talk with Mr. Cotter, the latter expressed to Mr. Finney the doubt he had with regard to the delegation, if there was a delegation, by the Executive Order of May 31, 1921, of functions from the Navy Department to the Interior Department; they discussed it back and forth and there passed between the witness and Secretary Fall the telegrams of April 20th and 22d (Exhibits "FF" and "GG") so that before Ambrose ever arrived at Three Rivers on April 23d every question with respect to who should be a party to that contract and with respect to the awarding of the contract had been settled in this telegraphic correspondence, "but it could have been unsettled by the Secretary"; Mr. Ambrose carried with him the memorandum which he had prepared respecting these bids, and carried with him various other papers relating to this transaction, among which, witness thinks, was a copy of the letter of April 25th, but of that he is not certain; he was to show these papers to Secretary Fall and discuss the whole situation with him, as well as to discuss the question that Mr. Cotter raised; that question was the direct thing to be discussed with the Secretary, but all these other things were also to be discussed, since if the Secretary had, after considering them, reversed his opinion or changed it his wishes would have been followed; in other words, it was not settled until the witness received the "Go ahead" telegram of April 23d; but that changed

(Testimony of E. C. Finney.)

nothing that the witness had been told to do before.

As regards the letter of the witness to the Pan American Company dated April 18, 1922, notifying the company of the award to it of the contract, it was Mr. Finney's view at that time that until the formal contract was signed by the authorized officials of the Pan American Petroleum & Transport Company and the authorized officials of the Government there was not a [294—216] binding contract between the parties. After Mr. Cotter argued that the Secretary of the Navy should sign the contract and the contract was drafted for the signatures of the parties, the witness thinks the first draft thereof provided for the Secretary of the Navy to join; recalling that the contract of April 25, 1922, in evidence, recites in its opening clause that the United States of America, one of the parties, is acting in that behalf by Edward C. Finney, Acting Secretary of the Interior, and Edwin Denby, Secretary of the Navy, Judge Finney testifies that he gave the directions for the drafting of the contract in that form, giving those directions to Ambrose or Bain.

Before the contract was signed Mr. Cotter called upon the witness regarding another subject, namely, the preferential right clause that was to go into the contract, and when Cotter called on the witness there was a conference at which there were also present Admiral Robison and Bain or Ambrose; Cotter wanted a definite assurance that his company would be given a lease for a definite piece or pieces

(Testimony of E. C. Finney.)

of land within a certain specified time; in other words, a general preference that his company would be given a lease if and when leases were made he thought did not offer enough inducement; as to the preferential right clause as it was being drafted to go into this contract, Cotter said it gave them nothing definite; nothing certain, and he said something about preferring to have the Government accept Proposal A. The letter of April 25, 1922, Plaintiff's Exhibit No. 125, was dictated by the witness in the presence and with the assistance of Admiral Robison, Mr. Ambrose and Dr. Bain, and in that letter there is stated in substance what Mr. Cotter had previously said in the conference about which the witness has just testified, the part of the letter containing the substance of what Mr. Cotter had said in that conference being this: "It is evident from our conversation of April 18 that your interpretation of preferential right was to the effect that the Pan American Petroleum and Transport Company desired the right to lease certain specified lands in Naval Petroleum Reserve No. 1 as well as preferential right to lease other land in Naval Petroleum Reserve No. 1 to the extent described in Article 2 of the contract. It is also my understanding from your conversation that unless the Pan American Petroleum & Transport Company can get a lease to certain lands your company would not desire to enter into a contract [295—217] under the terms outlined in Proposal B and preferred the Government would accept Proposal A." There was

(Testimony of E. C. Finney.)

further read to the witness from the above referred to letter of April 25, 1922, Exhibit No. 125, the following: "It is my understanding that unless you secure definite assurance from the Department that your company would obtain leases for certain tracts in Naval Reserve No. 1 the Pan American Petroleum & Transport Company would prefer not to enter into a contract as outlined in Proposal B," and he was asked where he got that understanding from, and answered "Cotter so stated." Mr. Finney testified that the schedule of royalties set forth in said last mentioned exhibit was suggested by Dr. Bain and Mr. Ambrose. Admiral Robison, Dr. Bain and Mr. Ambrose collaborated in getting up that letter of April 25, 1922, a few days before its date, Ambrose left on the 20th, so it must have been between the 18th and 20th; he has some recollection that he sent draft of that letter with Mr. Ambrose on the 20th, but does not seem to be absolutely positive of that; there is no way that the witness knows by which can be fixed now the date upon which that letter was prepared; he has not with him the retained file copy, but he does not think that that would indicate the date of drafting; he is not absolutely certain that the letter was drafted prior to the departure of Ambrose from Washington on April 20th but according to his best recollection it was dictated in the presence of Robison, Ambrose and Bain and he knows he had their help in writing it. He knows that Admiral Gregory outlined a plan of procedure to be followed under the contract

(Testimony of E. C. Finney.)

of April 25, 1922, but does not recall the date on which this was done. Thereupon there was offered in evidence Defendants' Exhibit "JJ," reading as follows: [296—218]

DEFENDANTS' EXHIBIT "JJ."

"NAVY DEPARTMENT.

"BUREAU OF YARDS AND DOCKS.

"Washington, D. C.

"April 22, 1922.

"Contract for Fuel Oil Storage Plant to be constructed by the Department of the Interior at the U. S. Naval Station, Pearl Harbor, T. H., for the use of the Navy Department.

"1. Contract consists of two principal parts. The first is the exchange of crude oil for fuel oil, the fuel oil to be delivered in tankers at Pearl Harbor. The second part is the construction of oil storage and the receiving of oil in the tanks at Pearl Harbor.

"2. The Department of the Interior should retain direct control of the oil business involved in this contract, in other words, of the first part of the contract mentioned above.

"3. It is proposed that the Chief of the Bureau of Yards and Docks be made the representative of the Secretary of the Interior in handling the second part of the contract as noted above. This would involve, first, all technical matters in connection with the plans and specifications for storage, and which in its general phases can be most expedi-

tiously handled in Washington. Second, the supervision of construction work in the field at Pearl Harbor, and third, the receiving of the oil at Pearl Harbor from the tankers and placing same in tank storage as it becomes available under this contract until such time as the completed plant shall be turned over to the Government.

"4. This will in no way involve the functions at present exercised by The Chief of the Bureau of Engineering in dealing with the Secretary of the Interior in regard to oil matters in general, since the only function of the Chief of the Bureau of Yards and Docks, as representative of the Secretary of the Interior, would be the technical work of constructing the tanks, the receiving and storing of the oil during construction and reporting to the Secretary of the amounts received.

"5. The Chief of the Bureau of Yards and Docks representing the Secretary of the Interior will then designate the Commandant at Pearl Harbor as representing the Bureau in the field. The District Public Works Officer will be designated as the Officer-in-Charge of the work under paragraph 215 of contract specifications. Lieutenant Keating will receive orders from the Secretary of the Navy to report to the Commandant of the Fourteenth Naval District for duty under the District Public Works Officer solely in connection with this contract.

"6. Notice of any appeals on the part of the contractor from the decision of the Officer-in-Charge of the work and the reasons therefor shall be forwarded promptly being routed through the Com-

(Testimony of E. C. Finney.)

mandant and the Chief of the Bureau of Yards and Docks on their way to the Secretary of the Interior.

"7. On account of the importance of this contract and of the fact that it is on a cost plus basis with a bonus and penalty clause as to date of completion of the work, and of the importance of the Government causing no delay, it is stipulated that the inspection [297—219] force to be provided by the Navy Department shall report for exclusive service on this contract, unless otherwise approved by the Bureau of Yards and Docks.

"8. The Chief of the Bureau of Yards and Docks shall be given authority of the Secretary of the Interior to appoint boards of Government representatives in connection with changes in construction work as provided by paragraph No. 230 of the specifications provided that any changes in contract be submitted to the Secretary of the Interior for approval.

"9. It is proposed to prepare necessary letters for the signature of the Secretary of the Interior and Secretary of the Navy to accomplish the above." [298—220]

Thereupon the witness testified that the fact is that the origin of the plan of procedure contained in the letter dated May 5, 1922 (Exhibit No. 129), signed by the witness and approved by Secretary of the Navy Denby, was the foregoing memorandum from the Bureau of Yards and Docks (Exhibit "JJ") prepared by Admiral Gregory, and the neces-

(Testimony of E. C. Finney.)

sity of having a well-defined plan of procedure to be followed in the offices and bureaus.

After the contract had been signed the matter of keeping accounts thereunder, both of fuel oil received, storage work completed, and crude oil delivered, was turned over to the accountants of the Bureau of Mines, but the witness has no personal knowledge of the details, and relied on the accountants; some of the correspondence with respect to the operations under the contract was drafted in the Bureau of Mines and signed by the witness and, if the files so show it, some so drafted was signed by Secretary Fall. In June, 1922, there arose a question about what should be done with approximately 54,000 barrels of fuel oil that had accumulated prior to the making of the April 25th contract, which oil was due to the Navy from the Standard Oil Company, and the witness took that matter up with the Secretary of the Navy by his letter of June 6, 1922, upon which the Acting Secretary of the Navy, Colonel Roosevelt, placed endorsement dated June 16, 1922, said letter and said endorsement being thereupon received in evidence as Defendants' Exhibits "KK" and "LL," respectively, and they read as follows: [299—221]

DEFENDANTS' EXHIBIT "KK."

"June 6, 1922.

"The Honorable,

"The Secretary of the Navy.

"Dear Mr. Secretary:

"In response to your letters of October 25 and

November 15, 1921, this Department arranged with certain oil companies in California for the exchange of royalty oil from the Naval Reserves in California for fuel oil at tidewater for use of the United States Navy, but following your letter of December 14, 1921, it was agreed to exchange the royalty oil for the erection and filling of storage. During this interim, however, certain exchanges had been entered into with certain oil companies for the exchange of royalty oil for fuel oil. The Standard Oil Company now refuses to deliver other than fuel oil for the November and December royalty oil and this cannot be applied to the credit of the Pearl Harbor contract.

"I have therefore to request that the Navy Department make arrangements with the Standard Oil Company of California for the delivery to the Navy of 54,661.73 barrels of fuel oil which I understand the Standard Oil Company will deliver either at the port of Richmond or San Pedro, California. I would appreciate being advised as to whether or not the Navy can arrange for the use of this fuel oil.

"Respectfully,

"E. C. FINNEY,,

"Acting Secretary."

DEFENDANTS' EXHIBIT "LL."

"1st Endorsement June 16, 1922.

"From: Acting Secretary of the Navy.

"To: Bureau of Supplies and Accounts.

(Testimony of E. C. Finney.)

"Subject: Disposition of certain royalty oil from
Naval Petroleum Reserves Nos. 1
and 2.

"1. Forwarded for action.

"2. It is desired that, if practicable, the fuel oil which the Standard Oil Company of California desires to deliver to the Navy under existing contracts be stored at the Naval Station, Pearl Harbor. If this be not practicable, it is then desired that a similar amount of fuel oil be set aside at that Station as a reserve and the amount of oil to be received from the Standard Oil Company of California be expended for current use in the Fleet.

"3. Attention is invited to the department's policy of not using, under any consideration at all avoidable, royalty oil from the Naval Petroleum Reserves for current use. It is, therefore, desired that every effort within practical limits be made to store this oil for reserve purposes rather than to use the same at the present time.

"/S/ T. ROOSEVELT." [300—222]

As testified by the witness on direct, he took no part in and knew nothing about the negotiations for the contract and lease of December 11, 1922, until after they were consummated; his office is on one floor of the Interior Department Building and the Secretary's office is on another; that is the largest office building owned by the United States and has capacity for about 5,000 people and it has been the witness' custom to go to the office of the Secretary of the Interior only when he had some

(Testimony of E. C. Finney.)

matter to bring up to the Secretary or when the Secretary sent for him; the office of the Director of the Bureau of Mines is located on the third floor of the same building and the director of that bureau frequently had dealings with the Secretary of the Interior directly during the period about which this witness has testified; the lease of July 8, 1921, with the United States Midway Oil Company was not signed or executed by Mr. Finney and he did not take any part in negotiating that lease; that is true also of the lease of July 12, 1921, with Pan American Company; the leases which followed the nine telegrams of November 14, 1921, were signed by the witness but he did not know of the telegrams at all until after they were sent out and all that he did with respect to those was that when the lessees accepted the terms of the telegrams he signed the leases that were made.

Leases between the Government and the Boston Pacific Oil Company covered a tract of land in Reserve No. 2 and a number of producing wells in that reserve which were leased by Secretary of the Interior Payne under Section 18 of the leasing act; subsequently the lessee made application for a lease to five additional new wells and that application was taken up by Secretary Payne with the Navy and finally presented to the President who approved the leasing of the five additional wells which was done; there were no competitive bids obtained for that; that was authorized August 24, 1920, and the lease was dated as of July 1, 1920,

(Testimony of E. C. Finney.)

and signed by John Barton Payne; there was another lease to the Consolidated Mutual Company in Reserve No. 2, which company had a lease for certain producing wells and made an application for a lease of the entire area covered within the mining claim; that application was considered by Secretary Payne and he recommended that a lease be made on the ground that there was water intrusion and that the area should be drilled up; that recommendation was for the leasing of the entire section of 640 acres; Secretary Daniels opposed that but [301—223] finally consented to a lease of 120 acres and President Wilson on February 16, 1921, authorized such a lease which, bearing that date, was signed by Secretary John Barton Payne; there was no competitive bidding for that.

As regards the leases made with Titus and others about which the witness has testified, he has no data showing the actual production of those wells and could not testify himself, either from memory or from any data, as to the average royalty received by the United States from those leases; that data is kept in the Bureau of Mines.

TESTIMONY OF A. L. WEIL, FOR PLAINTIFF.

A. L. WEIL, called as a witness on behalf of the plaintiff, testified that he is a member of the bar, is general counsel for the General Petroleum Company; he remembers a visit of Dr. Bain to the offices of that company in San Francisco in January, 1922, when there was a conference into which witness

(Testimony of A. L. Weil.)

was called; Dr. Bain and Mr. Ambrose asked the General Petroleum Company to bid on a proposition of building tankage at Pearl Harbor in exchange for royalty oils on the naval reserve; the witness discussed with Dr. Bain the matter of the legality of the proceeding, that is, the authority of the Secretary to enter into any such agreement, and he stated to Dr. Bain the views he held on the subject. Over the objection of defendants made on the same grounds as those interposed to the receipt in evidence of the opinion of the witness Sutro, which objection was as to this witness also overruled and an exception reserved, and subject also to the right of the defendants, granted by the Court, to move hereafter to strike out the testimony, Mr. Weil was permitted to, and did, testify that he told Dr. Bain that he very seriously doubted the authority of the Secretary to enter into such an agreement; in response to Dr. Bain's suggestion that they had gotten the opinion of the Solicitor of the Department the witness said that was not satisfactory and asked why the opinion of the Attorney-General had not been obtained and if that opinion would be obtained, telling Dr. Bain that General Petroleum would reconsider the question in the light of the views expressed by the Attorney-General; Dr. Bain said that he would not get the opinion of the Attorney-General, but witness does not remember what reason he gave; there were no papers in the nature of a proposed contract submitted to the witness at that time, all this was oral and occurred about January 3, 1922. [302—224]

**TESTIMONY OF LUTHER E. GREGORY, FOR
PLAINTIFF.**

LUTHER E. GREGORY, a witness called on behalf of the plaintiff, testified that he is Chief of the Bureau of Yards and Docks of the United States Navy, with the rank of Rear Admiral, and has held that office since early in January, 1922; his career in the Navy has been devoted to that Corps which is known as the Civil Engineering Corps of the Navy, during his entire service since 1898; his Bureau was first requested in December, 1921, before he became Chief, to prepare plans and specifications for fuel oil and storage station at Pearl Harbor, Hawaii; he took the oath of office as Chief of that Bureau January, 5, 1922, and from that time his Bureau continued in the professional relation of civil engineer, preparing plans and specifications in relation to the proposed Pearl Harbor fuel oil storage contracts.

Admiral Gregory produced a map of Pearl Harbor Naval Station, which shows the layout of all the tankage which has been built at that station, and another map of Ford Island, showing the gasoline storage station, which map was introduced in evidence as Plaintiff's Exhibit No. 131, exhibited to the Court; and used by the witness in testifying, and is appended to this statement of evidence, under the foregoing exhibit number; on the map, the numbers indicate the tanks constructed under the two contracts in issue, this being for convenience of designation.

Under the contract dated April 25, 1922 (Ex.

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4
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(Testimony of Luther E. Gregory.)

"B" to the Amended Bill of Complaint), 30 tanks of a capacity of 50,000 barrels each were built; these tanks, together with 9 others formerly on the property, are shown in a block at the lower left-hand corner of Exhibit 131; these 30 new tanks were constructed for reserve fuel.

Under the second contract dated December 11, 1922 (Ex. "C" to the Amended Bill of Complaint), there have been constructed [303—225] 17 tanks, the location of which is shown at the extreme right-hand of the map, Exhibit 131. In addition to these, the gasoline storage plant is located on Ford Island, a map of which was produced by the witness and offered in evidence as Plaintiff's Exhibit No. 132, and under that number is appended to this statement; Ford Island is to the north of the territory shown on Exhibit 131; on that island there are 9 gasoline tanks of a capacity of 225,000 gallons each, which were constructed there under the contract of December 11, 1922.

The area which was selected for the first group of tanks, under the April 25th contract, adjacent to the old group, was entirely insufficient for all of the storage which the Department required; also the wharfage facilities at that portion of the Navy Yard, adjacent to the old coaling plant, shown on the map, were not only inadequate in themselves, but did not even permit of the possibility of enlargement to be suitable for a proper tank wharf. As it became necessary to use additional space at the easterly end of the Navy Yard, the Bureau found

(Testimony of Luther E. Gregory.)

it possible to provide, near the easterly area, a wharf which would have proper facilities as to length and space and dredging, although it would require some little additional work, and therefore Merry Point, at the southeast end of the station, was selected, and a wharf which would be quite close to the tankage, as well as away from the industrial portion of the Yard, was constructed under the contract, and is shown near the center of Exhibit 131; the dredging was done, and the sea-wall built surrounding that point, making it a triangular-shaped pier, giving a length of about 800 feet on one side, and 1200 feet on the other, which pier is shown by a double line running outside a point marked "Merry Point" on Exhibit 131.

The contract called for the building of a quay wall around the triangular-shaped area, and that was built under specification of reinforced concrete, on reinforced concrete pilings, this [304—226] being required on account of the substratum, and for the further reason that the Navy wanted a fire-proof structure; any other would have been dangerous, where oil was handled. It was necessary to dredge a channel for a short distance in the immediate vicinity of the pier to get a sufficient depth for the ships that would use the wharf; which wharf served not only the group of tanks shown in the extreme southeast corner of the map, but served the second group at the extreme right, built under the second contract, and also served a group at the west end of the Yard, because of a pipe-line

(Testimony of Luther E. Gregory.)

connection between the two areas; in other words, all of the new tankage on the station proper, which, except Ford Island, is served by pipe-line facilities from the new wharf.

In connection with the second project, it was desired by the Navy to have a gasoline storage plant, as well as a fuel oil storage plant, and that has been constructed, and may be termed "the Ford Island station." This required, in addition to the tanks, a small amount of dredging, and the construction of a wharf, in order that vessels bringing gasoline could come up alongside and pump the gasoline into the tanks, and also the providing of the usual protective devices, and the connecting up with pipe-lines; that has been made a complete gasoline storage plant in itself.

Of the construction cost, the items embraced under the April 25th contract, approximately one-third consists of nontankage items, under which terms are included dredging, wharfage and things other than tanks, in which to put the oil, such things as piping and embankments around tanks, being considered absolutely tankage items; when the second project, under the December 11th contract, is taken into consideration, the percentage of non-tankage items will greatly drop, because with that the Department did not have any wharfage, except at Ford [305—227] Island. In the second project, things not strictly tankage were very much less in proportion to the whole cost than in the first project, the dredging and dock work done

(Testimony of Luther E. Gregory.)

under the first contract being equally available for the second tank farm. There was not a very considerable amount of nontankage work in connection with the second project, the witness' impression being that it would not be over 5%.

There was no total estimated cost of the second project, by reason of the fact that that was strictly on a cost basis, and subject to competition of all of the various divisions of the work.

When the first project was contemplated, there was some current use oil storage at Pearl Harbor, but no fuel oil reserve, or provision therefor; in other words, this was the first reserve fuel oil station that the Navy adopted.

As to the plans for the taking up of a fuel reserve project through these contracts, after the completion of this at Pearl Harbor, no definite consideration was given to that, except right in the Bureau's own designing office. The matters were not taken up with the Pan American Company at all. It was not the purpose to take up anything in connection with that until the Pearl Harbor matter was finished. When that was finished, it was the intention to go on to another. The Navy officials tentatively had in mind that there would be adopted a plan to go on with another fuel reserve base when this one at Pearl Harbor was completed.

In the United States Navy, there was in 1921 and 1922, and still is, a General Board, and subject to its approval, plans for the development of the

(Testimony of Luther E. Gregory.)

Navy's physical equipment are adopted from time to time. These are known as the War Plans. As regards the plans of the General Board with reference to naval fuel oil storage, as worked out prior to the autumn of 1922, that Board had been working on this proposition for a long time, [306—228] and up to the end of the autumn of 1922 it had formulated plans for storage, the details of which have not been given out, and the Department does not care to have them given out. The approximate cost would be, as stated by the Secretary of the Navy before the Public Lands Committee a year ago, in the neighborhood of \$103,000,000, approximately one-half of which would be for storage facilities, and one-half for the contents. The witness estimates that the total cost of the two Pearl Harbor projects will approximate between seven and a half million dollars and eight million dollars, which will include tankage and all of the equipment that had to be furnished with it, and exclude the contents.

The War Plans which the witness has already referred to, and which contemplate a sum to be spent for reserve fuel storage stations at various points, have been kept within the Navy Department and have not been presented to Congress; it is subject to revision from time to time by the heads of the Navy charged with responsibility in connection with such matters.

The two projects embraced in the contracts of April 25th and December 11, 1922, in issue in this

(Testimony of Luther E. Gregory.)

case, were not submitted by the Department to Congress for approval.

In addition to what has already been referred to, the specification for work under the second contract included a barracks for the custodians of the plant, who had to reside right within the area.

Each tank in the three areas at Pearl Harbor is surrounded by an embankment and a complete fence has been built around the areas, at the southeast end, the easterly tank farm, and the western area.

Under the April 25 contract, there was no plan to build any tankage on the Marine Corps reservation, which is shown along the southerly boundary of the Navy Yard; eight tanks [307—229] were designed to be placed in the southeast corner of the map (Ex. 131) immediately below the place called Merry Loch; it was found that the foundation conditions in the area immediately south of Merry Loch were very soft, and would involve very expensive construction to make the foundation satisfactory; so arrangements were made to transfer the location of eight tanks from that area to the westerly edge of the Marine Corps reservation; by so doing a very great expense was avoided.

In regard to the location of tanks under the second contract, the requirement of the General Board was such that if the Department had adopted the same size of tank that it had followed in the original work, namely, 55,000-barrel tanks, the area would not have been found sufficient; the

(Testimony of Luther E. Gregory.)

Bureau, of which the witness is head, therefore designed a new tank of the capacity of 150,000 barrels each, and found that upon laying these tanks down upon the ground, there was just the proper amount of room in which to get the storage which the General Board wanted. The Bureau therefore adopted for the second contract a size of tank very much larger than any other that had ever been constructed before for that purpose, namely, 150,000 barrels each: In order to work this plan out, the Marine Corps was requested to surrender sufficient land for those tanks, and this was agreed to.

A letter dated April 3, 1923, was received by the Bureau of Yards and Docks, and together with endorsement thereon and enclosures therewith, was admitted in evidence as Plaintiff's Exhibit No. 33, as follows:

U. S. EXHIBIT No. 133.

U. S. NAVAL STATION, HAWAII.

Pearl Harbor, T. H.

Public Works Department.

Apr. 3, 1923.

From: Public Works Officer.

To: Bureau of Yards and Docks.

Via: Commandant. [308—230]

Subject: Contract 4800—Additional Fuel Oil Storage, U. S. Naval Station, Pearl Harbor, T. H. Location of Tank Sites.

Reference: (a) Station Dispatch 8003—of April.

Enclosure: (A) Station Drawing No. N-259 and estimate.

1. In view of the fact that the contractors will open bids in New York next Saturday for the proposed earth work and berms for the fuel oil storage back of Quarry Point, the great cost entailed by using this site is believed to be such as to warrant a full reconsideration of its use. Several contractors have been out here looking over the work, and indications are that they are much discouraged as to the possibility of giving a satisfactory price for this work.

2. Tentative estimates based on the quantities for which bids are being asked, indicates that the average cost of excavation per tank at the Quarry Point site will be about \$53,000.00 to which is to be added the dikes, surfacing, concrete core walls and reinforcing material, making the average estimated cost per tank \$75,000.00.

3. Against this is submitted an estimate for using land similar to that of the lower tank site and Marine Reservation, including the land, the use of a favorable site will effect a saving of \$45,000.00 per tank, or a total of \$800,000.00 for the project.

4. The site recommended is a strip of land running long the east side of the channel from the Naval Station to the Bishop Point Naval Reservation and bounded by the O. R. & L. R. R. on the east. This strip is now uncultivated, covered with a light growth of algaroba, and is ideal land for

the foundation of tanks. The slight cover of soil is just enough to build the berms with, consequently there is the great saving over the heavy rock excavation entailed at the Quarry Point site. Without a doubt it should be possible for the contractors to arrange by license, lease or purchase to acquire the use of [309—231] this strip of land. Its acquisition under this contract is certainly fully justified, when it results in a net saving of some \$800,000.00. It is believed that by placing the matter in the hands of the contractor, this site could be obtained without any loss of time, as there would result a great saving in the time of construction by the omission of all the heavy work planned for Quarry Point.

5. Plan No. N-259 is forwarded herewith, on which has been indicated a feasible location for the tanks.

6. Another important consideration in this connection is the great desirability of the Naval Station having full control of the channel shore line. The present coaling and fuel oil pier will serve these tanks for the present, but for rapid fueling of the fleet it will be possible at any time to install a series of dolphins along the channel and very much expedite the furnishing of fuel to ships.

7. It is recommended that no award be made on the Quarry Point proposition in view of the excessive cost of this project:

(Sgd.) C. A. CARLSON.
C. A. CARLSON.

Commandant's Office,
U. S. Naval Station,
Pearl Harbor, Hawaii,
Received,
A. M. 10, Apr. 3, 1923.

FIRST ENDORSEMENT.

U. S. Naval Station, Pearl Harbor, T. H.

5 April, 1923.

SECRET.

From: Commandant.

To: Bureau of Yards and Docks.

Via: Chief of Naval Operations.

Subject: Contract 4800—Additional Fuel Oil Storage, U. S. Naval Station, Pearl Harbor, T. H.—Location of tank sites.

Enclosure: (B) Original of Commandant's letter
No. 966 of 4 Apr., 1923.

1. Forwarded approved subject to the comments contained in Commandant's secret letter No. 966 of April 4, 1923, and forwarded herewith.

(Sgd.) E. SIMPSON.

E. SIMPSON.

Operations Confidential files. [310—232]

Received

Apr. 20, 1923. 23.

Navy Department.

File No. SC 131-25:6.

Received 12:10 P. M.

April 21, 1923.

R. E. B.

E. C. S.

PART OF U. S. EXHIBIT No. 133.

Enclosure: (A)

COMPARISON OF COST OF TANK SITES ON
THE TRACT EAST OF QUARRY POINT
AND ON THE TRACT OF THE
BISHOP ESTATE DRAWING

No. N-259.

Quarry Point Site.

This estimate is based on the quantities of excavation, dikes, etc., shown in the invitation of the Pan-American Petroleum & Transport Company to bidders on Contract 4800, which are given below, together with the Yard's estimate of unit prices and total costs, which covers 18 tanks. No allowance is made for excavation for tank foundations or for sand foundations since these items are identical for both sites.

Excavation, 480,000 cu. yds. at \$2.00..	\$ 960,000.00
Rock filled dikes, 150,000 cu. yds., \$1.00	150,000.00
Surfacing dikes formed in excavation, 35,000 sq. yds. at \$1.00	35,000.00
Concrete core walls 6,000 cu. yds. at \$30	180,000.00
Reinforcing steel, 250 tons at \$120.00..	30,000.00
<hr/>	
Total cost of 18 tank sites	1,355,000.00
Cost of one tank site	75,300.00

This estimate does not include the securing and placing of borrowed material which may be necessary, or the stripping and refilling which might be required.

Bishop Estate Site.

Refer to Drawing N-259.

The minimum distance center to center of tanks is 450 feet. The site is practically level, and consists of earth about six inches to one foot deep overlying coral. To form berms having [311—233] a capacity of $1\frac{1}{2}$ times the capacity of a tank will require about 4,000 cu. yds. of excavation per tank, which is equivalent to a six-inch depth over the area. While no extended examination has been made, it is believed suitable dikes can be constructed of the material on the site without core walls.

Total excavation, 4000x18—72,000 cu.

yds. at \$4.00	\$228,000.00
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Total val. of dikes, 4000x18—72,000 cu.

yds. at \$2.00	144,000.00
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Acquisition of 110 acres of land at \$1000	110,000.00
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	\$542,000.00
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Cost of one tank site	30,000.00
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Comparison.

The saving per tank is, therefore, as follows:

Cost per site at Quarry Point	\$ 75,000.00
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Cost per site at Bishop Estate site,	
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including cost of land	30,000.00
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Saving per site	\$ 45,000.00
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Total saving	\$810,000.00
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Approximately 110 acres of land will be required for the Bishop Estate Site.

The map in evidence, Exhibit 131, does not show the privately owned land which the foregoing memorandums suggested could be acquired; that land is

located about two or three miles south of the station which the map showed.

Plaintiff thereupon offered in evidence as Exhibit 134 the following communication from the Commandant of the Naval Operating Base at Pearl Harbor to the Chief of Naval Operations, Washington, D. C., and the same was received in evidence, and so much thereof as was read to the court, the irrelevant portions being omitted, reads as follows:

PLAINTIFF'S EXHIBIT No. 134.

“Office of the Commandant,
Fourteenth Naval District
and

Naval Operating Base, Pearl Harbor, Hawaii.

SECRET. [312—234]

4 April, 1923.

From: Commandant,

To: Chief of Naval Operations.

Subject: Recommending change in site for additional fuel oil storage.

References: (a) Bureau of Yards and Docks contract 4800.

(b) Station dispatch 1004-1705 of April 1923 to Chief of Naval Operations.

1. The estimates which present the proposition of changing the site of the additional fuel oil storage contemplated on Quarry Point, have just today been brought to the Commandant's attention. It will be seen that an estimated saving of some \$800,-

000 would result if the change in the site as proposed is approved.

2. The inadvisability of locating the extensive fuel oil storage so close to the Naval Base has been recognized for some time, but as these contracts have been largely handled in the Department and further because of their peculiar nature embodying no actual appropriation from Congress, the Commandant has not seen fit to offer serious objections to their location.

There is no question, however, but that the proposed location of the contract hereunder considered is very undesirable from many points apart from its cost. It lies on much higher ground than the Naval Base activities, ground which slopes very abruptly down to the waters surrounding the Magazine Island and Submarine Base. Furthermore it lies directly to windward of the Station. The prevailing wind is from the northeast during the majority of the year. . . .

3. The Commandant feels that the location for fuel oil storage should be removed from the Naval Station and sees no objection in this connection to distance, as the oil can be led to points desired by pipe lines. It further seems undesirable to locate any such facilities as fuel oil storage in such a position as to interfere with expansion of other activities which are necessary in the immediate vicinity of the Base itself. . . . [313—235]

9. Owing to the peculiar nature of the contracts in connection with the fuel oil storage of this Base, it appears possible to have the contractors negotiate for the additional land thereby avoiding complica-

tions and the usual delays which are always encountered when the Government attempts to negotiate directly for the acquisition of land.

10. In view of the above considerations and the fact that the proposed site for the additional fuel oil storage as given hereunder would not interfere with the use of the shore line in question for the berthing facilities and even for additional supply facilities by rail from the Naval Station, the Commandant is led to recommend that the change be made and that the contractors be authorized to negotiate for the license, lease or actual purchase of the land in question. He, therefore, has sent today such recommendations by dispatch, as the contracts are scheduled to be opened in New York before this letter reaches the Department.

11. The land in question belongs to an estate which, it is feared, may object to sell. As, however, it is not land that is useful for sugar growing or even for residential purposes until water is available, it is thought probable that it can be leased or obtained on license, as is the custom of these Islands. As the site is considered so satisfactory, and in view of its importance as stated above, it would seem warranted to obtain it in any way possible in case actual purchase is found impossible.

The foregoing exhibit is signed by Admiral Simpson. Upon that exhibit was placed the endorsement by which it was forwarded from the Chief of Naval Operations to the Chief of the Bureau of Yards and Docks, which endorsements follows the same exhibit, and were received in evidence and reads as follows: [314—236]

2nd Indorsement
Navy Department.

SECRET.

Apr. 25, 1923.

From: Chief of Naval Operations.

To: Chief of Bureau of Yards and Docks.

SUBJECT: Contract 4800—Additional Fuel Oil
Storage, U. S. Naval Station,
Pearl Harbor, T. H.—Location of
tank sites.

Reference (a) Comdt. 14th Naval District Confidential Despatch 0004 received 5 April 1923.

1. Forwarded, with the request that the Chief of the Bureau of Yards and Docks prepare a reply to this correspondence for the Secretary's signature along the lines discussed by the Acting Chief of Naval Operations and the Chief of the Bureau of Yards and Docks at the time of the Receipt of Reference (a).

A. H. ROBERTSON,
Acting.

Apr. 26, 1923.

4800. SECRET. 3rd Indorsement.

From: Chief of Bureau of Yards and Docks.

To: Office of the Secretary of the Navy.

Subject: Contract No. 4800, Additional Fuel Oil
Storage, Naval Station, Pearl Harbor;
forwarding letter prepared for the
signature of the Secretary.

1. The Bureau is forwarding herewith letter

558 *Pan American Petroleum Company et al.*

(Testimony of Luther E. Gregory.)

prepared for the signature of the Secretary, as requested by the 2nd indorsement.

(Sgd.) L. E. GREGORY.

Operations Confidential Files.

Received

May 8, 1923.

Navy Department.

The witness identified a letter dated May 3, 1923, as having been prepared by him for the signature of the Secretary of the Navy in answer to the foregoing correspondence (included in Exhibit 134) and the said letter was received in evidence as Plaintiff's Exhibit No. 135, and is as follows: [315—237]

PLAINTIFF'S EXHIBIT No. 135.

SECRET.

May 3, 1923.

From: The Secretary of the Navy.

To: Commandant, Naval Station, Pearl Harbor,
T. H.

Subject: Contract No. 4800. Additional Fuel Oil
Storage, Naval Station, Pearl Harbor.

References: (a) Station dispatch 1004-1705, April,
To C. N. O.

(b) Commandant's letter No. 966,
April 4, 1923.

1. Throughout the negotiations regarding fuel oil storage under Naval Petroleum Reserve contracts, the Department has considered it inadvisable to arrange for any construction on other than Government-owned land. Accordingly favorable action on the recommendation in references, regard-

(Testimony of Luther E. Gregory.)

ing the removal of the Pearl Harbor storage to land to be purchased by the contractor at Bishop's Point, can not be given.

EDWIN DENBY.

The principal reason why it was thought inadvisable for the contractor to obtain land under these contracts was that it was fuel to be unnecessary; the Navy had at every station where fuel oil storage had been projected sufficient Government land upon which to build the storage, and at this particular place it was not felt that the objections raised by the officers at the Yard were sufficiently valid to change the Department's plans. The land referred to as a portion of the Bishop estate was some distance to the south of the Naval Station, and completely separated from it, which would make it necessary to build an entirely separate plant, and pumping station, and separate guardhouses, and as long as the Government had the area available at the easterly edge of the Navy Yard, which was not very suitable for either military or industrial purposes, and was sufficient for this purpose, the Navy Department thought it wiser to put the full storage there; witness thinks anyone who is familiar with the method of storage of oil on the west coast [316—238] is fully aware of the fact that hillsides are utilized, and it is not necessary to have level land; the Department considered that the officers at the station did not present valid reasons for making the change, and the considerations men-

(Testimony of Luther E. Gregory.)

tioned by the witness overcame, in his mind, the possible saving.

Cross-examination.

On cross-examination, Admiral Gregory testified that he had received no instructions specifically not to discuss the Department's present plans as to future reserve storage projects, but through general instructions; officers of the Department had not discussed War Plans with anybody outside of their own circle at any time when they received those plans; these are discussed only with whom it is necessary; that is the rule of the Navy Department, and it is because of that rule that the witness on direct examination stated that he did not desire to make public disclosure of those plans. The fact is, in so far as the witness feels at liberty to testify regarding it, that the General Board of the Navy, and the War Plans division thereof, have developed for the National Defense a plan to be carried on over a course of years, which looks to the establishment at strategic points of fuel stations for the use of the United States Navy; and those plans, as tentatively estimated, covering a number of years in the future, would involve, for construction of storage plants and for the contents thereof, an expenditure of approximately \$103,000,000, as disclosed by the Secretary of the Navy, Mr. Denby, to the Senate Public Lands Committee early this year; these plans are subject to future changes, but they are the existing plans in the Navy Department, and they are now the same plans that

(Testimony of Luther E. Gregory.)

were formulated a few years ago as approved War Plans of the Navy.

As testified on direct, the Bureau of Yards and Docks was, in November or December, 1921, directed to prepare plans for what is known as the Pearl Harbor project; since, Admiral Gregory has assumed duty as Chief of that Bureau, on January 5, [317—239] 1922, and he acquainted himself as rapidly as he could with the status of this and other matters pending in the Bureau, and learned how far that Bureau of the Navy Department had progressed with this first Pearl Harbor project. In the course of time, when these projects were actually embraced in contracts, one of them, dated April 25, 1922, was given a Bureau of Yards and Docks serial number, 4650, and the latter one, dated December 11, was given the Bureau's number, 4800, and they were thereafter known by these numbers in correspondence and other papers relating to them.

When Admiral Gregory familiarized himself with this matter, in January, 1922, the plan for the first project had been forwarded from the Bureau to the Secretary of the Navy; but they were only general plans; it had not been possible in the short time that was given to prepare them and make these plans comprehensive, nor, in his opinion, were they sufficient to enable any party to make an intelligent bid, and the feeling in the Bureau was that if any work should be done, that the plans should be drawn in greater detail, and that the Bureau should get more specific information from the Navy Yard

(Testimony of Luther E. Gregory.)

station in Hawaii as to the conditions on the ground, the foundations, the depths of water, the nature of the underlying soil, the amount that the piles would penetrate, and things of that sort, all of which would be useful in informing prospective bidders so that they could intelligently formulate real bids; in fact, the station had been requested early in December, when the Bureau was first instructed to proceed with these plans (the witness throughout his testimony referred to the office of the Commandant at Pearl Harbor, Hawaii, as "the station" and to the Bureau of Yards and Docks of the Navy Department, Washington, as "the Bureau") to secure that information and forward it; the Bureau knew, therefore, that the Station was making these investigations, but the preliminary plans had to be submitted [318—240] before that information was available. From the time when the witness took this matter up, he had frequent talks with Admiral Robison, Chief of the Bureau of Engineering, and he may have talked things over in a very general way with the Secretary of the Navy, but the Secretary was, of course, not familiar with the technical questions which were the paramount questions the witness had to consider, so that his talks with the Secretary of the Navy were very brief on that, and only in a very general way. He does not recall dates or anything specifically about these conferences with the Secretary of the Navy. As regard any talk or discussion during the progress of negotiations leading up to the contract with officials of the Interior Department, Admiral Gregory thinks

(Testimony of Luther E. Gregory.)

that in the formative stage of this work, he met Secretary Fall and Dr. Bain to discuss general features of the work; he does not recall the dates or just what particular subjects were discussed or considered.

A memorandum dated February 14, 1922 (Ex. No. 79), sent by Admiral Gregory to Admiral Robison, resulted from a conference the witness had with Admiral Robison in which the latter said that it was the expectation that the work would be done upon the basis of cost plus a percentage of profit, and Admiral Gregory told Admiral Robison he thought that would be undesirable; that the Navy ought to follow some other plan, and he followed up that conversation with the memorandum mentioned, which was for the purpose of putting on record and showing what he considered to be the objection to that method, and what he suggested should be the means of carrying out the work. The witness thinks this subject of his views on cost plus versus lump sum plans was discussed with either Secretary Fall or Mr. Finney, but certainly it was discussed with Dr. Bain, in a very general way, and witness understood that the objection which he raised would be given consideration, and that the nature of the contract would [319—241] be made to agree with his recommendation. In February or March, 1922, Admiral Gregory became acquainted with Mr. Dunn of the White Company, who called upon him in connection with this matter; there was a number of conferences held in Admiral Gregory's office with Mr. Dunn, who, Admiral

(Testimony of Luther E. Gregory.)

Gregory thought, was acting as the agent of the Pan American Company and as a prospective bidder, and who came to secure information, as is customary with anyone who proposes to bid upon any Naval work; and the principal things discussed were the nature of the soil, the conditions and methods of handling material, the labor market, and all questions of that general nature which have to do with construction work. Witness does not recall whether Mr. Dunn made any statement about any necessity for having specifications prepared in detail and the plans brought down to a basis where a lump sum bid would be possible; he would have considered that necessary whether Mr. Dunn mentioned it or not; he knew it was necessary to do that in order that anyone could make an intelligent bid. The plans and specifications sent to prospective bidders by the Interior Department under cover of letter dated March 7, 1922 (Ex. No. 91), bear date March 1st, and were prepared in the Bureau of Yards and Docks for the purpose of enabling competitors to figure on a lump sum bid basis; they were the second set of plans prepared; the first, prepared in December, were found to be so general and to convey so little information of a kind that would be required to submit an intelligent bid, that the Bureau prepared this second set subsequent to the receipt of information from the Pearl Harbor Naval Station as to local conditions; the second set was therefore complete, to the Bureau's satisfaction, at least to the extent that it

(Testimony of Luther E. Gregory.)

would be possible for anyone to render a very much better bid, a closer bid.

Lieutenant Keating, an officer of the Navy, was ordered to [320—242] the Bureau at the request of the witness, while the second set of plans was being prepared, he had been on duty prior to that time at Hampton Roads Naval Base, and he was selected to come to the Bureau during the course of the preparation of the plans preparatory to his detail to the Pearl Harbor Naval Station, where it was contemplated that he would be in immediate charge of the construction work. By direction of the witness, Lieutenant Keating acted during the period when the plans were being prepared and the time when the contract was being negotiated, as liaison officer between the Bureau of Yards and Docks and the Bureau of Mines. Prior to the receipt of bids, on April 15, 1922, Admiral Gregory had given instructions to Lieutenant Keating to prepare an estimate of the cost of the project on the basis of the plans and specifications which the Bureau had prepared; when the bids were opened, it was found that the lowest bid actually submitted was in the neighborhood of \$31,000 more than the estimate thus previously prepared by Lieutenant Keating; in other words, it was within one per cent of the estimate which the bureau had previously prepared.

Direct Examination.

On direct examination, Admiral Gregory stated the number of tanks covered by the first contract; the second contract called for 17 tanks for fuel oil,

(Testimony of Luther E. Gregory.)

with a capacity of 150,000 barrels each, and one with a capacity of 80,000 barrels. The purpose of that was to secure the total amount of storage which was requested by the General Board; there was also required to be furnished 9 tanks for gasoline storage, of 225,000 gallons each, 56 tanks for storing lubricating oil, of 25,000 gallons each, and all the equipment and facilities which would go with that, such as the fire apparatus, earth embankments, foundations, lubricating oil building, pump-houses, etc.

Admiral Gregory does not know how the quantity which the General Board decided it should have storage facilities for had [321—243] been arrived at; the General Board had adopted a program for storage at all the different stations, and that was reported to the Secretary of the Navy, who approved the report, and the Bureau was given instructions to prepare plans to provide that amount of storage, and undertook to design a plan for a fuel station for the quantity which the General Board had indicated it desired to obtain, and which the Secretary of the Navy had approved.

The 150,000-barrel tanks of special design were to provide the quantity of storage required in the area that was available to the Department, and were planned by a force of engineers and draftsmen in the Bureau, under the direction of the witness; they are not what are commonly known as commercial oil tanks, but are of a special design; that is also true of the tanks provided for in the contract of April 25, 1922; all of the principal features of the station, in addition to the tanks, such as pipe-lines,

(Testimony of Luther E. Gregory.)

the fuel station dock, and all the incidentals that went to make up this fuel base at Pearl Harbor, were specially designed and prepared in the Bureau. The barracks buildings are for men who operate the pumps, serve as watchmen, manipulate the valves, and have other duties in connection with the care and operation of the oil storage plant. They were planned for nothing else; just precisely as it would be necessary out at Elk Hills for the development of the Naval oil fields.

There is an old coaling base at Pearl Harbor, but the modern policy has been that all new ships built for the Navy are oil burning, the Navy is getting on an oil fuel basis rather than on a coal fuel basis, and in connection with this, the Navy Department has been gradually developing oil storage stations to supplement now, and ultimately to supplant, the coal stations. [322—244]

As regards the policy of the Navy Department with respect to the secret or public character of the matters embraced in the contracts in this case, the correspondence which came to the desk of the witness relative to the plans at Pearl Harbor were all marked "Secret," because they were a portion of the War Plans. It is the experience to have almost daily coming over important desks in the Department letters of that nature, and it is invariably the custom that such papers are passed only from one commissioned officer to another, and seldom are the contents made known even to civilian employees, except those of the most trusted character, and who

(Testimony of Luther E. Gregory.)

have to do with technical questions. Questions of that nature are not discussed with anybody outside of the service. The plans pertaining to this work witness does not think were so marked when they passed this Bureau, but they were given only to whose who it was necessary to consult, and requests were made that the plans be not passed around any more than necessary to secure the desired result. The witness recalls having impressed upon Mr. Dunn, of the White Company, the secret character of those plans and the necessity of having them handled in the most confidential way; he told Dunn they were part of the War Plans, and the understanding was that no unnecessary divulging of them would be considered.

As regards the question of additional land for the fuel station, there was a question of utilizing for this fuel station lands which theretofore had been put aside—on paper, at least—for the Marine Corps uses; that did not involve any trading of lands, it simply involved the subsequent use by the Navy Department of lands which it had theretofore intended to put to another use.

A. H. Robertson, who signed as Acting Chief of Operations some correspondence in April, 1923, on the subject of the lease or purchase by the contractor of lands not then within the [323—245] station, is Rear Admiral Robertson, then assistant to Admiral Coontz, the Chief of Navy Operations. Where it is indicated that the correspondence came from or was sent to "Operations," that means to the office

(Testimony of Luther E. Gregory.)

of the Chief of Navy Operations; preparation in that connection for the signature of the Secretary of the Navy by the Bureau of Yards and Docks of a letter referred to, and memorandum relating thereto, occurred after conference between the office of the Chief of Operations and the witness as Chief of the Bureau of Yards and Docks. No one connected with the Pan American Company was consulted or communicated with on that subject at all. It was purely a matter that arose at the station, and was disposed of in the Department. Upon being asked for his opinion as to the value of the construction work done at Pearl Harbor under the contracts in issue, the witness answered that it was almost impossible to give an exact opinion; he would further state that: "That if you look at the cost of the work to be in accordance with the original bid price, which was in the neighborhood of \$3,200,000, if you bear in mind that the savings were to accrue to the Government, it would mean that we then are eliminating what ordinarily would have been profit had an ordinary contractor bid upon this work. We feel, therefore, that the value to the Government is worth fully what the lump-sum bid price was, although we expect to gain a saving of something between \$300,000 and \$400,000. The exact figures are not yet available by reason of certain minor claims that are still in process of adjustment. In regard to the second contract, we are confident that we are getting full value for all of the price that is to come to us by reason of the fact that we

(Testimony of Luther E. Gregory.)

get it at cost and that we have insured competition on each and every part of the specific work which has been subcontracted to special bidders." As these contracts have actually been operated, neither one allowed a profit to the principal contractor, [324—246] the Pan American Company; ordinarily, on contracts of a similar character, contractors bid to make about 10 per cent on their cost.

Admiral Gregory thinks it would be a very fair assumption to make that the United States has received at least \$1.10 for every \$1.00 it expended on this Pearl Harbor work. The work has been done in accordance with the plans and specifications that were furnished, and the Bureau has had detailed to the Naval Station at least one officer of the Corps of Civil Engineers, Lieutenant Keating, who has been mentioned heretofore, to see that the work is done in accordance with those plans and specifications; he has been assisted by inspectors to see that the work is so done; in the event any additional assistance has been required in the way of yard facilities, or in the preparation of additional plans, the regular yard departments of the naval stations have been called upon, even from the Commandant down, to assist and see that the work was done in the proper way. The methods that have been followed in the Department in itself are quite similar to those that prevail for all other contract work; so that in all of the essential stages, certainly as regards construction and inspection, it is in accordance with the Navy Department's usual custom.

(Testimony of Luther E. Gregory.)

This has been done exclusively under the Bureau of Yards and Docks, and the local naval establishment at Pearl Harbor. No officer or employee of the Interior Department, as distinguished from officers and employees of the Navy Department, have had anything to do with supervising or inspecting this work. Lieutenant Keating routes his reports to the witness through the Commandant, who is a naval officer, and by regulations the representative of all the Bureaus.

Shortly after this work was placed under the Bureau of Yards and Docks, it advised the Commandant that he would be [325—247] the representative of the Bureau, just the same as he is in all routine matters. The Commandant, who was in command when the work was started, was Rear Admiral Simpson, who reached a retiring age during the period of this work, and who was succeeded by Admiral John D. McDonald, who is the present Commandant of the Navy Yard and District. Also there has been a change in the office of Public Works Officer; the one who was in charge when the work began was Commandant Carlson, who reached the end of a regular or normal tour of duty, and was relieved by Commander Brownell, who is there at the present. The Public Works Officer is in direct touch with the work. Lieutenant Keating has not been transferred from the start, he was there at the beginning of the work, and he is still director of all of the work at that place. From time to time, as this work progresses, it is very frequently necessary

(Testimony of Luther E. Gregory.)

for detailed drawings to be submitted for approval before the work can actually go on. These drawings are submitted by the contractor to the Bureau of Yards and Docks, where they are examined by the technical force handling that particular class of work, the same as they would drawings from any other contractor for similar work.

The dock and dredging referred to in the direct examination does not represent work separate and apart from the putting in of the complete fuel reserve storage station, but constitutes a part of the completion and utilization by the Navy of a complete fuel oil storage reserve station. It is not only an integral part of the fuel oil storage plant, but it is also specifically separate from the industrial portion of the yard; the map in evidence (Exhibit 131) shows this by indicating a separation of the reserve oil storage plant from the other portions of the naval station. What the witness has said about the dock and channel and other incidental facilities at Merry Point is also true with respect to the gasoline fuel station at Ford Island; [326—248] the reason for the location of gasoline storage at Ford Island is twofold; in the first place, it is desirable to have the gasoline storage somewhat isolated from the fuel oil storage; secondly, as nearly all the gasoline will be used by airplanes, it was considered desirable and necessary to have that storage right on the area which was devoted to the flying field. Ford Island is a separate island, and

(Testimony of Luther E. Gregory.)

is used jointly by the Army and the Navy as a flying field. This storage plant is for naval aviation use.

The Pearl Harbor plant, considered as a whole, provides storage for fuel oil, which is the greatest bulk of the Navy storage; for Diesel oil; for gasoline; and for a great many different grades of machinery and lubricating oil. Those are the four classes for which the Navy requires storage. Diesel oil is used for internal combustion engines; lubricating oil for the Navy must be kept in a great many different grades; at this place, the Navy has oil of different kinds for every sort of naval craft, —on the water, under the water, and in the air.

As regards whether in making contracts for war plans facilities, such as this, it is usual to make plans public by newspaper advertisement or circulars, "It is certainly not common to advertise our war plans. We do not do that."

As to whether there is any custom in connection with the making of supplemental contracts, when it becomes necessary in the prosecution of any piece of work to make any changes, whether in the way of additions, deductions, omissions, or even a change in principle, it is customary by supplemental agreement to carry out those changes, in order that the plans of the Department may be met.

The Bureau commenced work on the plans which are embraced in the supplemental contract of December 11, 1922, in October or November, 1922, the witness thinks; it was in the latter part of the summer, at least. This work was commenced as a

(Testimony of Luther E. Gregory.)

result of [327—249] orders received from the Secretary of Navy; the December 11 contract is called a cost contract, because that was the offer made by the Pan American Company, that it would effect this increased work on cost, without any profit whatever. As to why detailed plans and specifications were not made a part of the December 11 contract, and the exact sort of the work therein contracted for is not set forth, it is because of this: There had not been time to work out the full plans, and knowing that the work was to be sublet to different builders, for example, the steel tanks would be sublet to tank builders, the electric work to electric contractors, the piping to a piping contractor, etc., until the Bureau had sufficient time to prepare the detailed plans, "We considered that our interests were fully protected by simply effecting that agreement and stating that detail plans would be furnished to the contractor as soon as they were completed by the Bureau." That was subsequently done; in substance, that provided that the contractor obligated itself at cost to do the work as the Bureau of Yards and Docks thereafter planned and directed.

As to the practice that is followed with respect to the obtaining of competitive bids, and the right of subcontractors under the December 11 contract, the J. G. White Company, as agent of the Pan American Company, was instructed by the witness to obtain bids on the different portions of this work, and submit those bids to the Bureau for its action;

(Testimony of Luther E. Gregory.)

that plan was carried out; bids were obtained on the different parts of the work up to approximately 90 per cent of the aggregate value of the entire work, and a very lively competition was insured by asking enough people to bid to see that there was good competition, and awards were made to the low bidder in each and every case; the Bureau of Yards and Docks directed the White Company as to whom the subcontracts were to be made with. [328—250]

Prior to the receipt of bids for what became the April 25, 1922, contract, witness caused to be furnished to Dr. Bain for transmission to prospective bidders lists of companies and persons who might be considered as subcontractors. The work under this contract is entirely completed, and was accepted as of date December 15, 1922; that tankage has all been filled with oil. This was a completed project December 15, 1922.

With respect to the second contract, the work is nearing completion at the present time, and probably will be entirely completed by the end of the calendar year 1924, "over 90 per cent is now complete."

Under both contracts, the work progressed in a very satisfactory manner as to time and as to quality. Admiral Gregory thinks that the Pearl Harbor fuel base is the best the United States has in the entire service, and he does not know of any better in the world.

The memorandum enclosed with letter from Dr. Bain to Mr. Dunn, dated April 28, 1922 (hereafter referred to in this statement of the evidence

(Testimony of Luther E. Gregory.)

as Exhibit —), is in accordance with the discussion the witness had with Dr. Bain relative to the control of the work. The draft or plan of the contract, which bears date April 25, was before the Bureau, and being considered by it before the contract was actually signed up, as indicated by the date of the memorandum referred to, April 22.

Admiral Gregory has not the exact amount saved in the cost of the work under the April 25 contract, but it will be somewhere between \$300,000 and \$400,000 less than was anticipated, less than the lump sum price; in other words, that represents the saving that will come to the Government on that first contract. The plan of the first contract was that the contractor was under obligations to do the work at an amount not in excess of the lump sum stipulated in the contract, and stated therein in barrels of oil; if the work cost more than estimated, that [329—251] was to be borne by the contractor; if the work cost less, the Government was to get the benefit of it.

Redirect Examination.

On redirect examination Admiral Gregory testified that when he referred to the naval station at Pearl Harbor, he referred to the whole navy yard there, which is within the 14th Naval District; the project covered by the two contracts referred to in the testimony as naval fuel stations are what in the Department are called depots for coal, or depots for other fuel; that is the way they are designated in the naval appropriation acts. As to whether

(Testimony of Luther E. Gregory.)

they are really fuel depots, it is a part of the station work.

The witness identified the Bureau's plans for the work under contract 4650 (April 25, 1922) and contract 4800 (December 11, 1922), which consisted of two large bundles of blue-prints, and the same were marked in evidence as Plaintiff's Exhibits 136 and 137, but were not exhibited to the Court or used upon the trial. Exhibit 138 is a blue-print of location plan and profile under contract No. 4650; Exhibit No. 139 is a blue-print of plan for oil line and oil and water-piping for the tankage under contract 4800, all being marked in evidence, but as they were not used upon the trial below, the exhibits referred to in this paragraph are not included in this statement of the evidence.

As to the testimony of Admiral Gregory on cross-examination to the effect that the Navy did not advertise the war plans, advertisements are made for bids as a rule for those things for which the Department wishes to secure offers, simply making public sufficient information to get a satisfactory bid; in other words, a thing that is in the war plans may or may not come to fruition at a particular moment, and if it is decided that a particular project is to be started, for instance, if Congress appropriates for it, then the Department starts to [330—252] advertise for bids.

The ground at Pearl Harbor where this fuel plant is located, is far from flat; the highest tanks are located on a hill in the neighborhood of 50 or 60 feet

(Testimony of Luther E. Gregory.)

above the tide level; they can be seen from the inside of Pearl Harbor, but they cannot be seen from the ocean, because they are 6 or 7 miles inland, with very much higher ground, perhaps 700 feet, intervening between this location and the open sea; there is nothing to prevent them from being seen by an airplane going over the property; there is privately owned land all around the naval station in nearly all directions. The fact that naval reserve No. 1 has been leased to the Pan American Company at certain stated royalties is not a part of the war plans. The lease of December 11, 1922, was separate from the contract of that date; there is nothing in the war plans that required any secrecy about that lease so far as witness knew; he has no knowledge regarding any profit made by the contractor as a result of the selling or using of the oil; his testimony about the questions of profit is intended to apply to all of the construction work which came under his observation; he has no knowledge as regards whether the contract would be profitable in taking the oil and refining or selling it, or as to how desirable it might be to any oil company to get that quantity of royalty oil; this statement applies to both contracts. He presumes that all of the subcontracts involved a profit to the subcontractors, and he assumes that would be the ordinary contractor's profit; both contracts involved a substantial engineering fee to the White Company for getting subcontracts and supervising them. Under the first contract, the engineering fee to the White Corporation was a fixed sum,

(Testimony of Luther E. Gregory.)

which approximated 5 per cent, and under the second contract, it was definitely fixed at 5 per cent. [331—253]

Regarding his testimony as to conversations with Mr. Dunn, and perhaps others, about the conditions at Pearl Harbor that a bidder might desire to know, witness thinks some of the prospective tank bidders consulted the Bureau; they came informally; there was no written correspondence; he does not recall who they were, but the Bureau had some inquiries from tank builders; those were intending subcontractors under the Pan American, or whoever would bid, unless they decided that they could do the whole job in order to get the tanks, but they were primarily tank builders.

The Bureau was not able to have the plans and specifications in such shape when the second contract was made that they could be bid upon until some time thereafter, that is, as to the final complete plans; they were just general plans at that time; the making of the final plans strung along, the Bureau would take up one part of the work at a time, and as it finished that part, the plans would be issued to the White Company to go ahead with that portion of the work; then another portion would come afterwards; asked whether there was any reason, so far as his Department was concerned, why the contract could not have waited until he had the complete plans for the project, the witness answered, "Except that they were in position to go ahead with some of the work, and we had the plans

(Testimony of Luther E. Gregory.)

prepared in the order in which the work would be required to be let, to save time."

Under the second contract, a subcontract for the construction of the wharf for the gasoline plant on Ford Island was made with the Hawaiian Dredging Company in April, 1922. The price being \$98,676, and subcontract was made with the same concern for dredging, November 15, 1923, for \$54,000. The fencing subcontract, under the second contract, was let [332—254] December 17, 1923, to the Paige Steel & Wire Company, for \$93,124.

Recross-examination.

On recross-examination, Admiral Gregory testified that he has not with him the Bureau records showing exactly the extent to which the work under contract 4800 (December 11, 1922) had progressed; that it would involve delay to obtain them from Washington, but that Mr. Dunn and Mr. Kennedy of the White Company, who are in the courtroom, have with them data which will enable them to report definitely, and in such a way as to give the correct division; he is familiar with the progress both from the report of the White Company, and as Chief of the Bureau of Yards and Docks, and accepts them as being accurate.

As to the few subcontracts he was interrogated about on redirect, the witness says that a subcontract for fencing around the work would undoubtedly be one of the last things to be installed, there was no delay in getting the work under way after

(Testimony of Luther E. Gregory.)

the making of the contract of December 11, and it is customary for general contractors to make these subcontracts as the work progresses, and there is nothing unusual at all about the fact that on a job that takes a year or two to complete, some subcontracts are made as late in point of time as those referred to in this case.

The benefit of the saving of between three and four hundred thousand dollars, as witness approximated, about which he has spoken, was a saving of which the Government got the benefit after the White Company's engineering fee was charged to the cost of the work.

The plan to enlarge the Navy's fuel oil storage plant facilities, by whatever name called, after the April 25 contract had been made, was brought about as a result of a decision of the General Board, approved by the Secretary of the Navy, which [333—255] in turn resulted in directions to the Bureau of Yards and Docks, to proceed to plan this second project; as at that time there was under way the first project, from an engineering construction standpoint, it would not be a satisfactory or practical way of carrying forward the work, to have the second project taken up by an independent or new contracting firm, because the extended work is really to be so integrally connected with the original work, by reason of the piping, the electrical connections, the fire-fighting connections, and all that, as to make a separate contract with a separate party to involve, undoubt-

(Testimony of Luther E. Gregory.)

edly, a great deal of expense, and it would not be considered a practical way of going at it. The only logical way is to make it an extension of the first contract.

Redirect Examination.

On redirect examination the witness was asked whether it is not a fact that his Bureau never had the subcontracts under contract 4650 (April 25) at all, because it was a lump sum contract, and if it is not a fact that the Bureau could not get that, even Government counsel, except by communicating with the White Company. He answered that he was not sure that the Bureau had a copy of the contract, but "we were consulted on the bids, which is the essential part of it."

The examination of Admiral Gregory having been concluded, and he having been excused from the stand, there was offered and received in evidence a letter dated July 28, 1922, from J. J. Cotter, of the Pan American Petroleum Company, to the Secretary of the Interior, reading as follows:

U. S. EXHIBIT No. 140.

The Honorable,

The Secretary of the Interior,
Washington, D. C.

Dear Sir:—

There have been two reductions made in the published price of petroleum in California in the last two weeks at [334—256] twenty-five (25¢) cents

per barrel each. Oil which sold for \$1.10 now brings sixty (60¢) cents. Higher gravity oil has been likewise reduced.

We are seriously contemplating the adoption of a plan which should bring better prices for this oil, if and when the plan can be consummated. In order that this plan may be developed, it is essential that we should have immediately your consent for suspension of operations, both drilling and pumping, on lands which we have leased from both within and without the Naval Reserves. This suspension of operations may be made to such an extent as not to include offset wells, but license to make it complete is necessary in order that development of the contemplated plan may be attempted.

Reductions in the published prices became necessary because of the phenomenal, and we believe, temporary production of two newly discovered pools in southern Los Angeles county. We believe that when flush production of these pools is exhausted, that the over-supply will disappear, but in the meantime the flush production of the Naval Reserves will have been disposed of at present low prices at a great loss to the Government and to the lessees.

Inasmuch as all the Government royalty oil applied to the payment of work being done at Pearl Harbor is at published prices, the number of barrels required to satisfy payment under that contract has been greatly increased by the reduction in published prices. The Government is the

sufferer to a great extent in connection with this work while the contracting company merely has time of repayment of its expenditures delayed or postponed. We believe that if this oil can be safely stored underground, that better prices which the future should develop will result and bring out the liquidation of contract prices in approximately the same length of time with [335—257] a much smaller quantity of oil.

We hope that you will see your way clear to authorize us to suspend operations both of drilling or production, or either, to such extent as we may find it necessary in connection with the study of our proposed plan, until such time as said plan can be fully developed and submitted to you for your study and approval. We hope to be able to submit this plan within ninety days.

To enable us to commence the initiation of the plan which we have in mind and to avoid the menace of possible failure to fulfill our leases, specific telegraphic authority to discontinue operations, following by a mail confirmation, is hereby earnestly requested.

Respectfully,
PAN AMERICAN PETROLEUM COMPANY.

By J. J. COTTER.

Plaintiff next offered in evidence night letter telegram, dated July 28, 1922, from Secretary Fall to E. L. Doheny, which is Plaintiff's Exhibit 141, and reads as follows:

U. S. EXHIBIT No. 141.

Colonel E. L. Doheny,
1015 Security Building,
Los Angeles, California.

Your communication through Cotter of this date. Government not only prepared to accede to requests curtailing production and waiving immediate drilling requirements but desirous such policy be followed Naval reserves numbers one and two where results will not be disastrous because of water incursions or immediate danger drainage. Advise you instruct your representative consult immediately Campbell representative Bureau of Mines located Bakersfield who is being authorized by telegraph to carry out this program.

ALBERT B. FALL,
Secretary. [336—258]

Thereupon Plaintiff's Exhibit 142, a letter addressed to E. L. Doheny, at Los Angeles, from Albert B. Fall, was received in evidence, and is as follows:

U. S. EXHIBIT No. 142.

July 28, 1922.

My Dear Colonel:

Confirming my telegram of this date, I am also handing you copy of my telegram of instructions sent to Campbell our representative at Bakersfield.

I presume there is nothing to add to what has been stated in the two telegrams, except that I am in cordial accord with your ideas and with your reasoning.

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You will note that I have made this program general, while leaving it to be decided between the Lessees and Campbell in each specific instance just what course should be followed.

Very sincerely yours,

(Sgd.) ALBERT B. FALL.

Plaintiff's Exhibit 143, offered and admitted, is the telegram referred to in the last quoted letter, and is as follows:

U. S. EXHIBIT No. 143.

July 28, 1922.

Campbell,

Bureau of Mines,

Bakersfield, California.

Have just wired Doheny Los Angeles as follows
Quote Your communication through Cotter of this date. Government not only prepared to accede to requests curtailing production and waiving immediate drilling requirements but desires such policy be followed Naval Reserves numbers one and two where results will not be disastrous because of water incursions or immediate danger drainage. Advise you instruct your [337—259] representative Bureau of Mines located Bakersfield who is being authorized by telegraph to carry out this program end quote. This is your authority act with Doheny's representative as well as any other Government lessees in carrying out this plan. Government anxious reduce production account present prices therefore willing shut off partially or entirely where possible without immediate dan-

ger through incursions water or from drainage.

FALL,
Secretary,

As Plaintiff's Exhibit 144 was then read in evidence the following letter, dated at Washington, September 13, 1922.

PLAINTIFF'S EXHIBIT No. 144.

Mr. Paul Shoup,
The Pacific Oil Company,
Southern Pacific Building,
San Francisco, Calif.

My dear Mr. Shoup:

Your company appreciates fully the overproduction which now exists in California, and I do not wish to take any steps which will aggravate this situation. It is necessary, however, that the Government be protected in every way from drainage from wells producing on lands immediately adjacent to our naval reserves.

My attention has been called to the condition which exists in the heart of Naval Reserve No. 1, in which the Pacific Oil Company produces from wells on Section 31, T. 30 S., R. 24 E., and the Standard Oil Company from wells in Section 36, T. 30 S., R. 23E.

Several of these are line wells and while the drainage will not be appreciable, the Department finds it necessary to consider drilling on the northerly strip of Section 1, T. 31 S., R. 23 E., and a northerly strip of the West 1/2 of Section 6, T. 31

S, R. 24 E., unless offset production is curtailed. [338—260].

This matter has been discussed between your field superintendent and the local engineers of the Bureau of Mines without effecting any agreement. I am wondering whether you can not see your way to shutting down the following wells on Section 3: Wells Nos. 9, 11, 15, 50 and 51. You will find inclosed copy of a letter which I am writing to Mr. Storey, regarding the shutting in of certain of his wells in Section 36. If your company and the Standard Oil Company close in the wells mentioned in these two letters, the Department will not find it necessary to provide for the drilling of wells in Section 1 and Section 6, until your wells and those of the Standard Oil Company are again put to producing.

Respectfully,

(Sgd.) ALBERT B. FALL,
Secretary.

On the same date, Secretary Fall addressed a letter to Mr. H. M. Storey, Standard Oil Company, San Francisco, substantially identical with Exhibit No. 144, transmitting a copy of that exhibit to Mr. Storey, making request as to shutting down 5 wells in Section 36, which letter to Mr. Storey was read in evidence as part of Exhibit 144.

Under date of September 19, Mr. Storey replied to Secretary Fall that his company would be glad to shut down one of the wells as requested, but as the four others were all leased ground, it would be necessary to refer the matter to the lessors, and

that this had been done. Mr. Storey's letter, substantially as here stated, was read as Plaintiff's Exhibit 145.

On October 1st, 1922, Mr. Shoup sent from Los Angeles the following telegram to Secretary Fall, which, as Exhibit 146, was read in evidence:

PLAINTIFF'S EXHIBIT No. 146.

Hon. Albert B. Fall,

Secretary of Interior Washington, D. C.

Your favor of thirteenth ultimo I am complying with as we [339—261] wish to work in perfect harmony with your good self and the department under your direction stop Wells fifteen and fifty-one however are only gas wells and as we have contract with Midway Gas Company under which we are obligated to deliver this gas I am wondering if you would not be willing to have these operate stop What is your suggestion as to them stop We will be out some expense as the shutting in of these oil wells makes operating conditions rather disadvantageous but are nevertheless glad to meet your views which I think in long run mean reciprocal benefit.

PAUL SHOUP.

Plaintiff's No. 147 is dated October 4, 1922, and reads as follows:

U. S. EXHIBIT No. 147.

Memorandum to Secretary Finney:

Secretary Fall, by letter of September 13, suggested the shut-down referred to in Mr. Burke's telegram. The Secretary's object was to avoid

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leasing adjacent strips of Government land during a period of over-production. The Secretary asked no favors from any one and made his suggestion for the good of the Government as well as the operators concerned. Therefore, the Department does not owe any preferential lease in case the suggestion is accepted.

H. FOSTER BAIN.

Plaintiff's Exhibit No. 148 is a telegram, prepared in the Bureau of Mines by F. B. Tough, the then Chief Petroleum Technologist, dated at Washington, D. C., October 4, 1922, and sent to Mr. Paul Shoup, which, as Exhibit 148, was received in evidence, and reads as follows: [340—262]

U. S. EXHIBIT No. 148.

Your wire from Los Angeles first reference to shutting down your wells numbers fifteen and fifty one section thirty one thirty twenty four Elk Hills stop It appears that both these wells are producing gas from the same horizon that furnished the oil in this vicinity and that the oil in these wells is at present held back by the high pressure of gas in the upper part of this horizon stop For these reasons I am inclined to believe that considerable loss of gas which is the motive force causing these wells to flow would be equivalent to actual drainage of oil Moreover since these wells are in the oil bearing horizon it would be virtually impossible for me to lease a tract of land for gas wells only south of your property stop I appreciate your attitude in this matter and

assure you of the department's earnest desire to cooperate in solving the economic as well as producing problems of the petroleum industry.

FALL,
Secretary.

Plaintiff's Exhibit 149 is Mr. Shoup's reply, dated at San Francisco, California, October 5, 1922, reading:

PLAINTIFF'S EXHIBIT No. 149.

Hon. Albert B. Fall,
Secretary of Interior,
Washington, D. C.

Yours of the Fourth in connection with Shutting down wells on certain sections in Elk Hills we will accept your suggestion and shut them all down as named in your letter of the thirteenth assuming of course that Standard Oil Company will do likewise. Kindly advise.

PAUL SHOUP.

Plaintiff's Exhibit No. 150 is a telegram from the Bureau of Mines by H. Foster Bain, Director, dated Washington, D. C., October 6, 1922, addressed to Paul Shoup, at San [341—263] Francisco, and reading as follows:

PLAINTIFF'S EXHIBIT No. 150.

Much appreciate your cooperation. Standard has agreed. Will wire when Carman lessee from Standard signifies approval.

FALL,
Secretary.

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Plaintiff's Exhibit No. 151 is a letter from Mr. Storey to Secretary Fall, dated at San Francisco, October 11, 1922, which is as follows:

PLAINTIFF'S EXHIBIT No. 151.

Hon. Albert B. Fall,
Secretary of the Interior,
Washington, D. C.

Dear Mr. Secretary:—

We sent you the following telegram to-day:

“All of the wells mentioned your letter September thirteenth were shut in to-day.”

We could not give you earlier advice, because our lessors are eastern residents and their permission to shut in the wells in question was not received until yesterday.

Very respectfully yours,

/S./ H. M. STOREY.

Plaintiff's Exhibit No. 152 is a telegram prepared by Mr. Tough of the Bureau of Mines, dated at Washington, October 14, 1922, addressed to Paul Shoup, San Francisco, reading as follows:

PLAINTIFF'S EXHIBIT No. 152.

Referring your wire of the fifth to Secretary of Interior in which you state Quote We will accept your suggestion and shut them all down as named in your letter thirteenth assuming of course that Standard Oil Company will do likewise End quote Advised by wire dated San Francisco eleventh from H. M. Storey Quote All of the wells mentioned your letter September thirteenth were shut down to-

day End quote If you will give appropriate instructions to your field men in this regard [342—264] your cooperation will be appreciated by the Department.

FINNEY,
First Assistant Secretary.

Plaintiff's Exhibit No. 153 is a telegram from Paul Shoup to Assistant Secretary Finney, dated October 16, 1922, stating that "Orders have been given to close down our wells at once."

Plaintiff's Exhibit No. 154 is a letter from H. L. Westerbrook, Treasurer of the Belridge Oil Company, dated at Los Angeles, September 26, 1922, addressed to D. W. Moran, accountant, Department of Interior, Bakersfield, California, and reading as follows:

PLAINTIFF'S EXHIBIT No. 154.

Dear Sir:

We have finished Two Wells on Section 34-30-24, Elk Hills and working on two others which will shortly be finished at which time, we will for the present discontinue drilling, which action on our part, as I understand it, is entirely agreeable to the Department of the Interior, for the reason that our neighbors have discontinued drilling pending a better condition of the oil situation.

Mr. Whittier, our Vice-president, in charge of operations, has left for an extended trip in the East and requested me to secure, upon our completion of the other two wells, making four in all, a formal consent to discontinuance of drilling under present con-

ditions. I am somewhat at a loss to know how to go about securing this formal consent and am calling upon you for assistance. Will you please give me information regarding this matter and if you have a blank form to go by or there is a regulation letter to be written, I will appreciate very much if you will inform me just how to go about this. There is no question but what it will be agreeable to you people for us to suspend drilling for the time being. I understand our [343—265] neighbors have made such a stipulation and it has been granted.

Very truly yours,
H. L. WESTERBROOK,
Treasurer.

The enclosure with the foregoing, which was read in evidence as part of the same exhibit, is a letter from Mr. Lombardi, of the Pacific Oil Company, dated San Francisco, October 2, 1922, to Mr. H. L. Westerbrook, Treasurer of the Belridge Oil Company, Los Angeles, California, and reads as follows:

Dear Sir:

Referring to your letter of September 29th. It is our present intention not to drill on locations 4, 5, 6 and 8 on Section 35, Elk Hills, unless we are forced to do so by drilling across the line.

It is impossible to say when we will find it necessary to drill these wells, but in view of the present oil situation in California I am of the opinion that we will not drill them in the near future.

You are at liberty to show this letter to Mr. Campbell.

Yours truly,
M. E. LOMBARDI.

Plaintiff's Exhibit No. 155 is a letter dated October 21, 1922, from said Westbrook to E. P. Campbell, Deputy Supervisor, Department of the Interior, Bakersfield, California, and reads as follows:

PLAINTIFF'S EXHIBIT No. 155.

Dear Sir:

Kindly refer to your letter of September 28th, addressed to me with relation to a possible suspension of drilling on Belridge Oil Company, Section 34-30-24, Elk Hills, California.

Since receiving your letter I had some further correspondence with Mr. Lombardi, Manager of Development [344-266] of the Pacific Oil Company, 79 New Montgomery Street, San Francisco, California, and I am enclosing herewith copy of this letter of October 2nd in which he states in the last paragraph that I am at liberty to show this letter to you.

Will you kindly authorize the Belridge Oil Company to discontinue drilling or to suspend until such time as the conditions of the oil supply and market are more favorable, with the understanding that we will watch the property very closely and protect our property line at all times regardless of the consent which you are giving to the suspension of drilling; in other words, that it will be incumbent upon us to keep track of what our neighbors are do-

ing, and if necessary to offset a well at any time, we will immediately proceed to drill an offset well wherever it is necessary.

I have to advise that we have brought two wells into production, which upon the latest advice received from the field, were producing from 900 to 1000 barrels per day each, and we expect to bring in two additional wells within the next fifteen days at which time we will furnish you with a detail report of such. These four wells completely offset every well which adjoins us on all three sides exposed at this time.

Thanking you in advance for your kind and early reply, I am

Yours very truly,
H. L. WESTERBROOK,
Treasurer.

Plaintiff's Exhibit 156 is dated at Bakersfield, October 24, 1922, and is as follows:

PLAINTIFF'S EXHIBIT No. 156.

Belridge Oil Co.,
Merritt Bldg.,
Los Angeles, Cal.
Attention Mr. H. L. Westbrook.

Dear Sir:

This will acknowledge receipt of your letter of application of October 21st asking for suspension of drilling on your government lease Visalia 010142, Sec. 54, 30/24.—[345—267]

I hereby grant you permission to suspend drilling operations on the lease mentioned above until

(Testimony of Luther E. Gregory.)

the Department formally requests you to resume any or all operations as required under the lease, unless you should sooner begin on your own initiative. This permission is granted when, and if, the Pacific Oil Company has suspended its operations on wells 4, 5, 6, 6 and 8 in adjoining section 35. If any of these wells should be further drilling to completion this permission does not relieve you from drilling offset wells to any of these Pacific Oil Wells on a well-for-well basis. Your wells 1, 3, 15 and 17 should be produced continually when, and as, the Pacific Oil Company's wells 1, 2, 9 and 11 produce (on a well-for-well basis).

For: DEPARTMENT OF INTERIOR.

By: E. P. C.

E. P. CAMPBELL,

Deputy Supervisor,

U. S. Bureau of Mines.

There was thereupon offered and admitted in evidence as Plaintiff's Exhibit No. 157 a memorandum which it was stipulated was submitted by Mr. E. L. Doheny to representatives of the Navy and the Interior Departments, to Admiral Robison of the Navy, and to Secretary Fall of the Interior, who turned it over to Dr. Bain. This memorandum was without date, and the same was not read in evidence, and is not reproduced here, because it was stipulated that the later memorandum, dated November 6, 1922, and hereinafter reproduced as Exhibit 159, embodies all that is in Exhibit No. 157, and also additional matters.

Thereupon, there was received in evidence as Plaintiff's Exhibit 158 the following letter, addressed to Admiral J. K. Robison, Navy Department, Washington, D. C.: [346—268]

PLAINTIFF'S EXHIBIT No. 158.

"My dear Admiral:

I am enclosing herewith additional memoranda concerning the advantages which are offered to the Government in connection with the acquisition of additional territory for drilling purposes on naval reserve No. 1.

I am taking the liberty of including also a fresh copy of the memoranda which I submitted to the Interior Department.

Hoping that this additional memoranda is of the nature which you require, and assuring you of our desire to aid the Government in every way and to make such changes in the proposition as we are able to at your suggestion, I remain

Yours very sincerely,

E. L. DOHENY."

Thereupon a photostatic copy of the "Additional Memorandum" referred to, and enclosed with the foregoing Exhibit 158, was read in evidence as Plaintiff's Exhibit 159, and the same is as follows:

PLAINTIFF'S EXHIBIT No. 159.

"The situation in California has changed in the last four months to the great disadvantage of the producers and especially of the producers on Government lands, as well as to all lessors of all oil lands.

The discovery of three oil areas in localities where the ownership of lands had already been divided into small holdings has resulted in the very rapid and close drilling of a great many wells in each of those areas. Only the great depth of the wells and the length of time which it takes to drill them has prevented the flooding of the market with oil to an extent that would make it impossible to care for it.

The development of these new oil areas resulted in the lowering of the price of the oil, on the 14th of May, of 50 cents a barrel. This reduction was more or less justified by reason of the fact that this oil increased the surplus which was being produced over the daily capacity of the refineries, thus necessitating the building of storage to accommodate the oil which also itself became an investment, the expense of conserving the oil amounting to approximately the 50 cents reduction in price. A further reduction of 25 cents per barrel was made on July 15, and a still further reduction of 25 cents on July 25, thus reducing the basic price from \$1.60 to 60 cents per barrel.

As a result of this lowering of the basic price, the selling price of the Government royalty from the wells operated by its lessees in California has been reduced approximately \$250,000 per month or approximately \$3,000,000 per annum.

Every lessor and lessee in California not interested in a refinery has suffered a reduction in the selling price of his oil of exactly the same amount per barrel, regardless of the amount of the produc-

tion of each well and the cost per barrel of production.

The situation has naturally resulted in the shutting down of many wells that could not be operated at a profit on the latest base price. It has developed a situation which causes study to those most vitally affected.

The wells in the new oil districts are yielding oil under their maximum pressure and while wells in these districts and the lands are to a considerable extent operated under leases by the refining companies of the State; nevertheless the royalty oil which goes to the lessors, as well as the total production of the companies which [347—269] are not associated with refineries, is sold at this low price, which is lower than the cost of production in some parts of the California fields.

No complaint lies against the purchase of this oil at this low price, providing the public has the benefit of the reduction. This, however, is not the case, as the price of California oil products has not been reduced since May 14.

The logic of the situation in California is that these companies and individuals that have had substantial production before the advent of these new districts, and whose production was handled at a profit by the marketing companies at the prices which formerly obtained, must necessarily see that they without marketing facilities now find themselves competing with the casual producer of oil in the new field from wells yielding under maximum pressure and flush production which it pays the lessor

and operator to sell at the present low market prices.

It suggests that an opportunity exists for the investment by those having experience and confidence in the business in an additional enterprise which will help obviate the present handicap of such producers. It is expected that the present relations between the daily oil production and the capacity of the refineries on the Pacific Coast will continue for a considerable period and that the handicap which the producers operate under can only be relieved by the broadening of the market to an extent that is justified by the present increased production.

The plan which has been considered is as follows:

- First: To immediately construct from two to five million barrels of steel and concrete storage in California adjacent and connected with some deep seaport, possibly both at Los Angeles and San Francisco, and immediately upon the completion of a substantial part of the above storage to commence the taking of oil from the existing supply at such rate as will keep pace with the completion of the storage tanks and reservoirs. This will immediately arrest the downward tendency of prices in oil.
- Second: A refinery shall be immediately started with an initial capacity of 10,000 barrels per day, to be increased to 20,000 barrels per day as the situation justifies. This refinery it is estimated would be

ready for operation in from six to eight months.

Third: Pipe-lines and other transportation facilities for the carriage of oil from the sources of supply to the refinery and storage plant to be provided for as rapidly as possible.

It is estimated that this new venture will necessitate the expenditure of approximately \$10,000,000. It can only be justified if those who undertake to carry it out have confidence in the assurances which the different fields offer of a sufficient supply of oil to keep the refinery operating to capacity.

There are two reliable sources of supply for oil that might be used in connection with such an enterprise to the great advantage of the controllers of these sources. The one is the Government royalty oil from the wells now being operated on the public lands in California and in naval reserves Nos. 1 and 2. This royalty oil is at present devoted to the payment of the cost of construction of a naval base at Pearl Harbor. If a contract could be made for it according to the terms of which this royalty oil could be acquired for a period of 10 [348—269-A] years after the completion of the Pearl Harbor contract, or including the period during which the Pearl Harbor contract is being carried on, it would become a valuable adjunct to the above new enterprise. Not sufficient, however, to justify the investment of the substantial sums which this enterprise necessitates.

The other assurance which would be required in

order to make it possible for the enterprise to be of advantage to the Government is the assurance that certain designated lands situated in naval reserve No. 2 should when leased be leased to the company establishing such an enterprise, the developments of said lands to be done when and as rapidly as required by the Government to protect its lands from depletion by drilling on adjoining territory. The royalty on such lands to be the regulation royalty required by the Government.

The benefit which could be guaranteed to the Government as a result of the aid thus given to the new enterprise would be as follows:

- (a) The Government royalty oil to be transported to the refinery at San Pedro or San Francisco, as the case may be, without charge and the exchange be made at that point on the basis of the value of the oil there, thus giving to the Government for its oil the additional price which results from free transportation to tidewater. This amounts to somewhere from 30 cents to 50 cents per barrel, which compared to the present basic price is a very substantial increase.
- (b) To give the Government free storage for 1,000,000 barrels of fuel oil adjacent to the refinery at tidewater and also to bunker Government ships at cost at the docks of the new enterprise without profit.
- (c) To give the Navy the privilege of purchasing any additional fuel, which it might require above the amount which it would be entitled to

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in exchange for royalty crude, at 10 per cent less than the market price at tidewater, as determined by their current Navy contracts for fuel oil.

- (d) To sell to the Navy the manufactured oil products from the refinery, to wit, gasoline, kerosene, lubricating oils, greases, etc., at 10 per cent below the market prices, as determined by the current Navy contracts for such products.
- (e) To carry, subject to the requirements of the Navy, for a period of 15 years, 3,000,000 barrels of our "Mexpet" fuel oil of the following quality, the specifications being based on tests made from 31 tank steamer cargoes of fuel oil delivered in New York harbor over a period of five months.

Gravity	15.81° Beaume.
Furol Visc., at 122° F.	167.58 sec.
Flash	150° F.

This fuel oil can be carried at such places along the Atlantic seaboard of the United States as may be desired, in view of the location of our storage facilities.

We are increasing our storage at various points, notably Carteret and probably Cristobal.

Attention ought to be called here to the fact that this handling of oil through the pipe-lines free of charge to the Government would undoubtedly result in the enterprise sustaining a loss upon such royalty crude as is only equal in value to the fuel oil which the Government would get in exchange therefor at

tidewater. Much of the crude produced from naval reserve No. 1 is below the gravity where it has any substantial value as a refining material. [349—269-B]

The advantage of the Government sharing in this enterprise is obvious when it is considered that the government is the largest lessor in the State of California and consequently the largest sufferer among the lessors from the fact that it must compete with the casual producer of oil from wells on restricted areas which produce under great pressure substantial quantities of oil at a very low cost. Its position of being able to furnish a foundation for the carrying out of this enterprise enables it to participate in the advantages thereof in a very substantial way. The initiation of this enterprise would guarantee against any further cut. The development of it will guarantee substantial increases. The contract under which it would operate guarantees an additional value to the Government oil of at least not less than 30 cents to 50 cents per barrel. The Government's benefits from its present royalty of wells in existence is substantial and its exchange price is based upon the market price of oil which may at any moment be lessened arbitrarily by the marketing companies in California. The new enterprise is one that not only offers a good business reason for its inauguration according to the plan suggested, but it offers this additional reason, which must have a bearing upon the consideration of the subject, that the present low prices of oil have not resulted in any decrease in

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price of petroleum products to the consumers and consequently the proposed effort to stabilize the prices and give a larger participation to the Government will not affect adversely those toward whom the Government holds a parental feeling, the general consuming public.

Prices of crude oil at well:

May 12, 1921, base price of crude at well ..	\$1.60
May 13, 1921, base price of crude at well ..	1.10
July 15, 1922, base price of crude at well ..	.85
July 25, 1922, base price of crude at well ..	.60

Barrels

Daily

Our company's shut-in and producing wells at

Elk Hills—Government leases	16,000
Government royalty on this amount, approximately	5,280

Monthly Annually

On basis sales, 480,000 barrels,		
at \$1.60	\$768,000	\$9,216,000
Present price, 480,000 barrels,		
at 60 cents	288,000	3,456,000
	480,000	5,760,000
Government income, 158,400		
barrels, at \$1.60	253,440	3,041,280
Government present income,		
158,400 barrels at 60 cents ..	95,040	1,140,480
..	158,400	1,900,800
Approximate royalty to Government		
when all wells operating per cent		31-33

August sales, 363,914 barrels	\$309,410.00
August royalty, 110,652 barrels	93,385.00
August royalty on basis $12\frac{1}{2}$ per cent, 45,489 barrels	38,676.00
Difference royalty on basis $12\frac{1}{2}$ per cent, 65,163 barrels	54,709.00
Naval reserve No. 1 consists of 50 sections (2 sec- tions leased). [350—269-C]	

Standard Oil Co. has been draining gas from sections 35, 30, and we since October 14, 1919. This well came in and caught fire. Estimated amount of gas, 190,000,000 cubic feet per day. Probable value of gas sold and used from this well, \$1,000,000. Location of well on section 36, 30, and 23 about 750 feet from east line of section 35. Depth of well 2,141 feet. No oil, dry gas sand. Oil formation over 300 feet below this sand. Dry gas can be produced on section 35 without going into the oil formation. Standard Oil Co. producing oil in next location about 660 feet northerly from this gas well, from oil formation 2,486 to 2,567 feet. A portion of section 35 should be drilled immediately and possibly a small portion of section 26 for the protection of Government lands." [351—269-D]

Appended to the foregoing memorandum, and received in evidence as a part of the same exhibit, were 7 typewritten pages, marked, in their order, in lead pencil, 1st, 2d, 3d, 4th, 5th, 6th, 7th, the last having in pencil on it the words "No pipe-line"; each of these pages listed a certain number of sections in Reserve No. 1, ranging from a minimum of 4 sections to a maximum of 19 sections, represent-

ing different ideas as to the number of sections to be leased in the event of action by the Government on the propositions contained in the foregoing November 6th memorandum, the 7th page listed 4 sections, and the words "No pipe-line" indicated that if that number of sections only were leased, the lessee would not undertake the construction of the pipe-line referred to in the memorandum; the handwriting on the sheets referred to is that of J. C. Anderson, President of defendant, Pan American Petroleum Company.

Plaintiff's Exhibits Nos. 160, 161 and 162, consisted of written letters, dated October 24, November 15, November 16, respectively, from Admiral Gregory, as Chief of the Bureau of Yards and Docks, to the Secretary of the Navy, on the subject of relocating tanks at Pearl Harbor, by utilizing land theretofore intended for Marine Corps purposes, all in substance as testified to by Admiral Gregory; and as the said exhibits do not add to or change the testimony as orally given by the witness Gregory, their inclusion in full in this statement is not material, and is therefore omitted.

Plaintiff's Exhibit No. 163 was received in evidence, dated November 21, 1922, and reads as follows:

PLAINTIFF'S EXHIBIT No. 163.

From: Secretary of the Navy.

To: Board for the Development of Navy Yard Plans.

Via: (1) Chief of Bureau of Yards and Docks.

(2) Major General Commandant, U. S. Marine Corps.

SUBJECT: Fuel Oil Storage, Naval Station, Pearl Harbor, Contract No. 4650.

Reference: (a) Report of Board for the Development of Navy Yard Plans, Nov. 3, 1920. [352—270]

Enclosures:

- (A) Station telegram 8013—1625, October.
- (B) Station telegram 8021—1130, October.
- (C) Station telegram 8017—1632, October.
- (D) Commanding Officer's, Pearl Harbor, Marine Corps Detachment, telegram to Headquarters U. S. Marine Corps, 8518—1420, October.
- (E) Bureau drawing No. 97496.
- (F) Memo. of Chief of Bureau of Yards & Docks, dated 15 Nov. 1922, presenting additional facts relative to request for assignment of space for fuel oil tankage.
- (G) Memo. of Chief of Bureau of Yards & Docks dated 16 Nov. 1922 supplementing information contained in Enclosure (F).

1. The Department has today approved a change in the amount of reserve of fuel oil to be provided at Pearl Harbor from 250,000 tons to 625,000 tons. In order to secure storage space for 625,000 tons of fuel oil at Pearl Harbor it will not only be necessary to utilize all the land east of the existing concrete fuel oil reservoir near Merry Point and the

Submarine Base on Quarry Point to the boundaries of the Naval Station but also to locate the 8 tanks mentioned in the basic correspondence hereunder upon a portion of the Marine Corps reservation. The removal of Halawa Street to the eastward approximately 500 feet as shown on accompanying drawing A—83 of the U. S. Naval Station Pearl Harbor T. H. and the consequent reduction of the size of the Marine reservation is therefore directed.

2. As this change involves modification in the approved development plan of the Naval Station, Pearl Harbor, it is directed that the Board for the Development of Navy Yard Plans prepare, for the consideration of the Department, a new plan showing the locations of the tanks necessary to accommodate such portion of the 625,000 tons of fuel oil as can be accommodated on the land under the control of the Navy Department at Pearl Harbor, and also showing such other changes in the existing approved plan as may be necessitated by this increase in the fuel oil reserve.

3. Please return papers.

(Sgd.) EDWIN DENBY. [353—271]

Plaintiff's Exhibit No. 164 was next introduced and read in evidence, and the same is as follows:

PLAINTIFF'S EXHIBIT No. 164.

20 Nov. 1922.

From: Chief of Bureau of Engineering.

To: Secretary of the Navy.

Via: Chief of Naval Operations.

SUBJECT: Storage of Reserve Fuel Oil.

1. The storage for 1,500,000 barrels of fuel oil at Pearl Harbor under contract with the Pan American Petroleum and Transport Company is nearing completion and it is desirable at this time that information be at hand as to what further disposition should be made of the royalty oil accruing from Naval Petroleum Reserves Nos. 1 and 2.

2. Instructions are requested as to the quantity and location of reserve storage facilities to be provided on the West Coast of the United States (including the Hawaiian Islands).

J. K. ROBISON.

Upon this last quoted exhibit, there was placed an endorsement, signed by Admiral A. H. Robertson, heretofore identified in the testimony of the witness Gregory as a Rear Admiral of the Navy, at the time Assistant to Admiral Koontz, who was then Chief of Naval Operations, which endorsement bears the date of December 15, 1922, and, together with the notation of approval thereof by Acting Secretary of the Navy Roosevelt, was read in evidence as part of the foregoing Plaintiff's Exhibit No. 164. Said endorsement and notation of approval are as follows:

“From: Chief of Naval Operations.

To: Secretary of the Navy.

SUBJECT: Storage facilities for reserves of petroleum products at Naval Operating Base, Pearl Harbor, Hawaii.

1. It is recommended that the next project, to be undertaken in disposing of the royalty oil accruing from Naval [354—272] Petroleum Reserves No. 1 and 2 be increasing the totals of the reserves of all petroleum products at Pearl Harbor to the following figures:

Fuel oil	625,000 tons
Lubricating oil	3,200 tons
Diesel oil	10,000 tons
Submarine lubricating oil	1,200 tons
Aviation oil	300 tons
Aviation gasoline	3,000 tons
Gasoline	3,500 tons

2. The Chief of Yards and Docks has reported that by further developing Merry Point and by utilizing the tract of land between Avenue D and Avenue E and between Central Avenue and South Avenue the desired amounts of storage can be secured.

3. Further recommendation will be made with regard to reserves to be provided on the West Coast of the United States.

A. H. ROBERTSON, Acting.

Copy to Bureau of Yards and Docks.

Bureau of Supplies and Accounts.

Bureau of Engineering.

Navy Department.

Approved Dec. 15, 1922.

T. ROOSEVELT,

Acting Secretary of the Navy.

On December 18, 1922, a further endorsement was placed upon the same paper (Exhibit No. 164), which, as a part of the same exhibit, was received in evidence and reads as follows:

From: Chief of Naval Operations.

To: Chief of Bureau of Supplies and Accounts.

Via: (1) Chief of Bureau of Engineering.

(2) Chief of Bureau of Yards and Docks.

SUBJECT: Storage facilities for reserves of petroleum products at Naval Operating Base, Pearl Harbor, Hawaii.

1. Forwarded, inviting attention to Departmental approval dated 15 December 1922, of the recommendations contained in the 1st endorsement hereunder.

2. Please return papers promptly.

A. H. ROBERTSON,

Acting." [355—273]

Under date of December 19, 1922, Admiral J. K. Robison, Chief of the Bureau of Engineering, forwarded the foregoing exhibit, with the endorsement thereon, with the comment "Contents noted"; this was followed by a like comment signed, on Decem-

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ber 22, by Admiral Whitehorne, Acting Chief of the Bureau of Yards and Docks; on December 26, by Admiral David Potter, Chief of the Bureau of Supplies and Accounts.

It was stipulated between counsel for plaintiff and for defendant that these endorsements were part of the method of the Navy Department at Washington by which official papers were sent around to the officers of various Bureaus concerned with the subject matter, the endorsements being used by forwarding officers to convey their comments.

Plaintiff thereupon offered in evidence as Exhibit 165, letter dated November 22, 1922, from Admiral Robison, Chief of the Bureau of Engineering, to the Bureau of Yards and Docks, which, together with the postscript following the signature, reads as follows:

PLAINTIFF'S EXHIBIT No. 165.

SECRET

14956-162-1-2-F.

22 November, 1922.

To: Bureau of Yards and Docks.

SUBJECT: Reserve storage facilities for petroleum products,—Naval Station, Pearl Harbor.

1. The Bureau of Engineering has recently been informed that the approved War Plans provide for the following storage facilities for petroleum products in the Hawaiian Islands:

Fuel oil	625,000 tons
Lubricating oil	3,200 tons
Diesel oil	10,000 tons
Submarine lubricating oil	1,200 tons
Aviation oil	300 tons
Aviation gasoline	3,000 tons
Gasoline	3,500 tons

2. It is requested that the Bureau of Engineering be informed whether or not these storage facilities can be provided within the limits of the Naval Station at Pearl [356—274] Harbor. It is also requested that, if there be available space for these storage facilities, the Bureau of Yards and Docks proceed with the preparation of the necessary plans therefor.

J. K. ROBISON.

Present storage fuel . . 426,000 bbls.

Pan Amer. Contract 1,500,000 bbls.

1,926,000 bbls. + 275,000 tons
Final 625,000 tons

To be provided 350,000 tons
2,450,000 bbls.

Plaintiff next offered in evidence as Exhibit No. 166, letter from the Secretary of Navy to the Secretary of the Interior, dated November 29, 1922, reading as follows:

PLAINTIFF'S EXHIBIT No. 166.

THE SECRETARY OF THE NAVY.

WASHINGTON.

29 November, 1922.

My Dear Mr. Secretary:

The Navy's needs for storage of fuel oil and other petroleum products at Pearl Harbor, Territory of Hawaii, involve a considerable extension of filled storage beyond that existing or provided for in the contract with the Pan American Petroleum and Transport Company, dated 25 April, 1922. It has been suggested that if the preferential privilege for leasing areas in the naval Petroleum Reserve #2 now possessed by the Pan American Petroleum and Transport Company under the terms of the above-mentioned contract be immediately put into operation over such areas of that reserve as would naturally be opened up at once, and as would not be part of a natural reserve which can be maintained more or less indefinitely,—the Pan American Petroleum and Transport Company would be glad to undertake the construction and filling of the additional storage required at Pearl Harbor.

The Department requires additional facilities at Pearl Harbor as follows: [357—275]

	(tons)
Fuel oil	350,000
Lubricating oil	3,200
Diesel oil	10,000

Submarine Lubricating oil	1,200
Aviation oil	300
Aviation gasoline	3,000
Gasoline	3,500

The Department desires, in addition, storage for fuel oil and other petroleum products along the Atlantic and Pacific coasts, as well as at the Panama Canal.

It would be a national advantage to have a considerable commercially owned fuel oil storage at Honolulu.

It has been suggested that the contract with the Pan American Petroleum and Transport Company could be revised so as to provide for free transportation of navy royalty oils from the sources of supply to a refinery at deep water. This free transportation would, of course be a considerable Navy asset. It would further be an asset for the Navy to have stored, for any considerable period, such as fifteen years, any large quantity of privately owned commercial fuel oil—such fuel oil to be subject to the requirements of the Navy.

It appears to this Department that the royalty oil accruing to the Navy from additional leases in Naval Petroleum Reserve #1 should be a sufficiently great proportion to the total production as in itself to justify the granting of the leases.

I have heretofore requested you to act as the Agent of the Navy Department in this matter; and I now make the request that you take steps

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to modify the existing contract with the Pan American Petroleum and Transport Company for the production and filling of fuel oil storage at Pearl Harbor (or enter into a new contract, if such be found more desirable) to the end that the above increase in storage be added to the present plans for the Pearl Harbor development, and that as much fuel oil in storage as practicable be ordered for the benefit of the Navy. [358—276]

I have instructed Rear Admiral J. K. Robison, the Engineer-in-Chief of the Navy, to confer with you in this matter, as my direct representative, and shall be pleased either directly, or through him, to furnish you any information or assistance that you may require, and that this Department may be able to give, if you see fit to undertake the accomplishment of this request.

It is requested that the *amounts* of storage projected be treated as confidential.

Very respectfully,

EDWIN DENBY.

The Honorable,
The Secretary of the Interior,
Washington, D. C.

Plaintiff thereupon offered in evidence as Exhibit 167, letter dated December 8, 1922, reading as follows:

PLAINTIFF'S EXHIBIT No. 167.

"The Secretary of the Interior,
Washington, D. C.

Dear Sir:

We have given very careful consideration to the difference between the royalty schedule which the Government has offered us in the lease connected with the proposed modification of our Pearl Harbor contract and the changes in such schedule which we had proposed to request of the Government. Realizing, as we do, that the value of this contract depends largely upon better prevailing prices for crude oils than at present obtains, we have concluded that the possible appreciation in the price may be made to absorb the difference between the schedule of royalties offered and that which we had proposed to request, with the result that we have decided to accept the Government's schedule of royalties as offered.

With appreciations of my highest esteem, I am,
Sincerely yours,

E. L. DOHENY,
President." [359—277]

As Plaintiff's Exhibit 168, there was formally received in evidence contract bearing date December 11, 1922, in words and figures as contained in Exhibit "C" to the Amended Bill of Complaint; and as Plaintiff's Exhibit 169, a lease, December 11, 1922, in words and figures as contained in Exhibit "D" to the Amended Bill of Complaint.

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As Plaintiff's Exhibit 170, there was put in evidence, but not read to court, the specifications for work at Pearl Harbor done under the December 11, 1922, contract, and it is stipulated by the parties hereto that as the contents of these specifications are immaterial to any question presented here, it is not necessary to set them forth in or annex them to this statement of evidence.

Thereupon, as Plaintiff's Exhibit No. 171, the following letter, dated December 29, 1922, with the notations of approval at the foot thereof, was introduced in evidence:

PLAINTIFF'S EXHIBIT No. 171.

"The Secretary of the Interior,
Washington, D. C.

Dear Sir:

Supplementing the contract entered into by the Pan American Petroleum and Transport Company with the United States of America under date of December 11, 1922, in order that the intentions of both parties thereto may be made perfectly clear, we wish to confirm our understanding that it is our mutual purpose and intention that the Government will deliver in exchange, and the Pan American Petroleum and Transport Company will receive the Government's royalty gas and casinghead gasoline to be applied in discharge of the Government's obligations under the original contract dated April 25, 1922 between the United States of America and the Pan American Petroleum and Transport

Company, until the deliveries of such gas and casinghead gasoline, together with deliveries of royalty crude oil heretofore made and hereafter to be made, [360—278] shall be sufficient to satisfy the Government's obligations under said contract of April 25, 1922, and that thereafter such royalty oil, gas and casinghead gasoline shall continue to be delivered by the Government in accordance with said contract of December 11, 1922.

Very truly yours,

JOS. J. COTTER,
Vice-President.

Above sets forth my understanding.

Approved:

ALBERT B. FALL,
Secretary of the Interior.

Approved:

EDWIN DENBY,
Secretary of the Navy."

Plaintiff's Exhibit 172, letter dated January 22, 1923, from Secretary Fall to Commissioner Spry of the General Land Office, reads as follows:

PLAINTIFF'S EXHIBIT No. 172.

"Dear Mr. Commissioner:

As you will recall, the administration of the Naval Petroleum Reserves has been placed in this Department by Executive Order of the President. Within the reserves are certain leased areas title

to which rests upon claims initiated before the reserve was created. The papers relating to such leases are in your office and constitute a part of the public files of this Department.

At the request of the Navy Department, and in pursuance of the war plans of the General Board, I have made certain exchange arrangements and agreements under which contractors are charged with the responsibility of drilling offset wells and performing other development as ordered by the Government, upon lands within the reserves but outside the leased areas mentioned above. These contracts form part of the confidential records of the Navy Department and are not for public inspection. Copies [361—279] have been deposited with the Bureau of Mines for guidance of the officers of that Bureau in enforcing the contracts, and may be inspected by you as occasion arises, but are not considered to be part of the files of this Department.

Leases have been issued to limited areas in Petroleum Reserves No. 1 and No. 2 in California under the authority of the Act of June 4, 1920, and the records are, I understand, now in your Department. Since these relate to Navy, rather than Interior Department business, you will please transfer all the papers to the Bureau of Mines so that the records belonging to the Navy may all be in one place.

No portion of the Naval Petroleum Reserves are

now subjected to entry in any form or to leasing through this Department.

Respectfully,

FALL,
Secretary."

Thereupon, under exhibit numbers as hereinafter stated, correspondence consisting of applications for leases, and replies by officers of the Navy and Interior Departments to those applications, was offered by the plaintiff, and admitted in evidence by the court over, as to each and all of said communications severally, objections of the defendant on the ground that the said correspondence and the contents thereof are irrelevant and immaterial to any of the issues in this case; that the defendant had not been shown to have had any connection with or knowledge of the same, or to be in any way affected thereby; and that as to the defendant, the statements made by the writers are hearsay, and the evidence incompetent. To the overruling of each and every objection to each and every of the said exhibits, severally made, the defendant reserves separate exceptions. The court also reserved to the defendant the right to hereafter move to strike from the evidence in the case the [362—280] said exhibits. This correspondence, with the omission of the immaterial parts, being in substance as follows:

Exhibit 173, letter from Spaulding Gas and Petroleum Company, Taft, California, dated February 18, 1921, to Commander Landis of the Navy, San Francisco, proposing to lease the northwest

quarter of Section 1, T. 31 S., R. 24 E., and the northeast quarter of Section 2, T. 31 S., R. 24 E., from the Navy or Interior Department, for such period as is usual in oil leases from the Government, subject to the usual provisions of such leases and other provisions which the Navy Department may require and which are equitable to both parties, on the following royalties: 50 per cent of oil produced from wells producing 251 barrels or more each day, averaged at the end of each calender month; 25 per cent from wells producing 250 barrels or less each per day; excepting such oil and gas as is required for fuel purposes in the operation of such development and as may be used in the laying of necessary roads or pavements; all gas and gasoline extracted to be settled for on usual terms; lessor to have the right to take at its expense all gas produced for the extraction of helium; company will at its expense begin drilling within 60 days from date of lease offsetting wells to the present producing wells of the Standard Oil Company and Pacific Oil Company on Sections 35 and 36, T. 30 S., R. 24 E., and continuing until either one of two rows of offsetting wells are completed; offers to furnish necessary references, bonds and other information to prove reliability, efficiency and good faith; believes the matter should have immediate attention as experience has proven that an oil drainage of lands adjacent to present production is an assured fact and that approximately 50,000 barrels of oil production per day from the adjoining section is depleting the Navy's reserve

very rapidly in that immediate vicinity. [363—281]

Exhibit 174, letter from Commander Landis to Chief of the Bureau of Engineering, Navy Department, Washington, D. C., dated February 25, 1921, forwarding the foregoing proposal, stating that the Spaulding Company consists of men well informed regarding the probable oil value of Sections 1 and 2, and that in the event the Navy Department decides to lease any portion of those sections, the writer is convinced that fully competent and reliable companies would be willing to lease on a royalty basis of one-half.

Exhibit 175 is a letter dated at Washington, April 27, 1921, addressed to Mrs. Sue Greenleaf, New York City, signed by Admiral Thomas Washington, Acting Secretary of the Navy, stating that in reply to Mrs. Greenleaf's letter of April 18, 1921, she is informed that the land to which she refers is a small strip in Reserve No. 1, and there is no intention at the present time to lease any of Section 30-31-24; that under the circumstances, it was not believed to serve any useful purpose to discuss the question in an interview.

Exhibit 176 is a letter dated April 27, 1921, addressed to Mr. C. W. Bowen, Erie, Pennsylvania, signed H. A. Stuart, by direction of the Chief of Bureau, replying to Bowen's letter of 18th instant to the Secretary of the Navy, and informing him that the Navy Department put out a proposal for leasing a small strip of land in Naval Petroleum

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Reserve No. 1 a few weeks ago, but time for receiving bids expired April 25, 1921; that it is not the intention of the Navy Department to open up the Naval Reserves generally for exploitation; the only drilling that will probably be done will be in the nature of a few offset wells to protect the reserves from drainage by outside operators.

Exhibit 177 is a letter dated April 27, 1921, addressed to Alvine C. Schott, Massillon, Ohio, signed "H. A. Stuart, by direction of the Chief of Bureau," which is a reply to a letter dated April 22 from the addressee, and is substantially the [364—282] same as Exhibit 176.

Exhibit 178 is a letter dated April 27, 1921, addressed to W. A. Garland, Bellingham, Washington, replying to a letter of April 17th, in all other respects the same as Exhibit 176.

Exhibit 179 was a letter dated April 28, 1921, from Commander Stuart, addressed to W. P. Cole, Coalinga, California, replying to his letter of the 18th instant to the Secretary of the Navy, informing him that it is not the present intention of the Navy Department to develop the Naval Petroleum Reserves; it has been found advisable to lease a small portion of this land in order to counteract drainage by outside operators; it is not the present intention of the Navy Department itself to conduct drilling operations. If addressee desires, it is suggested that he take up the question with Commander Landis, in San Francisco.

Exhibit No. 180 is letter dated April 28, 1921,

from Commander Stuart to J. W. Ragesdale, Taft, California, replying, in the absence of the Secretary of the Navy from the city, to letter from Ragesdale to the Secretary, stating that there is no intention to lease the section to which Ragesdale refers, and that it is still the intention of the Navy to retain the Naval Reserve as intact as possible. The only drilling that will be permitted will be undertaken when real necessity requires offset wells to be put down; as this condition does not exist in the vicinity of section 34-30-23, it is not anticipated that any drilling will be required in this region for some time.

Exhibit No. 181 is letter dated May 5, 1921, from Commander Stuart to L. M. Hale, Connellsville, Pennsylvania, replying to letter of April 29 to the Secretary of Navy, relative to leasing of certain Naval Reserve oil lands, and being in substance the same as Exhibit 176.

Exhibit 182 is letter dated May 5, 1921, addressed to A. B. McBeth, Midway Gas Company, Los Angeles, California, [365—283] reading as follows:

PLAINTIFF'S EXHIBIT No. 182.

Dear Sir:

Replying to your letter of April 19th, I beg to inform you that the decision of the Navy Department to drill a small number of offset wells in the Elk Hills in California has in no way changed the policy relative to a general development of the naval petroleum reserves. It is still the desire of

the Navy Department to hold the reserves intact wherever possible to do so. Such being the case, I do not deem it wise to permit even the gas development of the Elk Hills region of the reserves. As stated in previous correspondence, it is believed that the danger of tapping the oil sands is too great to permit such an undertaking.

While it is extremely unfortunate that the natural gas supply of Los Angeles and adjoining municipalities is so short of their needs, I cannot but feel that the future well being of the Navy should receive my first consideration.

Yours very truly,

EDWIN DENBY.

Exhibit No. 183 is letter dated May 11, 1921, from Commander Stuart to F. W. Janssen, Bakerfield, California, and is in substance the same Commander Stuart's other letters above referred to.

Exhibit No. 184 is a letter addressed to Commander Landis, San Francisco, dated Bakersfield, California, May 17, 1921, signed by R. J. White and H. T. Coffin, stating that White is the owner of placer mining claims embracing all of Section 2, T. 31 S., R. 24 E., Naval Reserve No. 1; that an application for patent to said land is now pending before the Interior Department; that in June, 1919, the Attorney General by request of the Secretary of the Navy, filed protest against said application, and that White, in due time, filed his [366—284] answer thereto; that the protests had never been heard and the application never finally passed upon.

In view of the fact that the north line of said section 2 is a portion of the exterior boundary of the Reserve No. 1, and that the land adjacent is being developed, and large quantities of oil being produced therefrom, it would seem to be a mutual advantage to the Navy Department and to the owners of mining claims in section 2 that some arrangement be made whereby offsetting wells may be sunk along the north line of that section as early as possible, in order to protect petroleum deposits there; that with this end in view, White and Coffin, who owned the equitable interest in the mining locations, proposed to surrender their claims of title if the Navy Department will grant them a lease based on a 20 per cent straight royalty for all oil and gas produced, and covering a strip about 900 feet wide, lying immediately south of and adjoining the entire north line of section 2.

Exhibit No. 185 consists of a letter from Commander Landis, dated at San Francisco, May 25, 1921, forwarding the foregoing application of White and Coffin to the Chief of the Bureau of Engineering at Washington, with the statement that on April 25, 1921, bids for the operation on a royalty basis of a 900-foot strip in section 1 had been received at the San Francisco office and forwarded to the Navy Department at Washington; the drilling of 22 wells on that acreage was considered advisable to protect the Navy's interest against drainage effected by the operations of the Standard Oil Company on Section 36-30-24. A somewhat similar situation is developing in section 2-31-24,

which is being affected by the operations of the Pacific Oil Company on section 35-30-24. Since April 1, one of the Pacific Oil Company wells has been producing 2,600 barrels a day, and three wells of the Standard have come in as 2,000 barrel wells. Quantity estimated at 55,000 barrels per day is being produced on said sections 35 and 36. No suggestion has thus far [367—285] been made to lease a strip in section 2-31-24 for the reason that White and others have an application for patent pending before the Interior Department, based on discovery of fuller's earth. The accumulation and submission of evidence in the case will require a great deal of time during which the interests of the final owner of section 2 is not being protected, and the section will be drained to a considerable extent by the operations of the Pacific Oil Company on section 35 just north. Considering the long delay that will be unavoidable, and the uncertainty as to the final outcome, it would seem advisable to take advantage of their offer by the leasing act to bring about a settlement to quiet title to this section. The proposition of White and Coffin to drill two lines of wells offsetting those of the Pacific Oil Company, and additional wells in the acreage involved at the suggestion of the Navy, on a 20 per cent royalty, is forwarded. Since the settlement involves the surrender on the part of the applicants of all right and title to all of section 2, except a lease to a strip of 900 feet wide, the writer (Commander Landis) recommends favorable consideration of it. The

matter has been discussed with special assistant to the Attorney General, Benjamin, and meets with his approval. Special assistant to the Attorney General Hamel will be in Washington in June, and will be able to furnish detailed information regarding the claim for patent. Other claims are referred to, and the letter closes with, "It is believed that the only claim to be considered is that of R. J. White and H. T. Coffin, who agree to quiet any and all other claims."

Exhibit No. 186 is a letter dated Washington, June 28, 1921, from the Secretary of Navy to the Secretary of Interior, reading as follows:

PLAINTIFF'S EXHIBIT No. 186.

My dear Mr. Secretary:

There is inclosed herewith a copy of a letter from Lieut. Commander I. F. Landis, United States Navy, retired, the officer in charge of the naval petroleum [368—286] reserves in California.

Lieut. Commander Landis inclosed with his letter a letter from R. J. White and H. T. Coffin, a copy of which I am also forwarding for your consideration.

It has been the contention in the past of the Department of the Interior, the Navy Department, and the Department of Justice that Fuller's earth claims in the naval petroleum reserves are of little value. However, in view of the compromise with the Eight Oil Co. and in order to end further liti-

gation and consequent delay in settling this question, it might be advisable to effect some sort of compromise.

In view of the weakness of this claim, it is believed that the claimants will compromise for a much smaller amount of land than they have indicated in the inclosed letter.

Sincerely yours,

EDWIN DENBY,

Secretary of the Navy.

Exhibit No. 187 is letter dated May 25, 1921, addressed to R. L. Welch, American Petroleum Institute, New York, signed by the Secretary of Navy, advising him in reply to letter of May 19, from Welch, that the question of policy with respect to the Naval Petroleum Reserves is now being discussed with the Department of Interior. "Pending a decision as to the policy to be adopted in regard thereto, I am not in a position to discuss the question as it relates to the general oil interests.

"I am, of course, cognizant of the fact that there is at present an over-production of oil and I appreciate the situation in which the oil industry as a whole finds itself."

Exhibit No. 188 is a letter from B. T. Dyer, of the American Oil Engineering Corporation, dated at San Francisco, June 21, 1921, addressed to Commander Landis at San Francisco, and reading:
[369—287]

PLAINTIFF'S EXHIBIT No. 188.

"Dear Sir:

During 1920, and during the time that Secretary Daniels was in office, the American Oil Engineering Corporation through their New York office conferred with Commander Stuart in Washington with a proposal from the American Oil Engineering Corporation to supervise the drilling of Navy Reserve No. 1 and No. 2. After this conference it was suggested by Commander Stuart that our New York Office put the proposal in writing. This was done and forwarded to Secretary Daniels. An answer was not received by the American Oil Engineering Corporation, and to bring this to your attention again, let me respectfully submit a brief of the proposal for your consideration.

Owing to the fact that there will be from time to time offset wells drilled in the Elk Hills and adjoining the Navy Reserve, we propose that an arrangement be made whereby the American Oil Engineering Corporation will undertake the drilling of a well or wells in behalf of the Navy, taking entire charge of the operations and the production and delivering to the Navy at tidewater, either at San Pedro or at the Navy's nearest point at San Francisco, such oil as developed from these wells. As a suggestion, if this Division of the Navy Department should not have appropriations for such development, the American Oil Engineering Corporation would do this development at its own cost

and be reimbursed through the sale of the oil produced at the market prices to the Navy which could possibly be paid from their appropriation for fuel oil. The American Oil Engineering Corporation would do this development, dehydrate the oil, and make such arrangements as necessary for transportation by pipe line to such points desired by the Navy. This all would be done at actual cost on voucher form approved by some representative of the Navy Department. As a compensation to the American Oil Engineering Corporation we would undertake this development and the financing that would be necessary and receive as our [370—288] fee for the engineering and supervision of this work, one-eighth of the oil produced.

You will please understand that the American Oil Engineering Corporation is an independent engineering corporation which have an adequate force of engineers and practical oil men who have been in development oil business for many years, and particularly in the California field.

The American Oil Engineering Corporation would simply act as the agents of the Government or Navy Department in the development, during the work at actual cost and receiving no cash bonuses. Their compensation would be from the 8th royalty as mentioned above. A working agreement between the Navy and the Engineering Corporation could be elastic enough so that should the Navy at any time store sufficient oil, the future product could be disposed of by selling to one of the

existing marketing companies. The American Oil Engineering Corporation have in the past designed and built a number of the largest pipe lines in the United States together with pumping stations and tank farms. Should any construction work of this nature be required this Engineering Corporation are capable of taking care of any such condition that may arise in the future.

We believe that if the Navy Department duly consider this proposal and allow us to have a conference with you and obtain your approval, such arrangement could be mutually agreed upon which would be very satisfactory to your Department.

Were we the marketing company or affiliated with any of the marketing companies, or unable to carry out any of the obligations, we would hesitate to make such a proposal; but, owing to the fact of our being absolutely independent in any such nature, the Navy Department would possibly be favorable to some such arrangement. [371—289]

You will understand this proposal is not in detail, as we naturally do not know the policy of the Government in this connection; but should the Navy desire to have their other royalty oil handled in connection with this work, we are well able to take care of such a condition, delivering to your storage dehydrated oil. We would thank you to consider such an arrangement, and if you can honestly give such an approval or recommendation, we would appreciate to have you forward this along and advise us at 909 of the Nevada Bank Building, and we will particularly appreciate having this proposal reach your

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Honorable Secretary of the Navy, Edwin Denby,
and Commander Stuart at Washington.

Very truly yours,

B. T. DYER."

Exhibit No. 189 is letter addressed to Hon. Albert B. Fall, Secretary of the Interior, dated June 29, 1921, reading as follows:

PLAINTIFF'S EXHIBIT No. 189.

"My dear Mr. Secretary:

I am forwarding herewith copy of a letter from Lieutenant-Commander I. F. Landis, U. S. Navy, Retired, the officer in charge of the Naval Petroleum Reserves in San Francisco, in which the American Oil Engineering Corporation offered a proposal to supervise the drilling of Naval Reserves No. 1 and No. 2.

While it is not contemplated that there will be an intensive campaign conducted in these reserves, it is believed that the proposal of the American Oil Engineering Corporation is worthy of consideration in case it is decided to drill further offset wells in these reserves.

Sincerely yours,

EDWIN DENBY." [372—290]

By Exhibit 190, dated at Washington, July 26, 1921, addressed to the attention of Commander Stuart, the Navy Department, Messrs. Penfield and Penfield, "as Washington attorneys for the Union Oil Company of California," requested to be advised as soon as action is taken on that company's

proposition submitted August 27, 1920, to handle oil from the California Naval Reserves. Replying to this letter, Commander Stuart, under date of August 5, 1921 (Exhibit 191), informed Penfield and Penfield that the question of exchanging crude oil from these reserves for fuel oil has been turned over to the Department of the Interior, and it is suggested that the matter be taken up directly with that Department as soon as possible.

Exhibit 192 consists of a letter from Francis V. Keesling, attorney at law, San Francisco, addressed to the Navy Department, dated September 12, 1921, asking to be advised of the procedure necessary upon application to lease oil lands in naval reserve pursuant to the act of June 4, 1920.

Exhibit 193 is a reply to Mr. Keesling, dated September 23, 1921, signed by A. J. Hepburn, Acting Chief of the Bureau of Engineers, stating that application for such lease could be made to the Secretary of the Interior, and adding that the Navy Department, however, is opposed to drilling the Naval Reserves, and this view is concurred in by the Department of the Interior, except where it is necessary to protect the Government's interests by sinking offset wells where the land on adjoining property is being drilled.

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Exhibit No. 194 reads as follows:

PLAINTIFF'S EXHIBIT No. 194.

"Honorable Albert B. Fall,
Secretary of the Interior,
Washington, D. C.

Dept. of the Interior.

Received

Nov. 22, 1921.

To Bu. of Mines,

Secy.'s Off. Mails & Files.

Dear Sir:

Pursuant to your suggestion to Mr. Cole, Mr. Todd and [373—291] Mr. David at recent conference, the following proposal or outline is presented for and on behalf of Mr. Burton P. Porter and his associates, for your consideration:

Fully appreciating the many vexatious problems confronting you in administering the affairs of your Department, may we offer our aid in this matter, and to that end present a brief resume of the new conditions as we understand them.

During President Taft's administration an attempt was made to withdraw from entry and segregate certain oil lands in Kern County, California, designated areas to be called "Naval Reserve No. 1 and No. 2," as a part of the plan the oil deposit was to be left in natural storage for use by the Government in the event of an emergency.

This plan and purpose to carry out the letter and spirit of the conservation of natural resources.

Unfortunately, as you know, for the one hundred per cent success of this plan, certain companies and

individuals, having vested rights to substantial portions of oil lands within these reserves and some immediately outside of same, have drilled and are drilling many wells that by reason of the well known fugitive nature of oil and gas have and are draining the territory to the extent that the Government's oil deposits are seriously menaced.

If these operations are not met by not only offsetting, but also anticipating wells, in due time the reserves will be materially depleted and exhausted to an extent that operation of the Government lands will be unprofitable to both the nation and the operator.

Under existing circumstances it is respectfully urged that a development plan be adopted that will adequately protect the lines; that oil deposits be removed and stored at the earliest possible moment, thus carrying out the actual conservation plan. [374—292]

As initial wells are conceded to secure a larger production than subsequent wells, by reason of gas pressure and other elements, good oil business requires a drilling campaign, anticipating to a reasonable degree the operation of abutting lease owners, rather than to follow their operation by offsetting wells.

We ask your indulgence for going into some detail in this matter, with which you are so thoroughly familiar, but we have tried to give the subject a careful survey and submit for your consideration our views.

Inasmuch as none of this territory has been formally offered to the oil fraternity for bids, we are

unable at this time to submit definite figures, but if permitted to make a bid will submit a proposal about as follows:

(1) It is our theory that the entire territory embraced within Naval Reserves 1 and 2 should be developed as rapidly as possible and the saved oil stored above ground for future Government use.

To accomplish this end efficiently will necessitate the division of territory among a number of operators. Each selected operator, however, should be awarded a sufficiently large acreage to justify the large initial expenditure required for successful operations in this field. We respectfully suggest that a section would justify the installation of an efficient plant and organization.

(2) A definite substantial percentage of oil to lessor, dependent upon amount of land involved and where located.

(3) Will build storage, earthen, concrete or steel at locations selected by the Department; storage to be built according to Government specifications and under Government supervision.

Lessee to accept from Government in payment for building said storage, oil, at market price, whether oil is produced [375—293] by lessee or other operators within the reserve.

Will build said storage upon a cost plus basis or upset price.

There being no appropriation for building storage, the above plan will enable the Department to accomplish purpose of conserving the oils without

the expenditure of money. The enterprise will carry itself.

(4) We will agree to drill the wells necessary to be drilled to properly develop a given tract and will prefer leaving the ultimate number of wells and the locations thereof to the final judgment of your Department.

(5) We are in a position to furnish necessary and sufficient machinery, tools, appliances, material and organization to carry forward in a workman and business like manner the involved operation.

Resume: The Government planned to conserve certain oils in natural storage. The original conservation plans miscarried.

To redeem the situation it is practicable, feasible and advisable to produce and store said oils in Government owned storage.

We believe we can be helpful to work out and consummate such a plan.

Respectfully submitted,

(a) BURTON P. PORTER.

By WILLIAM L. DAVID.

November 3, 1921.

Address all communications to—

John E. Todd, New Willard Hotel,

or

Ralph D. Cole, Bachelor Apts.,

Washington, D. C.

Exhibit No. 195 is a letter to B. J. Bradner, Los Angeles, California, from William Spry, Commissioner of the General Land Office, dated at Washington, September 28, 1921, which, together with un-

dated note from B. J. Bradner appended to the [376—294] foot thereof, reads as follows:

PLAINTIFF'S EXHIBIT No. 195.

“My dear Sir:

In reply to your letter of September 17, 1921, you are advised that the land described, being part of Sec. 12, T. 31, S. R. 24 E., M. D. M., California, was included in the petroleum withdrawal of September 27, 1909, was withdrawn under Executive Order of July 2, 1910, and was included in Naval Petroleum Reserve by Executive Order of September 2, 1912. In view of the status of the land, any rights which prior locators may have are governed by the provisions of Secs. 18 and 18a of the Act of February 25, 1920 (41 Stat., 437). See the oil and gas regulations, Circular 672. At this time leases of lands in the Naval Reserve will not be issued unless for administrative reasons it is considered advisable to develop the oil in the lands, a matter as to which the Secretary of the Navy will be consulted.

Very respectfully,

WILLIAM SPRY,
Commissioner.

Will you please take this up and advise me if the Navy Department will cooperate with the Land Department in granting a lease in order that the stockholders of the Midway-Valley Oil Company may again drill the premises and have an opportunity to recoup themselves for the loss they incurred

through ignorance or mistake of their driller.

Very truly yours,

B. J. BRADNER."

Exhibit No. 196 consists of a letter from the Secretary of the Navy, dated October 13, 1921, addressed to B. J. Bradner, attorney, Los Angeles, California, reading:

PLAINTIFF'S EXHIBIT No. 196.

Sir:

Replying to your letter of the 5th instant, I beg to inform you that I have forwarded same to the Secretary of [377—295] the Interior under whose supervision the Naval Petroleum Reserves have recently been placed by an executive order of the President.

The remarks of the Commissioner of the General Land Office as quoted in your letter are noted and insofar as the Navy Department is concerned there is no immediate prospect of granting any permits or leases on any portion of Section 12-31-24; it is desired, if possible, to retain this section as a portion of the Naval Reserves and to hold the oil, if any, underlying it in the ground for future use.

The Navy Department is fully acquainted with the records in this case and while it may sympathize with you for the loss your company claims to have incurred it cannot admit that the company has any legal rights to any portion of this land.

Yours very truly,

EDWIN DENBY,
Secretary of the Navy.

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Exhibit No. 197 is a letter dated November 9, 1921, addressed to Thomas R. Littlepage, Washington, D. C., reading as follows::

PLAINTIFF'S EXHIBIT No. 197.

"Dear Mr. Littlepage:

Referring to application filed by you on behalf of Mr. R. D. Clarke for lease of certain lands in Petroleum Reserve No. 1, California, and to your recent personal visit to urge early action thereupon, I have to advise you that the whole question of dealing with lands and oil in naval reserves and the method to be followed in connection therewith is under investigation and consideration by Secretary Fall. Until some definite conclusion is reached, no action will be taken upon applications of this character. I trust however, definite conclusion will be reached within the next few weeks.

Respectfully,

(Sgd.) E. C. FINNEY,

First Assistant Secretary." [378—296]

Exhibit No. 198 is letter dated at Washington, December 20, 1921, addressed to Mr. F. W. Clements, Washington, D. C., reading as follows:

PLAINTIFF'S EXHIBIT No. 198.

"Dear Mr. Clements:

Referring to your personal visits and to telegram from Lawler and Degnan, asking for lease on a portion of section 30, township 31 south, range 24 east, M. D. M., California, I have to advise you that no policy has yet been determined upon as to the hand-

ling of lands in Naval Reserve No. 2 not covered by existing claims or preference rights. I deem it advisable, therefore, to defer action upon your request and those of others received in connection with lands similarly situated until Secretary Fall's return after the first of the year. At that time the matter will be taken up and you will be further advised.

Respectfully,

(Sgd.) E. C. FINNEY,
Acting Secretary."

Exhibit No. 199 is a letter dated January 7, 1922, addressed to Florian B. King, Austin, Texas, reading as follows:

PLAINTIFF'S EXHIBIT No. 199.

"Dear Mr. King:

In the absence of Secretary Fall, I am replying to your letter of December 27, 1921, relative to obtaining a permit or lease in Naval Reserve No. 1.

In Naval Reserve No. 1, three tracts have been advertised recently for competitive bid. The large companies operating in that vicinity have placed bids on these tracts, but on account of the intensive drilling requirements and large amounts of capital needed to develop these reserves, none but the largest operators have seen fit to bid.

It is the policy of the Government to keep this reserve intact, insofar as possible. In the three instances mentioned, it has become necessary to grant leases to protect [379—297] the Government's interests. However, it is not the intention of the Department to lease other acreage inside of

Naval Reserve No. 1 at this time. Thus, the bids on tracts which have been thrown open have been closed, but if at a later date, it is decided to throw open other tracts within the reserve to the public for bid, I am sure the Secretary will be glad to inform you of the tracts and the terms and conditions relative thereto.

All the leases issued in Naval Reserve No. 2 have been awarded to operators with preferential rights.

Secretary Fall is now in the West. It is my opinion that this matter would not warrant your coming to Washington at this time.

Respectfully,

(Sgd.) E. C. FINNEY,
Acting Secretary."

Exhibit No. 200 is dated February 2, 1922, and reads as follows:

PLAINTIFF'S EXHIBIT No. 200.

"Memo. for Secretary Finney:

Frank R. Stewart has only recently been appointed and confirmed as Collector of Internal Revenue for Arizona. Of course he was active in behalf of the party during the last campaign and thinks that he and his friends should be rewarded by receiving special consideration when oil lands are leased. I told him that it was my understanding that for the present at least, no more leases would be granted in California Naval Reserves but that he would be written fully regarding the situation, and that if later on it is decided to contract for more drilling he and his associates would be afforded

an opportunity to submit a bid, etc. Will you please write him.

CVS."

In connection with the foregoing exhibit, counsel for [380—298] plaintiff stated that the initials "CVS" are those of Mr. Safford, whose title, as testified to by the witness Finney, was that of Administrative Assistant to the Secretary of the Interior.

By letter dated February 4, 1922, Exhibit 201, from George R. Wickhan, Assistant Commissioner of the General Land Office, Washington, D. C., to Frank R. Stewart, Phoenix, Arizona, there was transmitted plats of township 30 south, ranges 23 and 24 east, and 31 south, range 24 east, with the statement that the writer had checked the same, and outside of the Naval Reserves, he did not find any land which was open to either lease or permit application.

Exhibit No. 202 is a letter also dated Washington, February 4, 1922, addressed to Frank R. Stewart, Phoenix, Arizona, reading:

PLAINTIFF'S EXHIBIT No. 202.

"Dear Mr. Stewart:

Your inquiry with reference to leasing of oil lands in California Naval reserves has been called to my attention.

Wherever there were existing claims and oil wells within the limits of such reserves, claimants were by the leasing act given a preference right to leases upon their claims, in the event it was determined to

drill up the lands. Therefore, as to such lands there is no authority to make leases to others. There are considerable areas of unappropriated lands in Naval Reserve No. 1, but for the present it is not the intention of this Department or the desire of the Navy Department that such lands be leased any further than may be necessary to offset existing wells upon adjoining patented lands. Some such leases have been awarded and bids have been received for drilling of additional wells on section 2, in Naval Reserve No. 1, to offset wells of the Pacific Oil Company. At present, I am therefore unable to advise you of any definite opportunities to secure oil leases in those reserves.

Respectfully,
(Sgd.) E. C. FINNEY,
Acting Secretary." [381—299]

Exhibit No. 203 is a letter dated February 18, 1922, from Joseph W. Clarke, Attorney at Law, Leadville, Colorado, addressed to the Department of Interior, asking to be advised if there is any disposition on the part of the Government to lease petroleum lands reserved for the benefit of the Navy, and, if so, to be furnished with copies of regulations governing the leasing of same.

Exhibit No. 204 is a letter dated at Washington, March 30, 1922, addressed to Joseph W. Clarke, Leadville, Colorado, reading:

PLAINTIFF'S EXHIBIT No. 204.

"Dear Mr. Clarke:

I regret the delay in answering your letter of

February 18, making inquiry with reference to the leasing of naval petroleum reserves, and requesting copies of regulations applicable thereto. Your letter was mislaid and only called to my attention by my assistants yesterday.

The naval petroleum reserves in California are being handled entirely by this Department and some offset leases have been made thereupon under a general policy but only with reference to specific cases, i. e., we are endeavoring to protect the corpus of the property as much as possible, and are not developing the same more rapidly than necessary; consequently, have only been granting leases or permits for offset wells to protect the Government property against encroachment of private owners.

There are no specific regulations applicable to the leasing of such lands.

Respectfully,
(Sgd.) ALBERT B. FALL,
Secretary."

Exhibit No. 205 is a letter dated March 30, 1922, from Secretary Fall to Hon. Samuel D. Nicholson, United States Senator, acknowledging receipt of letter from Senator [382—300] Nicholson, on March 27, calling attention to the foregoing letter from J. W. Clarke, and stating in substance to Senator Nicholson what is set forth in Exhibit No. 204.

Exhibit No. 206 is a telegram, dated at San Francisco, April 15, 1922, signed A. D'Heur, addressed to H. Foster Bain, Director of the Bureau of Mines, Washington, asking to be advised if any land in

section 34-30-24, Naval Reserve No. 1, has been leased.

Exhibit No. 207 is telegram from Bain to D'Heur, dated April 15, 1922, stating the Department is considering leasing strip of land along east line of section 34-30-24, Naval Reserve No. 1, but no lease has been granted to date.

Exhibit 208 is a telegram from Florian B. King, dated at Austin, Texas, April 17, 1922, addressed to Secretary Fall at Three Rivers, New Mexico, reading, "Would like to bid on line protection lease with drilling contract in naval reserve number one California. Can you give me interview some day this week concerning same."

Exhibit 209 is a letter dated at Washington, April 18, 1922, to Florian B. King, Austin, Texas, signed C. V. Safford, Administrative Assistant, which reads:

PLAINTIFF'S EXHIBIT No. 209.

"Dear Mr. King:

Secretary Fall has started West and I am taking the liberty to answer your letter of April 8, 1922, regarding the possibilities of drilling in Naval Reserve No. 1, California.

The Department instituted the policy of drilling necessary offset wells in Naval Reserve No. 1 to prevent undue drainage from wells located on surrounding land. In general this was handled through competitive bids submitted by different oil companies on request of the Department of the Interior. The most urgent offset wells have been provided for and to my knowledge the Secretary is not

planning to throw open any of Naval Reserve No. [383—301] 1 in the near future. As a matter of fact an arrangement has been made with one of the oil companies holding some patented land within the Reserve itself whereby neither the Government nor this oil company will drill without giving six months notice to the other party. This agreement covers some of the best acreage remaining in Reserve No. 1 and as far as I know the Secretary has no plans to open up this land in the near future.

Respectfully,
(Sgd.) C. V. SAFFORD,
Administrative Assistant.

Exhibit No. 210 is a telegram to Florian B. King, dated at Three Rivers, New Mexico, April 22, 1922, reading:

PLAINTIFF'S EXHIBIT No. 210.

"Am not making additional leases Naval Reserve Number one Expect to do so later and will be glad to consider your application Will return Washington about May fifteenth.

FALL,
Secretary."

Exhibit No. 211 is telegram dated Washington, April 18, 1922, reading as follows:

PLAINTIFF'S EXHIBIT No. 211.

"A. D. Heur,
Pacific Oil Company, Southern Pacific Bldg.,
San Francisco, Calif.
Yours seventeenth. Appreciate your point of

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view. Sorry circumstances prevented Secretary accepting your cooperation section thirty-four where lease mentioned my wire fifteenth will probably issue shortly.

H. FOSTER BAIN,
Director, Bureau of Mines."

Exhibit No. 212 is a letter dated at Taft, California, April 26, 1922, reading:

PLAINTIFF'S EXHIBIT No. 212.

"Department of the Interior,
Washington, D. C.

Gentlemen:

Enclosed please find application of R. H. Anderson [384—302] for lease of oil and gas lands under provisions of the Act of February 25, 1920, embracing

The east half of the North-east quarter of
Section 3, Township 31 South, Range 24 East,
M. D. B. and M., Kern Co., California.
located within the boundaries of Naval Petroleum
Reserve No. 1.

Understanding that the policy of the Interior Dept. relative to the lands located in Naval Petroleum Reserve No. 1 (Elk Hills) is to lease the lands adjacent to producing wells, Mr. Anderson has made this application for the above-described lands which are adjacent to the wells drilled and now producing on Section 35 by the Pacific Oil Co.

While he has made application for the east half

of the North-west quarter of said section, he is willing to take that portion of the North-west quarter which would conform to the department's leases heretofore executed in similar cases.

Hoping that this application will receive your careful consideration and that applicant will receive a lease upon terms and conditions as have been executed on previous occasions by the Department to lands in said Petroleum Reserve, I remain,

Very truly yours,

H. S. BELL."

Exhibit No. 213 is a letter dated April 28, 1922, from Penfield & Penfield, Attorneys at Law, Washington, D. C., to the Secretary of the Interior, as follows:

PLAINTIFF'S EXHIBIT No. 213.

"Sir:

As Washington attorneys for the Union Oil Company of California, we would respectfully call your attention to the following telegram which we today received from Mr. E. W. Clark, Executive Vice-President of said company:

'Your letter relative to contract between Government and Pan American Petroleum Company for handling and exchange of crude [385—303] oil in California naval reserves for fuel oil and storage at Pacific Coast points. Please advise Secretaries of Navy and Interior Union Oil Company of California is much disappointed that it was not invited to bid on this business and if it is too late to submit proposition in

present case would ask them to please remember that Union is much in the oil business out here both refining crude and fuel oil with adequate storage and transportation facilities and hopes that in future they will bear this in mind to the end that we be given opportunity to bid on any proposal or plan they may have occasion to submit to any oil company.'

It is respectfully requested that the Company be borne in mind in the event of future requests for submission of bids.

Requests for proposals should be sent to the general offices of the Company, which are located in the Union Oil Building, Los Angeles, California.

A similar letter is being submitted to the Secretary of the Navy.

Very respectfully,
PENFIELD & PENFIELD."

Exhibit No. 214 is a letter dated April 28, 1922, prepared in the Petroleum Division of the Bureau of Mines, addressed to Penfield & Penfield, signed E. C. Finney, Acting Secretary, acknowledging the foregoing, and stating that the same will be placed on file for reference.

Exhibit No. 215 is a letter dated April 28, 1922, prepared in the Bureau of Mines, addressed to Scott Ferris, New York City, signed by E. C. Finney, Acting Secretary, acknowledging letter from Ferris of April 19, requesting that he be notified whenever any Government land in the Naval Petroleum Reserve is offered for public bid, stating [386—304] that his name and address has been

noted and that he will receive copy of proposals for bids on Government lands that may be offered for lease within Naval Petroleum Reserves.

Exhibit No. 216 is a memorandum from Finney to Ambrose, dated May 4, 1922, and reading:

PLAINTIFF'S EXHIBIT No. 216.

"Dear Ambrose:

I am inclined to think the best way to dispose of this matter is to frankly state that in connection with the exchange of government royalty for fuel oil, the Department has arranged to lease the NE $\frac{1}{4}$ Sec. 3 to the Pan American Oil Co. If you agree with this view, please prepare letter to Bell accordingly.

FINNEY."

Exhibit No. 217 is a letter dated Los Angeles, May 5, 1922, from B. J. Bradner, Attorney at Law, to William Spry, Commissioner of the General Land Office, Washington, D. C., reading:

PLAINTIFF'S EXHIBIT No. 217.

"Sec. 12-31-24, Elk Hills

Kern County, California.

Dear Sir:

I call your attention to your letter of September 28th, 1921, relative to the 200 acres in said Section that were drilled by the Midway Valley Oil Company. In accordance with your letter, I took the matter up with the Secretary of the Navy, and he said the matter was referred back to your Depart-

ment as you were solely in charge of the Naval Petroleum Reserves.

I am now informed that the Naval Reserve lands are being leased in some instances.

I have again written to the Secretary of the Navy and also call your attention to this matter, that it may be possible for us to secure a lease on that Section and drill another well thereon. We undoubtedly passed up the oil producing sand through lack of knowledge at that time in the drilling of that territory, as we drilled the well 5,050 feet and spent in [387—305] excess of \$83,000 on that well.

I think I would have no trouble in getting the co-operation of the original locators and the United Midway Lands Company, our grantors, if that is necessary, but I think that our rights there are entitled to some consideration as we were the only ones to my knowledge, who actually spent a lot of money and worked in good faith to develop the property.

Your early reply will be appreciated.

Very truly yours,

B. J. BRADNER."

Exhibit No. 218 is letter dated May 6, 1922, addressed to H. H. Bell, Taft, California, reading as follows:

PLAINTIFF'S EXHIBIT No. 218.

"Dear Mr. Bell:

Your letter of April 26, 1922, submitting application on behalf of R. H. Anderson for a lease to

oil and gas lands in the E. $\frac{1}{2}$ N.E. $\frac{1}{4}$, Sec. 3, T. 31 S., R. 24 E., Naval Petroleum Reserve No. 1, is received.

As you are doubtless aware, the Navy and Interior Departments, prior to the receipt of your letter, entered into a contract with the Pan American Petroleum and Transport Company for the exchange of the Government's royalty oil from leases in Naval Reserves Nos. 1 and 2 for fuel oil in storage, the company named being the best and lowest bidder. In connection with that bid, the company stipulated that it should be given the option of lease upon the N. E. $\frac{1}{4}$, Sec. 3, and because of the advantage to the Government, the Departments agreed to this situation. Accordingly, the E. $\frac{1}{2}$ N.E. $\frac{1}{4}$ Sec. 3, described in your letter and Mr. Anderson's application can not be leased.

Respectfully,

(Sgd.) E. C. FINNEY,
Acting Secretary."

As rewritten in the Secretary's office. [388—306]

Exhibit 219 is a letter from the Secretary of the Navy to B. J. Bradner, Los Angeles, and reads:

PLAINTIFF'S EXHIBIT No. 219.

May 16, 1922.

"My dear Mr. Bradner:

I have your letter of May 5 wherein you express a desire to obtain a lease for the Midway Valley Oil Company on 200 acres of oil lands in Kern County, California. You are advised that this de-

partment is not now awarding any leases whatsoever in connection with the naval petroleum reserves. These matters are being handled entirely by the Secretary of the Interior for the Navy Department.

Sincerely yours,

SECRETARY OF THE NAVY."

Exhibit No. 220 is letter dated Washington, June 21, 1922, addressed to Mr. Fred Dennett, Washington, D. C., reading:

PLAINTIFF'S EXHIBIT No. 220.

"Dear Mr. Dennett:

I am in receipt, by your reference of telegram from Mr. W. F. Williamson, stating:

We understand leases are being granted without competition covering lands in the Midway field
* * *

Mr. Williamson asks whether you can secure for his company lease in Sec. 34, T. 30, R. 24.

Mr. Williamson's statement that leases are being granted without competition in the Midway field is not quite in accordance with the procedure which has been followed. In that part of the Midway field known as Reserve No. 2, preference right leases have been granted under section 10 of the leasing act to individuals or companies entitled. Several tracts of land not covered by claims were awarded after the submission of bids by a large number of companies and individuals. In Naval Reserve No. 1 the situation is somewhat different,

and a lease was awarded in Sec. 1 thereof to the Pan American Company and the United Midway Company for drilling certain wells after competition. Subsequently a lease was [389—307] awarded to the Pan American for lands in the north part of Sec. 2 and to the Belridge Company for wells along the east line of Sec. 34 to offset drilling on adjoining patented lands, both these companies and others having had applications on file for such leases.

When bids were asked for for exchange of royalty oil from Naval Reserves Nos. 1 and 2 for fuel oil in storage, the best bid received was that of the Pan American Oil Company, with an accompanying condition that the company be given leases in the north part of Sec. 3 and in the east portion of Sec. 34, adjoining the Belridge lease; also that that company should be considered in connection with future offerings that might be made in the east part of Naval Reserve No. 1.

The Secretary of the Navy, the Secretary of the Interior, and their associates, after very careful consideration of all of the bids concluded that it would be to the advantage of the Navy to accept the Pan American bid with this condition attached, and that was done. In pursuance of this undertaking, a lease has been given to the Pan American for the NE. $\frac{1}{4}$ Sec. 3. No other leases have been made, so far as I am advised.

The Department has an agreement with the Pacific Oil Company not to drill a block of land in Reserve No. 1, including the W. $\frac{1}{2}$ Sec. 34, and

parts of Secs. 27, 28, 29, 30, 31, 32, and 33, T. 30, S., R. 24 E.; also parts of Secs. 3, 4, 5 and 6, T. 31 S., R. 24 E., without giving six months' notice in advance to the respective parties to the agreement. Some applications have been received in the west half of the reserve, but it is not the intention of the Department to take action thereon at the present time, as no conclusion has been reached by the Navy Department and this department as to further drilling in said reserve.

Respectfully,

(Sgd.) E. C. FINNEY,
First Assistant Secretary. [390—308]

Exhibit No. 221 is letter from L. E. Eddy, of the Honolulu Consolidated Oil Company, San Francisco, California, dated July 25, 1922, addressed to E. C. Finney, First Assistant Secretary, Department of the Interior, reading as follows:

PLAINTIFF'S EXHIBIT No. 221.

"Dear Mr. Finney:

Since coming west, I am, as a matter of course, not in a position to know of the purposes of the Department except by asking, What I want to know is this:

It has occurred to me that for the purpose of carrying out the announced policy of the Navy Department of storing its fuel oil supply in tanks at quickly accessible Pacific and other points (considered here as a business-like move), it will doubtless be desirable sooner or later to draw upon Naval Reserve No. 1 for part of the Pacific sup-

ply, for which purpose it will become necessary to make some development of the western part of that reserve. Will you kindly advise me, if proper, if you are considering this matter, and if so, the terms that will be extended for such development, with special reference to Section 28, T30S, R23, M. D. M.?

Sincerely

L. E. EDDY."

Exhibit No. 222 is letter from B. T. Dyer, Los Angeles, California, dated July 27, 1922, addressed to A. W. Ambrose, United States Bureau of Mines, Washington, D. C., reading as follows:

PLAINTIFF'S EXHIBIT No. 222.

"Dear Sir:

I am attaching you copies of two separate applications I am making of Elk Hill leases. I would appreciate your considering these and any help you can give me in the matter. I realize the confidence Secretary Fall puts in you in these matters and I would like very much any suggestions or help you can give.

I did not go into details with regard to my talk with [391—309] Mr. Doheny's representative in Elk Hills and I have not seen Mr. Doheny personally so far, but I believe I can in the future bring about a waiver of his preferential right on a small tract.

I dislike going to a lot of friends for help in these matters, if I can work them out alone.

With kindest regards, I am,

Very truly yours,

B. T. DYER."

Exhibit No. 223 is letter from said B. T. Dyer, dated Los Angeles, July 27, 1922, addressed to Hon. A. B. Fall, Secretary of the Interior, and reading as follows:

PLAINTIFF'S EXHIBIT No. 223.

"Dear Sir:

Since calling on you in Washington July 1st, in regard to my obtaining a lease on the East $\frac{1}{2}$ of the West $\frac{1}{2}$ of Section 34, Township 30, South, Range 24 East, Navy Reserve No. 1, Elk Hills, Kern County, California, at which time I discussed this, I advised you I thought it would be possible I could obtain the waiver of Mr. Doheny's preference rights, which I understand cover the East Half of the West Half of this section, I have talked with Mr. J. C. Anderson, Mr. Doheny's brother-in-law, who represents Mr. Doheny in his Elk Hills operations. So far I have failed with respect to obtaining this waiver. As Mr. Anderson thought it would jeopardize their contract with your Department, he preferred that I not ask for same.

However, will you please accept for file my application on this 160 acres as above described, on such terms and conditions as may be acceptable to your department at the time.

It was my hope and intention that I could obtain this lease through giving up the lease from

the Government to Leland et al. and 120 acres in the Northwest quarter of Section 26, Township 30 South, Range 24 East, in [392—310] transferring these rights to the above described ground.

I also intended purchasing the equity of the rights in the Northeast 40 of the Northwest quarter of the said Section 26 to go along with the transfer, which would allow me the full 160 acres.

If you will kindly accept this application, I will appreciate hearing from you at any time. I am prepared to drill this lease in any manner your Department may deem advisable. I can run from one to four strings of tools and drill it up as fast as possible, or I would be willing to delay drilling, unless offset wells were developed.

I can arrange to deliver you at tide water at either San Pedro or San Francisco Harbors dehydrated fuel, barrel for barrel as to the crude production of the lease, or I can deliver you the original crude on the property. I trust this will have your favorable consideration, as our group of locators were very instrumental in the starting of the development in Elk Hills and today our only asset in this district is this Northwest Quarter in Section 26 which is now determined not very valuable.

Per your instructions I am sending a copy of this application to Mr. Ambrose of the Bureau of Mines.

I can furnish such bond as is necessary and refer you to the Farmers & Merchants National Bank of Los Angeles, and Mr. F. H. Hillman, Vice

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President, Standard Oil Co. of Calif., of San Francisco, Calif.

Very truly yours.

B. T. DYER."

Exhibit No. 224 is the following intra-departmental memoranda:

PLAINTIFF'S EXHIBIT No. 224.

"August 4, 1922.

Memorandum for Secretary Fall:

With regard to the inclosed correspondence from [393—311] B. T. Dyer of California, which applies for lease of the East $\frac{1}{2}$ of the West $\frac{1}{2}$ of Sec. 34, T. 30 S., R. 24 E., Naval Reserve No. 1, California:

The land in question constitutes a portion of the area covered by the recent operating agreement between the Secretary of the Interior and the Pacific Oil Company, whereby neither party should drill any wells without first giving six months notice. The entire area subject to this agreement and, in particular, the strip applied for by Mr. Dyer, is not subject to drainage by offset wells. It is felt that this agreement is desirable from the Government's standpoint and, as you recall, it was made with the bureau's cooperation. I, therefore, would not feel justified in recommending that the operating agreement be broken at this time.

In addition, the East $\frac{1}{2}$ of the West $\frac{1}{2}$ of Sec. 34-30-24, Naval Reserve No. 1, is subject to preferential rights granted to the Pan American Petroleum and Transport Company. Before the De-

partment would be justified in leasing this strip to anyone, I believe that consideration would have to be given to the Pan American Company.

Aside from the above-mentioned facts which, in themselves, would seem to justify the rejection of Mr. Dyer's application, I believe the present conditions as regards over-production and low price of oil, render further development of Government lands which are not subject to drainage, undesirable at this time. Therefore, it is recommended that the lease as requested by Mr. Dyer, not be granted.

E. A. HOLBROOK,

Acting Director

For H. FOSTER BAIN,

Director.

Exhibit No. 225 is letter dated Navy Department, August 9, 1922, to the aforesaid B. T. Dyer, reading as follows: [394—312]

PLAINTIFF'S EXHIBIT No. 225.

"My dear Mr. Dyer:

I have your letter of July 29, 1922, addressed to the Secretary of the Navy and informing the Department that you desire a lease for drilling in Naval Petroleum Reserve No. 1. It is noted that you have applied also to the Secretary of the Interior for such a lease.

I would inform you that by an agreement of some time ago, the Secretary of the Interior is charged with the making of arrangements for such development of the Naval Petroleum Reserves as may be

considered necessary, the Secretary of the Interior acting in this regard for the Secretary of the Navy and, under the circumstances, I must refer you to the Secretary of the Interior in this case.

Very respectfully yours,

R. E. COONTZ,

Acting Secretary of the Navy."

Exhibit No. 226 is a letter dated August 9, 1922, by which Admiral Coontz, who was acting Secretary of the Navy, transmitted to the Secretary of the Interior copy of the correspondence between B. T. Dyer and Admiral Coontz.

Exhibit No. 227 is dated Los Angeles, August 9, 1922, addressed to Mr. T. E. Swigart, Bureau of Mines, Washington, D. C., and reads:

PLAINTIFF'S EXHIBIT No. 227.

"Dear Mr. Swigart:

I have your letter of the 4th, relative to my application of July 27th, covering land in ELK HILLS.

I knew of the Pan-American preferential right, this having been explained to me by both Secretary Fall and Mr. Ambrose. I have not given up hope that the Pan-American might waive this to me yet.

Secretary Fall suggested I make my application saying it would have the proper consideration at the right time. [395—313]

As to the agreement between the Pacific Oil Co. and the Government, I told both Secretary Fall and Mr. Ambrose I was agreeable to having a lease subject to this also and that I would be glad to delay

drilling a year or eighteen months if the Department wished. All I am trying to do is to know that later at the right time I will have a sure lease and that my application for one would not be buried and that a later application might get the land. I have an application in for a drilling arrangement, which was made long prior to the Pan-American Co.'s preferential arrangement but as yet have had no reply on it.

I am aware of the over-production conditions at the present time and I see newspaper comments that the Government talks of shutting down further reserve drilling. At the same time Mr. Anderson, of the Pan-American Co. tells me he intends to drill a large portion of the reserve held under their contracts, on a very large scale.

Now, my dear Swigart, I have applied and applied and gone to Washington several times to see what I could do with not much result yet, but I am still on the job. I am able to carry out any financial obligation I undertake and as I personally had a great deal to do with the early development in the Elk Hills at a cost of a lot of hard work and money, I feel your department should play back. This may not be properly diplomatic but it's right.

Very truly yours,

B. T. DYER.

Call on me when you get out to California."

Exhibit No. 228 is dated at Washington, July 31, 1922, and is as follows:

PLAINTIFF'S EXHIBIT No. 228.

"Mr. B. J. Bradner,
912 Wright-Callender Bldg.,
Los Angeles, California.

Dear Mr. Bradner:

Replying to your letter of May 5, 1922, in which you request that consideration be given your company, relative [396—314] to granting a permit to prospect for oil and gas on Section 12, Township 31 S., Range 24 E., in the Elk Hills Field, Naval Petroleum Reserve No. 1, California:

While certain leases have been granted in this reserve, in order to protect the Government's land from drainage, no wells are now being drilled on or near the section referred to in your letter, and the Department cannot consider your application for a lease.

Respectfully,
(Sgd.) ALBERT B. FALL,
Secretary."

Exhibit No. 229 is dated in Washington, August 4, 1922, addressed to B. T. Dyer, Los Angeles, and reads:

PLAINTIFF'S EXHIBIT No. 229.

"Dear Mr. Dyer:

In the absence of Mr. Ambrose, I am replying to your letter of July 27, which enclosed two copies of letters of the same date to Secretary Fall. The Secretary will, no doubt, reply to your application for lease of the East $\frac{1}{2}$ of the West $\frac{1}{2}$ of Section 34, Township 30, South, Range 24 East, Navy Re-

serve No. 1, California, but I am writing this to point out to you why, in my opinion, it would not be possible for the Department to lease this strip of land at the present time.

As you know the Pan-American Oil Company has a preferential right to this strip and, first of all, before any leasing to other parties could take place they would have to waive their claim. As it happens you requested a lease inside of an area which, at the instigation of the Bureau of Mines and with the Bureau's full knowledge, has been made the subject of a special operating agreement by the Government and the Pacific Oil Company. The Secretary of the Interior, acting for the Government, and the Pacific Oil Company agreed not to drill any wells on lands within this area without first giving six months notice. This action was taken to prevent the drainage of [397—315] this portion of the Naval Reserve at the present time. Obviously, I cannot recommend to the Secretary that this operating agreement be broken and the land leased for development.

As you are aware the present over-production in California is in such proportions that the present seems the most unsuitable time for leasing additional portions of the Naval Reserve and, until these conditions are changed, I am doubtful if the Secretary will lease additional portions of the reserve and encourage further drilling.

In view of the facts set forth in the second paragraph of this letter, it would seem that the chances for *your* and your associates to obtain a lease of the

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East 1/2 of the West 1/2 of Section 34, Township 30, South, Range 24 East at this time are not very good. Later on, if the Secretary decides to lease other portions of Naval Reserve 1, I feel that, with your application on file, you will be assured of receiving proper consideration.

Very truly yours,

T. E. SWIGART,

Acting Chief Petroleum Technologist."

Exhibit No. 230 is a telegram dated at Washington, August 7, 1922, as follows:

PLAINTIFF'S EXHIBIT No. 230.

"Edmund Burke,
Hotel Atlantic,
Chicago, Ill.

Your wire sixth. Lands described have not been leased. All except Northwest six thirty-one twenty-four within area where Government and Pacific Oil Company have agreed not to drill without notice to other party.

(Signed.) FINNEY,
First Assistant Secretary."

Exhibit No. 231 is a letter dated at Washington, August 12, 1922, addressed to L. E. Eddy, Honolulu Consolidated Oil [398—316] Company, San Francisco, reading as follows:

PLAINTIFF'S EXHIBIT No. 231.

"Dear Mr. Eddy:

This will reply to your letter of July 25, 1922, requesting information relative to further leasing of

land in Naval Petroleum Reserve No. 1, Elk Hills Field, California and with special reference to Section 28-30-23 E.

The Department's policy is not to lease additional lands in Naval Petroleum Reserve No. 1 at the present time and, because of the great overproduction of crude oil in California as well as the low price of oil, I am doubtful if the Secretary will be inclined to modify this policy until conditions improve.

Your application has been placed on file and, also, has been called to the attention of the Bureau of Mines, I feel sure that the Secretary will be pleased to consider a bid from your Company when, in the best interests of the Government, it is decided to lease additional tracts in this reserve.

With kindest regards, I am

Respectfully,

(Sgd.) E. C. FINNEY,
First Assistant Secretary."

Exhibit No. 232 is an Intra-Departmental memorandum dated October 7, 1922, reading:

PLAINTIFF'S EXHIBIT No. 232.

"Memorandum for the Director:

I transmit herewith lease application Visalia 010155 filed by E. H. White, et al., covering Section 2, T. 31 S., R. 23 E., M. D. M., Naval Reserve No. 1.

Reference is made to the attached sketch showing the relation of Section 2, applied for, to the producing area adjacent to it. It will be observed that the nearest production to the applicants land is in

Sec. 36, T. 30 S., R. 23 E., and that the nearest producing well to the tract is Hay No. 17 of the Standard nearly half a mile away from the NE. corner of Section 2. [399—317] Material drainage of oil from Section 2 is therefore not probable.

Mr. W. W. Cutler, of the Bakersfield office, has called attention to the fact that indications of water were found in the gas zone in wells No. 15 of the Pacific Oil Company in Section 31 and well No. 13 of the Standard and suggests that this might signify that gas may not be found in the NW. $\frac{1}{4}$ of Section 1 as this area is rather low structurally. It is presumed that similar conditions would prevail in the NE. $\frac{1}{4}$ of Section 2. However, should commercial gas be present in Section 2, it is not thought that sufficient quantities are now being drained by present wells in Section 36 to make advisable the drilling of protective wells in Section 2.

In view of the fact that present knowledge indicates that Section two is not now being harmfully drained of either oil or gas and also because of the present policy not to lease lands in Reserve No. 1, except to prevent drainage, the bureau engineers recommend that this application be refused.

F. B. TOUGH.

Approved Oct. 11, 1922.

D. A. LYON,
Acting Director for H. Foster Bain, Director."

Exhibit No. 233 is a letter dated at Washington, October 7, 1922, addressed to S. P. Wible, President, Eight Oil Company, Washington, D. C., and reads as follows:

PLAINTIFF'S EXHIBIT No. 233.

"Dear Mr. Wible:

This will acknowledge receipt of your communication filed October 6, 1922, asking for an oil lease on Sec. 30, T. 30 S., R. 24 E., and Secs. 25 and 26, T. 30 S., Ra. 23 E., Naval Reserve No. 1, California, in which the Associated Oil Company and your Company would be equally interested, if granted.

The application refers to the fact that the Associated Oil Company spent large sums of money in prospecting the [400—318] sections mentioned; also that the Eight Oil Company had interests in a number of sections in the reserve, all of which interests, of both companies, were settled and compromised by the former Secretary of the Interior by the granting of leases in sections outside of the naval reserve. The application states that the wells on the lands taken by the companies in return for those surrendered in the naval reserve have proved to be small producers, and that equitably said companies should be given some consideration in the leasing of lands in the naval reserve. It is also set forth that drainage of oil and gas has been for several years and is now going on from Sec. 36, T. 30 S., R. 23 E., a school section, and Sec. 31, T. 31 S., Ra. 24 E., a railroad section, which lands are near the ones sought in your application.

An arrangement to limit production from said patented sections is now under consideration, and if consummated will relieve or reduce the drainage referred to. Aside from the leasing of lands for the purpose of drilling wells to offset producing

wells on lands outside the reserve, and other leases in connection with the securing of fuel oil for the Navy, it has been the policy of the Navy Department and of this Department, particularly in view of the present low prices and over-production in California, not to immediately drill up the remainder of Reserve No. 1. I cannot, of course, undertake to state at this time what the future desires or plans of the Navy Department may be with respect to the development and disposition of its oils in the remainder of this reserve.

Your application, therefore, can not be granted at the present time, but will be placed on file with other applications for further consideration when economic conditions indicate the advisability of further leasing.

Respectfully,
(Sgd.) ALBERT B. FALL,
Secretary." [401—319]

Exhibit No. 234 is a letter dated at Washington, October 18, 1922, addressed to Mr. E. H. White, Bakersfield, California, reading:

PLAINTIFF'S EXHIBIT No. 234.

"Dear Mr. White:

The joint application for an oil and gas lease filed by C. E. White, R. L. McCutcheon and yourself on April 18, 1922, at the local Land Office at Visalia, California, has been forwarded to this office for recommendation. In future correspondence relative to this application please refer to serial Visalia 010155, which number has been given your filing.

The land embraced in your application comprises all of Sections 2, T. 31 S., R. 23 E., M. D. M., California, and forms a part of United States Naval Reserve Number 1. The Government has adopted the policy not to lease lands embraced in this reserve at the present time unless such lands are being drained of their oil and gas reserves from adjacent drilling operations.

The section applied for lies possibly half a mile from the nearest development which is in Section 36, T. 30 S., R. 23 E., to the northeast. At the present time the operators in this section have shut in certain of their wells, thereby curtailing drainage from adjacent sections. The action on the part of the operators has made the drillings of offset wells in the area inadvisable and the Government is, at the present time, unwilling to lease the lands you applied for.

Your application has been placed on file and will be given full consideration at such time as those lands may be available for lease.

Sincerely,

(Sgd.) E. C. FINNEY,
First Assistant Secretary."

Exhibit No. 235 is a letter dated at Washington, October 24, 1922, addressed to F. J. Carman, Los Angeles, California, [402—320] reading as follows:

PLAINTIFF'S EXHIBIT No. 235.

"My dear Mr. Carman:

Referring to your application for oil and gas lease

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to certain ground in Naval Petroleum Reserve No. 1, Elk Hills, California, under date of May 12, 1922, and the amendment to this application under date of June 19, 1922, you are advised that, in view of the present over-production of crude oil, the Department does not consider it advisable to issue leases in Naval Petroleum Reserves Nos. 1 and 2, in California, except when such leases are necessary as a practical expedient to protect the Government's oil properties from drainage by wells on adjacent lands from which the Government receives only a very small royalty, or none at all.

Recently, an agreement has been negotiated, whereby first and second line wells, drilled along the south line of Section 36, Township 30 S., Range 23 E., and Section 31, Township 30 S., Range 24 E. have been shut in, thereby rendering it unnecessary for the Department to lease adjacent land at this time.

Your application, with the amendment, is being filed for consideration at such time as the Department may decide to issue more leases in these reserves.

Sincerely,

E. C. FINNEY,

First Assistant Secretary."

Exhibit No. 236 is a letter dated Washington, October 25, 1922, addressed to Mrs. Mabel Walker Willebrandt, Assistant Attorney General, Washington, and reads:

PLAINTIFF'S EXHIBIT No. 236.

"Dear Mrs. Willebrandt:

I am in receipt of your letter of October 15, relative to the possibility of a friend of yours desiring to bid on a lease under the Leasing Act of February 25, 1920, in Section 34-30-24, Naval Petroleum Reserve Number 1, California.

I wish to advise you that the present policy of the [403-321] Government is not to lease any of the lands within Naval Petroleum Reserve Number 1, unless such lands are being drained of their oil and gas reserves from wells drilled on patented or other lands nearby. This policy has been adopted very largely because of the present over-production of oil.

I shall be pleased, however, to receive a formal application from the parties you write about and on receipt of same will be glad to have the application placed on file with others that have been received. These applications will be given further consideration at such time that the Department deems it advisable to lease additional lands within the Reserve.

Sincerely,

E. C. FINNEY,
First Assistant Secretary."

The foregoing exhibits, numbered 172 to 236, inclusive, were read in evidence over the objections, and subject to the exceptions, hereinbefore stated.

The plaintiff called as a witness in its behalf

**TESTIMONY OF PAUL N. SHOUP, FOR
PLAINTIFF.**

PAUL N. SHOUP, who testified that he is President of the Pacific Oil Company, and of the Associated Oil Company; that the agreement between his company and the Government not to drill certain areas in Naval Reserve No. 1 is still in force, and is being observed by his company, the Government, and the Pan American Petroleum Company.

Mr. Shoup remembers a visit from Dr. Bain to the former's office in January, 1922, in which a conference was had regarding the question of an understanding between the Pacific Oil Company and the Government, whereby there would be no unnecessary drilling done in Naval Reserve No. 1, looking toward the protection of the Naval Reserves or a part thereof, some seven sections; that discussion was preliminary to correspondence already introduced in evidence; Dr. Bain did not mention anything about the Pearl Harbor project, and did not [404—322] lay before the witness at any time the question of exchange of royalty oil for construction at Pearl Harbor.

Upon being asked whether Dr. Bain or any other Government official at any time either in writing or orally, suggested to the Pacific Oil Company the probability of leasing any part of the Naval Reserve No. 1, Mr. Shoup answered that he did not know whether Dr. Bain submitted a proposition or not, but the Navy or the Interior Department called for bids upon fractional sections; with reference

(Testimony of Paul N. Shoup.)

to strip leases on Section 1, Section 2, and possibly some fractional sections. He has never been advised of an intention to make a larger lease. If the matter had been submitted by competitive bidding for lease of the Naval Reserve, his company would have been interested.

Cross-examination.

On cross-examination, Mr. Shoup testified that the Associated Oil Company of which he is president is a subsidiary of the Pacific Oil Company, of which he is also president, in the sense that the Pacific owns about 58 per cent of the stock of the Associated; he is also vice-president of the Southern Pacific Railway Company, which is a small stockholder in the Pacific Oil Company, and which obtains its fuel from that oil company; the Standard Oil Company, as of record, which is the only way he has of judging, owns about 10 or 11 per cent of the stock of the Pacific Oil Company.

When Mr. Shoup saw Dr. Bain in San Francisco in January, 1922, there were present at the conference Mr. Lombardi, acting vice-president of the Pacific Oil Company, Mr. McLaughlin, vice-president of the Associated Oil Company, and perhaps others whom, if they were there, he does not now know. The witness met Dr. Bain in Washington in March, 1922, prior to the end of that month. The witness does not recollect any correspondence between either of his companies and Dr. Bain about the Pearl Harbor project, between January

(Testimony of Paul N. Shoup.)

and the end of March, 1922. It is his recollection that Dr. Bain said nothing about the [405—323] Pearl Harbor project at the time he saw witness in January, and as to when he first heard of the Pearl Harbor project, he thinks it came to him through Mr. McLaughlin, but he cannot say when; he did not become aware of the fact that Dr. Bain and his vice-president, Mr. McLaughlin, conferred on that subject in San Francisco in January, 1922; he did not become aware of the fact that in January, 1922, on the occasion of the visit he has testified about, Dr. Bain explained the plans of the Pearl Harbor project to Mr. McLaughlin, the vice-president of the Associated Oil Company; and he did not know that thereafter, and prior to the opening of the bids, Dr. Bain and Mr. McLaughlin were in correspondence on that subject; he might explain that by saying that he was east, and subsequently returned and was away on sick leave some time during the latter part of March, and not so closely in touch with business as he otherwise would have been; of course, he knew this subject had come up, but he does not recollect the channels through which it came up. The period of time that he was away on account of illness was the latter part of March and the first half of April, 1922. The witness was thereupon asked and answered as follows: "Q. Who in your organization, either as an officer of the Pacific or Associated, would have handled with the Government

(Testimony of Paul N. Shoup.)

such a project as the Pearl Harbor project? A. Mr. McLaughlin."

Plaintiff thereupon offered in evidence contract dated May 22, 1922, between the Pan American Petroleum & Transport Company, and the Associated Oil Company, which was marked Exhibit No. 238, and which, in substance, provided that from its date to a period which it was agreed ended with July 17, 1924, the [Pan American Company sold, and the Associated Oil Company bought, royalty oil received by the Pan American Company under the terms of contract between it and the [406—324] United States dated April 25, 1922, at the posted field price at which the Pan American credited the Government with such oil, for all said royalty oil under 20 degrees Baume, and at a premium of 15 cents per barrel above said posted field price on all said royalty oil 20 degrees Baume, and over.

Plaintiff next offered in evidence as Exhibit 239 contract between the same parties for a period beginning July 17, 1924, and ending February 1, 1925, which in substance provided for the sale by the Pan American to Associated of all of the said royalty oil at the posted field prices without premium.

Thereupon there was received in evidence, subject to the court's ruling ultimately to be made in this case as regards materiality, relevancy, competency and admissibility, on all grounds except the mode of proof, the ruling being reserved by the court,

and the court reserving to the defendants the right to move to strike out the stipulations so read, two stipulations, as follows:

“It is stipulated and agreed that Admiral C. W. Parks, if called as a witness, would testify that he became the Chief of the Bureau of Yards and Docks of the United States Navy on or about January 12, 1918, and remained in active charge of the Bureau of Yards and Docks until in December, 1921. That it was his duty as Chief of the Bureau of Yards and Docks to have charge of the construction of fuel depots for the United States Navy, and in particular, of the preparation and submission to Congress of estimates of appropriations for the purpose of establishing fuel depots, including the construction of tanks for the storage of fuel oil, gasoline and other petroleum products for the use of the United States Navy.

That on October 7, 1918, a sub-committee of the Committee on Appropriations of the House of Representatives was [407—325] considering the first deficiency appropriation bill, 1919, which became the Act of November 4, 1918, Chapter 201, 40 Stat. 1020. That Admiral Parks stated to the sub-committee at that time that the appropriation of \$322,500 requested for fuel oil storage in the bill was to complete the project for tank construction at Yorktown, Virginia. (Hearings before sub-committee of the Committee on Appropriations of the House of Representatives, October 7, 1918, 65th Congress, 2nd Session, p. 788, and estimate of September

23, 1918, 65th Congress, 2nd Session, H. R. Doc. 1307, p. 3.)

That upon the consideration of the Naval Appropriation Bill of 1920, which became the Act of July 11, 1919, Chapter 9, 41 Stat. 131, Admiral Parks submitted estimates for the construction of depots for coal and other fuel in the sum of 805,000 (Estimates for Appropriations for Fiscal Year 1920, 65th Congress, 3rd Session, House Doc. 1430, p. 341). And that included in this sum was the amount of \$141,000 to pay for the increased cost of a project for storing oil at Pearl Harbor, T. H. (Hearings before Committee on Naval Affairs, House of Representatives, Dec. 6, 1918, 65th Congress, p. 469).

That upon consideration of the Naval Appropriation Bill for 1921, which became the Act of June 4, 1920, Chapter 228, 41 Stat. 812, Admiral Parks requested the sum of \$2,135,000 for depots for fuel, of which sum the amount of \$1,000,000 was requested for steel storage tankage for reserve fuel at Pearl Harbor, T. H., and \$1,050,000 for the same purpose at Puget Sound (Estimates of Appropriation, 1921, 66th Congress, 2nd Session, House Doc. 411, p. 410, and Hearings before Committee on Naval Affairs, House of Representatives, February 25, 1920, 66th Congress, 2nd Session, pp. 1418-23).

That upon consideration of the Naval Appropriation Bill for 1922, which became the Act of July 12, 1921, Chapter 44, [408-326] 42 Stat.

122, Admiral Parks requested the sum of \$1,836,000 for depots for coal and other fuel, including the sum of \$126,000 for use at Melville, R. I., and \$150,000 for use at Portsmouth, N. H., and in addition thereto the sum of \$200,000 for fuel oil storage at Cavite, P. I. (Estimates of Appropriations, 1922, 66th Congress 3rd Session, House Doc. 871, p. 405), and that there was no appropriation for the item in question. (Hearings before subcommittee of Committee on Appropriations, House of Representatives, 66th Congress, 3rd Session, January 15, 1921, pp. 368-370, 381-384.)"

And another stipulation reading:

It is stipulated and agreed that if called as a witness Representative John J. Fitzgerald would testify that on May 1, 1917, he was Chairman of the Committee on Appropriations of the House of Representatives, which had presented to the House the bill H. R. 3971, Public No. 23, 65th Congress, 1st Session, which became the Deficiency Appropriation Act of June 15, 1917, Chapter 29, 40 Stat. 182. That on May 1, 1917, this bill was under consideration by the House and that he Representative Fitzgerald, then stated to the House, as reported in the Congressional Record for May 1, 1917, Vol. 55, Part 2, p. 1656, to wit: That the details with regard to the appropriation of \$1,500,000 for fuel oil storage construction had been submitted to the Committee but that the projects upon which this sum was to be expended were not printed in the bill and were not made public because of war

reasons against disclosing the circumstances of the construction of this storage.

It is further stipulated and agreed that if Representative Swagar Sherley were called as a witness he would testify that on October 6, 1918, he was a member of the House of Representatives and was then Chairman of the Committee on Appropriations of the House of Representatives which had presented to the House Bill, H. R. 13086, Public No. 233, which became [409—327] the Deficiency Appropriation Act of November 4, 1918, Chapter 201, 40 Stat. 1020. That on October 6, 1918, while the House had under consideration the aforesaid bill Mr. Sherley then made the statement to the House as reported in the Congressional Record for October 6, 1918, 65th Congress, 2nd Session, Vol. 6, Part 2, p. 11305, to wit: That an estimate of \$165,000 for the construction of fuel oil storage at Pearl Harbor had been submitted to the committee but had been omitted from the bill as reported because it was agreed that this item could be subsequently taken up in the Naval Appropriation Bill for 1920. [410—328]

**TESTIMONY OF WILLIAM A. KENT, FOR
PLAINTIFF.**

WILLIAM A. KENT, called as a witness on behalf of plaintiff, testified that he is chief accountant for the Bureau of Mines and has had charge of the accounts with reference to the two contracts with the Pan American Petroleum & Transport Company for the Pearl Harbor project; he is familiar with the proposal sum referred to

(Testimony of William A. Kent.)

in the contract of April 25, 1922, and knows that the same was increased or decreased by reason of the varying price of fuel oil; the accounts for construction under that contract have been kept in barrels of oil; the witness kept an account of fuel oil delivered, and after the arrangement was somewhat changed that account was kept in dollars but transferred into crude oil every three months; by transfer he means the amount is represented in basic crude oil; he has always kept the construction separate from the fuel oil; he kept the account of fuel oil in such a way that every three months he would carry the fuel oil carried by the Government in dollars in value, and then would translate that into basic crude at \$1.10 under the contract and divide the dollars representing the fuel oil delivered by \$1.10 which would give him the number of barrels of basic crude to be credited to the contractor; when he ascertained the number of barrels of basic crude that a fuel oil delivery represented he put it in the fuel oil account; every delivery of fuel oil, if it was at a different price from \$1.50 a barrel, changed the number of barrels in the proposal sum; the price at which the fuel oil was delivered, with freight, is $\$1.36\frac{2}{3}$ per barrel; when witness got report of the delivery of fuel oil at $\$1.36\frac{2}{3}$ he translated that into barrels of basic crude by dividing it by \$1.10; the proposal sum was thus altered; as a matter of fact, under the new arrangement, witness did not use the figures of the proposal sum; he discarded

(Testimony of William A. Kent.)

them; as far as fuel oil was concerned he carried his accounts in dollars; as regards construction, the witness went over 9 vouchers of the J. G. White Engineering Corporation at the end of every calendar month so as to ascertain if their accounts were correctly kept as to the work done and the material furnished; there were two lines of accounts that were necessary on account of the character of this contract; in the first place, starting with the proposal sum, this amount of basic crude oil was built up by such additions as, first, under the contract where the unit price was given but not the quantity, and again by such changes [411—329] as arose and were authorized by the Navy, and then decreased in the same way under similar conditions; that basic proposal, or the proposal sum at the beginning, has been built up until it now includes many items that it did not include in the beginning, and that will be balanced and can be balanced only when the contract is completed; that would have been sufficient except for Article 12 which made it necessary to keep the exact cost of the work and it was this part that witness obtained through the periodical examinations at least once a month of the records of the J. G. White Engineering Corporation, which were kept in dollars; the dealing through the White Company was entirely in the form of dollars; as to the books of the witness, as far as the costs are concerned they have been kept in dollars to correspond with the records of the J. G. White Engineering Corporation; the

(Testimony of William A. Kent.)

witness on his books has a proposal sum account; that has been increased from time to time; but there are some items in that that will not be added or taken away until the closing of the account in the settlement. As regards the second contract, witness has kept its accounts solely in dollars. The interest provided for in the first contract is added on the books of the witness to the proposal sum in the number of barrels of basic crude oil; it can be calculated in barrels directly, or it can be calculated in dollars and then transformed; he generally calculated it in dollars and then reduced it by the simple formula already mentioned to barrels of basic crude oil; the number of barrels of basic crude oil is not the number that contractor will require because crude oil may go up or down in posted field prices; therefore when he comes to close his books he takes a number of barrels of basic crude oil gotten as a fixed figure by additions to or subtractions from the proposal sum and then he will see whether crude oil is in fact lower or higher than \$1.10, if it is lower it will take more barrels to satisfy the number of barrels of basic crude at \$1.10 and if it is higher it will take less; each run of oil is at the price of the current quotation; as to how these things shall be calculated, the contract provides, and he follows that in accounting. As to his method of calculating interest on the second contract and as to whether the interest compounds monthly, it depends upon what is done with the amount charged, the reading

(Testimony of William A. Kent.)

of the contract is that the amount due for interest shall be first deducted from the oil before credit is given, the seeming and evident [412—330] intention was to wipe out the interest every month; the effect would reduce the amount available for payment on the principal and therefore, in effect, result in compounding the interest; this had been modified to the extent that instead of happening every month the credit is every three months and that modification dates back to the beginning of the second contract, so that the interest has been wiped off every three months; as to whether that compounds interest quarterly it produces the effect he has spoken of; it reduces the amount available for payment on the principal.

There was no cross-examination of the witness and he was excused.

The plaintiff thereupon placed in evidence the following stipulation which had been entered into between the parties;

"It is hereby stipulated by and between the plaintiff and the defendants, by their respective solicitors of record, that at all times referred to in the plaintiff's Bill of Complaint and in the defendants' Answer in the above entitles cause, the following were facts:

"(1) Neither the Secretary of the Navy nor any chief of Bureau, *not* any other person in the Navy, requested at any time the opinion of the office of the Judge Advocate General of the Navy, or any of his associates or assistants, as to the validity, force

or effect of the Executive order of Warren G. Harding dated May 31, 1921; nor was any such opinion requested of or rendered by the solicitor of the Navy.

“(2) At no time was the opinion of the Judge Advocate General’s Department or office, or the opinion of the Solicitor of the Navy, requested by the Secretary of the Navy or any chief of bureau of the Navy, or any other officer of the Navy, or of the United States, touching or concerning the validity, legality or form of the contract of April 25, 1922, between the United States and Pan American Petroleum & Transport Company, except as such matters are covered by opinions as regards which the parties hereto have stipulated under date of October 10, 1924.

It is further stipulated and agreed by plaintiff and defendants in this cause, acting by their solicitors of record, that this stipulation may be read to the Court on the trial of said cause and be made part of the testimony therein, with the same force and effect as to the facts hereinbefore set out as if testified to by competent witnesses under oath in open court room.”

Plaintiff thereupon placed in evidence a stipulation between the parties agreeing that the following are facts:

“(1) Relating to the acquisition by the defendant, Pan American Petroleum Company, of lease between the United States of America and the United Midway Oil Land Company, dated July 8,

1921, and lease between the United States and W. R. Ramsey, dated December 14, 1921. [413—331]

“On March 13, 1922, negotiations were opened between said defendant and said W. R. Ramsey, who prior to said date had become the lessee under both of the aforementioned leases, for the assignment thereof to said defendant; said negotiations were opened on that day by said Ramsey offering, subject to the approval of the lessor, to assign the two aforesaid leases in consideration of the sum of \$850,000; in the course of the negotiations which followed said offer the said Ramsey represented, and the said defendant found, that actual expenditures which had thus far been made in the development work on the land leased as aforesaid totaled to March 18, 1922, the sum of \$553,994.72, said expenditures having been for boiler plants, pipe-lines, storage tanks, a fully equipped camp consisting of bunk-house, cook-house, warehouse, drilling tools, casing, warehouse stocks, etc., in connection with the development of the lands under said leases and the bringing in thereon, up to said date, of five completed wells, and the drilling of three additional wells then in process of drilling; said Ramsey further represented that there was at that time due him from the United Midway Oil Land Company the sum of \$148,000, which sum was additional to the aforementioned sum, to reimburse said Company for its prior expenditures on said lands; that the said Ramsey and his assignor had expended the

additional sum of \$162,000 for legal expenses and other administration and overhead items against which there had been credited the sum of \$104,000 received from the sale of oil produced from wells on said lands up to said time. As a result of negotiations between March 13, 1922, and March 25, 1922, assignments of said two leases were made on the last mentioned date by said Ramsey to said defendant together with a conveyance of all of the property, improvements, tools, and equipment owned by the assignor, free and clear of all liens, encumbrances and claims of every nature whatsoever, for the sum of \$750,000; said assignments were executed on the 25th day of March, 1922, and approved by E. C. Finney, First Assistant Secretary of the Interior, on April 7, 1922.

“(2) That on or about the 5th day of January, 1922, R. J. White, and associates, agreed to, and did, deliver, to the Pan American Petroleum Company, a quitclaim to all their right, title, interest and claim in and to section 2, T. 31, S., R. 24, E., in consideration of an agreement to pay to said claimants a royalty of $7\frac{1}{2}$ per cent from all wells thereafter drilled by said defendant upon the northerly strip of said section 2, 1173 feet wide; that the said White and associates have neither received, nor is there any agreement that they shall receive, any royalty from wells drilled in any other part of Section 2 or in any other part of Naval Reserve No. 1 or elsewhere; that the said claim, and the release thereof, covered all of said Section 2.” [414—331-A]

Plaintiff thereupon offered in evidence letter dated December 11, 1922 (Exhibit 241), reading as follows:

PLAINTIFF'S EXHIBIT No. 241.

"December 11, 1922.

Hon. A. B. Fall,
Secretary of the Interior,
Washington, D. C.

My dear Mr. Secretary:

It is reported on good authority that your department contemplates leasing certain parts of naval reserves one and two in the State of California. I do not know whether this report is true or not, but my information from California is to that effect.

While I am opposed to leasing any part of these naval reserves at this time, except that part which it is necessary to lease to protect the reserves from drainage by others through offset wells, if it is the policy of the department to lease these lands or any part of them at this time, I desire to know it, as I have some very reputable, capable, and responsible parties who desire to submit bids to the department for oil leases covering all or any part of these reserves. I suppose that these leases will be let upon proper notice and if notices of this kind are issued, I would be glad to have a copy thereof sent to me at my office.

I would like to have information concerning this at an early date.

Yours very truly,
J. W. HARRELD."

Plaintiff then offered in evidence its Exhibit 242, reading as follows:

PLAINTIFF'S EXHIBIT No. 242.

"December 12, 1922.

Hon. J. W. Harreld,
United States Senate,
Washington.

My dear Senator:

Your letter of December 11th, in which you seek information concerning leases on the naval reserves in California, is received.

The Secretary of the Interior has been acting as the business agent for the Navy Department, under direction of the President, handling naval reserves of the United States. Under this direction, made at the request of the Secretary of the Navy, the matter of additional leases and policy with reference to leases is not left in the sole direction of the Interior Department.

In arranging leases, the terms of same; contracts, etc., touching same, I do so only when requested by the Navy Department.

The Navy Department is a military arm of this Government and information concerning their plans, the details of same, etc., must be secured from the Navy Department itself. [415—332]

I think you can readily see that this is the case and I have no doubt that an application to the Commander-in-Chief of the Army and Navy from yourself will receive favorable attention if it is deemed

to be in accord with the best interests of the Government.

Very respectfully,

ALBERT B. FALL,
Secretary."

Plaintiff next offered in evidence telegram dated at Three Rivers, New Mexico, November 6, 1922, which was marked Exhibit No. 243, and reads as follows:

PLAINTIFF'S EXHIBIT No. 243.

"Finney,

First Assistant Secretary,

Interior Department, Washington D. C.

Am returning proofs and memoranda having no stenographer here will ask you to prepare report for me using your judgment making it not longer than last using Bain and my *ad interim* reports might refer to fact advertise for bids royalty oil think unnecessary go into details naval oils as we merely cooperating with navy but referring such cooperation also to cooperation with agriculture in appointments commission milk river Klamath also.

Possibly public health at Hot Springs and our general cooperative policy stop You had probably best call attention immediately president budget out Alaskan road stop I will not leave until after Fifteenth expect meet Hover and discuss Colorado River.

FALL,
Secretary."

It was stipulated that the foregoing referred to annual report of the Department of the Interior that goes to the President.

Thereupon plaintiff rested the presentation of testimony on its behalf in chief. [416—333]

DEFENDANTS' EVIDENCE.

Before testimony on behalf of the defendants was introduced it was stipulated by the parties, with the approval of the Court, that the right reserved from time to time during the introduction of evidence on behalf of the plaintiff should be exercised after all the testimony in the case has been introduced and that the defendants may proceed with the introduction of evidence without waiving their right to make the several motions when the evidence is all closed.

Thereupon the defendants read in evidence the following stipulation dated October 10, 1924, inviting the Court's attention to the fact that this is the stipulation containing exceptions referred to in the stipulation read by counsel for the plaintiff which made mention of the matters stipulated between the parties "under date of October 10, 1924":

"It is hereby stipulated by and between the plaintiff and the defendants, by their respective solicitors of record, that at all times referred to in the plaintiff's bill of complaint and in the defendants' answer in the above-entitled cause the following were facts:

"In the Navy Department of the United States at Washington there was an office known as the

office of the Judge Advocate General of the Navy; that Julian L. Latimer, an officer of the United States Navy, with the rank of Rear-Admiral, was Judge Advocate General of the Navy; that Commander Walter B. Woodson, an officer of the United States Navy, was Assistant Judge-Advocate-General; that the Solicitor of the Navy Department was Pickens Neagle, and George Dyson was an attorney in said office.

"Under date of November 30, 1921, the office of the Judge Advocate General of the Navy received from the Bureau of Engineering a request for an opinion, signed by Admiral J. K. Robison, chief of that Bureau, a true photostatic copy of the original of which request for opinion is appended hereto, marked Exhibit 'A.' "

(Exhibit "A" reads as follows:

"NAVY DEPARTMENT,
BUREAU OF ENGINEERING,
WASHINGTON, D. C.

30 November 1921.

To: Judge Advocate General.

SUBJECT: Naval Petroleum Reserves—royalty oil from.

1. There is now accumulating for the account of the United States Navy royalty oil from Naval Petroleum Reserves Nos. 1 and 2 amounting to about 1,000 barrels daily. This amount is likely to increase in the near future. It is proposed to exchange the royalty crude oil for fuel oil in storage at Pearl Harbor or other points to be later desig-

nated by the United States Navy. It is planned that the tanks in which this exchange oil shall be stored shall be provided by the lessor of the oil wells. Will this be legal, it being [417—334] presumed that the oil in storage at Pearl Harbor, as well as the tanks, and appurtenances are to become the property of the United States.

J. K. ROBISON,
Chief of Bureau.”)

“The aforesaid request for opinion dated November 30, 1921, was referred to the Solicitor’s division of the said office of the Judge Advocate General and there was prepared therein by the said George Dyson an opinion dated December 2, 1921, which received the consideration of Assistant Judge Advocate General Woodson, of the said Dyson, and of Judge Advocate General Latimer, and was the subject of consultation among them. Pursuant to the custom of the said office the concurrence in said opinion of the said Dyson and Woodson was indicated on a retained file copy by the initials ‘DY’ and the initial ‘W,’ respectively, near the upper left-hand corner of the first page of said retained copy of said opinion, a true photostatic copy of said retained file copy being hereto appended, marked Exhibit ‘B.’ ”

(Exhibit “B” is the retained file copy of Exhibit “C,” hereinafter set forth in full, and the same is therefore not reproduced here.)

“Said Latimer signed the original of said opinion and it was forwarded to and considered by the Secretary of the Navy who discussed the subject matter

thereof on or about December 5, 1922, with said Latimer and said Robison and in the presence of the two last named officers the Secretary of the Navy approved said opinion indicating his said approval by dating and signing the said opinion at the foot of the second page thereof; at the same time and after the aforesaid discussion, and in the presence of the said Latimer and Robison, the said Secretary of the Navy, Edwin Denby, with his own hand on the margin of the second page of the original of said opinion wrote the following: 'Do this. E.D. Dec. 5th, 1921,' a true photostatic copy of the original of said opinion, showing the original signatures of the said J. L. Latimer and the said Edwin Denby, and the aforesaid marginal notation, being hereto appended, marked Exhibit 'C.' "

(Exhibit "C" reads as follows:

**"DEPARTMENT OF THE NAVY,
OFFICE OF THE JUDGE ADVOCATE
GENERAL, WASHINGTON.**

December 2, 1921.

From: Judge Advocate General,

To: Bureau of Engineering.

SUBJECT: Naval Petroleum Reserves,—royalty oil from.

References: (a) Bureau's letter dated November 30, 1921, 598061-690-C-20.

(b) Bureau's letter dated November 30, 1921, 598-690-6-C-20.

1. Returned.

2. The Act entitled 'An Act making appropria-

tions for the Naval service for the fiscal year ending June 30, 1921, and for other purposes' approved June 4, 1920, provides:

'That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves [418—335] as are or become subject to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled "An Act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," or pending applications for United States patent under any law; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States; And provided further, That the rights of any claimant under said Act of February 25, 1920, are not effected adversely thereby; And provided further, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922: Provided further, That this appropriation shall be reimbursed from the proper appropriations on account of

the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct.'

3. The Act above quoted authorizes the Secretary 'to use, store, exchange, or sell the oil and gas products from the properties within the naval petroleum reserves, and those from all royalty oil from the lands in the naval reserves for the benefit of the United States.' The authority granted the Secretary of the Navy 'to store' this oil and its products, necessarily carries with it the authority to designate the *place* of storage and the authority to provide the means of storage. The authority granted 'to exchange' is unrestricted; i. e., the Act does not specify nor limit what may be taken in exchange for the oil and its products. Hence, if the Secretary of the Navy desired 'to store' some of the oil and its products, he has the authority 'to exchange' a part of the crude oil for fuel oil or for tanks or for both fuel oil and tanks under such arrangements as he may see fit to negotiate with the lessors or others; and said fuel oil and tanks, so received in exchange, may legally become the property of the United States. Furthermore, the Act makes available the sum of \$500,000 until July 1, 1922, from such sums as have been or may be turned into the Treasury as royalties on lands within the naval petroleum reserves for the purposes of the Act quoted above. Therefore, any part of the sum of \$500,000 now remaining unobligated is available to defray the expenses of 'storing, exchanging or sell-

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ing' the oil and gas products from the properties within the naval petroleum reserves, and those from all royalty oil from the lands in the naval reserves. If any part of this sum is expended for the purpose of *using* the oil by the United States, however, 'the proper appropriation' must be debited with a like amount.

4. Answering your questions, specifically, you are advised:

(a) It would be legal to exchange the royalty crude oil for fuel oil in storage at Pearl Harbor or other points to be designated by the Secretary of the Navy under arrangements whereby the exchanged oil shall be stored in tanks provided by the lessors of the oil wells, such tanks and their appurtenances to become the property of the United States.

(b) It would be legal to use the royalty oil on board vessels of the United States Navy and if so used, it should be expended at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct, and should be debited at the rate so fixed by the Secretary to the appropriation. [419—336]

'Fuel and Transportation.,

J. L. LATIMER

5 December, 1921.

Approved:

EDWIN DENBY,
Secretary of the Navy.")

Do this.
E. D.
Dec. 5th,
1921.

"Under date of May 9, 1922, there was received at the office of the Judge Advocate General of the Navy from the Bureau of Engineering, signed by Admiral J. K. Robison, Chief of that Bureau, a request for an opinion, a true photostatic copy of the original of which request is hereto appended, marked Exhibit 'D.' "

(Exhibit "D" reads as follows:

"NAVY DEPARTMENT,
BUREAU OF WASHINGTON,
Washington, D. C.

9 May, 1922.

From: Bureau of Engineering,
To: Judge Advocate General.
Subject: Naval Petroleum Reserves—royalty oil
from.

1. It is requested that this Bureau be informed whether, under the provisions in 'an act making appropriations for the Naval service for the fiscal year ending June 30, 1921, and for other purposes,' approved June 4, 1920, it is legal to build and equip tankage for the storage of fuel and other oils for the Navy, using therefor the \$500,000 mentioned in the act either in part or the whole thereof.

2. This Bureau understands that the words, 'and to use, store, exchange, or sell the oil and gas products thereof and those from all royalty oil lands in the Naval Reserves for the benefit of the United States' mean that it is legal to use this appropriation for the purpose of building and equipping storage to be used for the storage of a reserve supply of

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fuel oil for the Navy. It is a fact, however, that sufficient tankage for this purpose is not now available; is it legal under this act to construct this storage for the purpose stated and with the \$500,000 appropriation mentioned therein?

J. K. ROBISON,
Chief of Bureau.

Copy to: Chief of Naval Operations,
Bureau of Supplies and Accounts.")

"In response to the last mentioned request there was prepared between the date of the receipt of said request and May 15, 1922, by the aforesaid Dyson an opinion which was concurred in by the said Woodson, Neagle and Dyson, the concurrence of Woodson being indicated by the initial 'W' written by him near the upper left-hand corner of the first page of the retained office copy of said opinion; the concurrence of the said Neagle being indicated on the same copy by a symbol, customarily used by him for that purpose, just above the said initial 'W.' A true photostat of the said retained office copy of the last mentioned opinion is hereto appended, marked Exhibit 'K.' The changes noted on said copy, consisting of the figure 19 to indicate the date of the final opinion on the first page, the word 'lessees' to correct typographical error in the use of word 'lessors' on said exhibit, are in the handwriting of said Latimer." [420—337]

(Exhibit "E" is retained file carbon copy of Exhibit "F," having the initials and notations above

referred to on it, and as Exhibit "F" is hereinafter reproduced, Exhibit "E" is not copied herein.)

"On or about May 19, 1922, the said Latimer, after consultation with the aforesaid Woodson, Neagle and Dyson, signed the original of the said opinion which was thereupon forwarded to and considered by the Secretary of the Navy, Edwin Denby, and by him approved, the said approval being indicated by his signature near the foot of the second page of said opinion. True photostatic copy of the original of said opinion, showing the signatures of the said Latimer and the said Denby, is hereby appended, marked Exhibit 'F.' "

(Exhibit "F" reads as follows:

"1st Endorsement:

NAVY DEPARTMENT,

Office of the Judge Advocate General.

May 19, 1922.

From: Judge Advocate General.

To: Bureau of Engineering.

Subject: Naval Petroleum Reserves—royalty oil from.

1. Returned.
2. The Act entitled 'An Act making appropriations for the Naval service for the fiscal year ending June 30, 1921, and for other purposes' approved June 4, 1920, provides: [and the act is quoted in full.]

[Paragraph 3 of this opinion is a copy of paragraph 3 of the opinion of December 2, 1921, quoted above as Exhibit 'C.']

4. Answering the Bureau's question specifically, you are advised:—

That it would be legal to build and equip tankage for the storage of oil and gas products from the naval petroleum reserves, and those from all royalty oil from lands in the naval reserves, and that any part of the sum of \$500,000 now remaining unobligated is available to defray the expenses of 'storing, exchanging or selling' said oil and gas products from the naval petroleum reserves, and those from all royalty oil from lands in the naval reserves.

J. L. LATIMER.

Approved:

EDWIN DENBY,
Secretary of the Navy.")

"On or about December 8, 1922, Admiral J. K. Robison, Chief of the Bureau of Engineering of the Navy, by direction of Edwin Denby, then Secretary of the Navy, referred to the office of the Judge Advocate General of the Navy draft of the contract of December 11, 1922, between the United States of America and the Pan American Company, copy of which is Exhibit 'C' to the plaintiff's amended bill of complaint in this case; the said contract was considered by the said Solicitor and Judge Advocate General and with the exception of a few verbal changes thereon indicated to be made in said office, and which were made in the final executed draft, the said contract was approved by the said Judge Advocate General's office on the 11th day of December, 1922, and the Secretary of the Interior was [421—338] informed of that

opinion and approval on said date before the said contract was executed. This information was conveyed to the Secretary of the Interior by communication dated December 11, 1922, signed J. K. Robinson, Engineer in Chief, United States Navy, a copy of which communication is attached hereto, marked Exhibit 'G.' "

(Exhibit "G" reads as follows:)

"11 December, 1922.

My dear Mr. Secretary:

The copy of the supplementary contract between the Government and the Pan-American Petroleum and Transport Company for accomplishing the completion of the oil storage in Pearl Harbor, etc., has been carefully reviewed by me and by the Judge Advocate General of the Navy. With the exception of a few verbal changes that have been noted thereon, this copy is entirely satisfactory to the Navy Department and is believed to be an advantageous one for the Government to enter upon. I assume that the Interior Department will prepare the final contract for signature and unless otherwise directed will act accordingly.

Very respectfully,

J. K. ROBISON,
Engineer-in-Chief, U. S. Navy,
Chief of Bureau.

Honorable Albert B. Fall,
Secretary of the Interior,
Washington, D. C.")

"It is further stipulated and agreed by plaintiff and the defendants in this cause, acting by their

solicitors of record, that this stipulation may be read to the Court on the trial of said cause, and be made part of the testimony therein, with the same force and effect, as to the facts hereinbefore set out, as if testified to by competent witnesses under oath in open courtroom, and with the same force and effect as to the exhibits above enumerated and hereto appended as if the originals thereof were produced and their authenticity formally proved by competent evidence thereof.

This stipulation entered into at the City of Washington, in the District of Columbia this 10th day of October, 1924.

ATLEE POMERENE,
OWEN J. ROBERTS,

Solicitors for United States of America, Plaintiff.

FREDERIC R. KELLOGG,

FRANK J. HOGAN,

J. J. COTTER,

WELLBORN & WELLBORN,

O'MELVENY, MILLIKEN & TULLER,

Solicitors for Pan American Petroleum Company
and Pan American Petroleum & Transport
Company, Defendants." [422—339]

Thereupon defendants offered in evidence the following stipulation entered into at the City of Washington October 9, 1924, by counsel for plaintiff and defendants, and the same was read to the Court, and marked Exhibit "QQ":

DEFENDANTS' EXHIBIT "QQ."

"It is agreed that the following may be read as the testimony of J. McG. Williamson relating to his

connection with Pearl Harbor contract of April 25, 1922, with same force and effect as if present at trial."

"At some time before the bids were submitted on April 15, 1922, First Assistant Secretary Finney sent for Mr. Williamson and told him that the Government was contemplating doing the work at Pearl Harbor, to be paid for by exchanging therefor crude oil from the California Naval Reserves; that the authority covering the proposition was contained in the Act of June 4, 1920; and Williamson was told by Finney to report to Director Bain of the Bureau of Mines for the purpose of assisting Bain in the legal phases of the matter.

Williamson had no connection with the Executive Order of May 31, 1921, was never asked about it and gave no consideration to the question of its validity.

Williamson gave consideration to the question of the form in which bids would have to be submitted in order to be comparable with one another. He was present at conferences with various people in this connection, including Bain, Ambrose, Dunn and Cotter, and among other things discussed was the formula which was to be used in the bids establishing a ratio between crude oil and fuel oil and construction. Williamson states that in this preliminary consideration of the proposition he was given some little assistance by a man named Tallman (not the Commissioner), an employee of the General Land Office.

Williamson states that the contract was drafted

based upon the alternative B bid of the Pan American Company, and that in connection with its drafting there were conferences between himself and Bain, Dunn, Ambrose and Cotter; that Finney did not participate in these conferences and that the only definite thing he remembers taking up with Finney was the question as to the legal authority to be cited in the contract under which the contract was made, and that at that time Finney adopted the language contained in the contract as follows: 'That by virtue of authority contained in and the policy expressed by applicable Acts of Congress.'

Williamson was not called upon to, and did not, pass upon any question as to legal authority for the doing of what was done. His province was to assist in putting in language the contract which it had been decided to make.

Williamson had no talk with the Solicitor of the Interior Department in connection with the contract, and as far as Williamson knows the Solicitor did not function in any way in connection therewith.

Secretary Fall gave Williamson no instructions whatever. Williamson does not know Fall and never saw him or heard from him in connection with this matter.

Williamson did not know of and has no recollection of the opinion of the Judge Advocate General as to legality."

The foregoing stipulation bears the signature of counsel for the parties. [423—340]

Testimony of H. Foster Bain, for Defendant.

H. FOSTER BAIN, called as a witness on behalf of defendants, testified that he is now Director of the United States Bureau of Mines, and has held that office since May 7, 1921, having been appointed by the President and confirmed by the Senate; prior to that date he was Assistant Director of the Bureau of Mines for one year, during the war, from April, 1918, to April, 1919; he was also Assistant Director and Acting Director from January 1, 1921, to the date he was confirmed as Director; his nomination was sent to the Senate as Director of the Bureau of Mines first by President Wilson in the early part of 1921, and later by President Harding; a statement of his education and experience prior to entering the Bureau of Mines is this: He graduated from the University of Chicago and for several years was a practicing geologist with the Iowa Geological Survey; served for a while with the United States Geological Survey; was the first director of the Geological Survey of Illinois; practiced as a mining engineer and had charge of the operation of mines; was editor of the "Mining and Scientific Press" in San Francisco, the "Mining Magazine" in London, and visited mining properties in various parts of the world; the year of his graduation was 1897, and the foregoing is a résumé of his activities from 1897 to the present time.

The functions of the Bureau of Mines may be thus summarized: It is a Bureau in the Department of the Interior which has several responsibilities, the main one being the study of conditions in mines

(Testimony of H. Foster Bain.)

and mineral industries of the United States with reference to improvement of efficiency, increase of the safety and decrease in waste; it is also the active agent of the Government in the handling of mines and mineral properties which belong to the Government, and in the latter capacity it has charge of the operations on the leases under the various land laws which provide for leasing the public domain for [424—340A] mining purposes. In the Bureau there is a division of petroleum and natural gas, known informally as the Petroleum Division; the head of that, up to a few months ago, was called Chief Petroleum Technologist, but is now the Chief Petroleum Engineer.

A. W. Ambrose joined the Bureau of Mines in 1917 as a petroleum engineer, but passed through various grades and had various duties, so that he was chief petroleum technologist at the time the witness became Director of the Bureau, and he served as chief petroleum technologist up to a time when he was made assistant director, subsequent to which time he resigned, in 1923.

The witness had no knowledge of the executive order of May 31, 1921, prior to its promulgation. As regards when Dr. Bain first came into contact officially with the handling of the Naval Petroleum Reserves, aside from possibly signing letters which passed over his desk and which he signed on the basis of proper initialing by subordinate officers, he had no direct relation with the reserves until some time in the late summer or fall of 1921. At various

(Testimony of H. Foster Bain.)

times in that period, matters relating to the Naval Petroleum Reserves were discussed with the witness by Mr. Ambrose and others in the Bureau, and on a few matters with the Secretary, such, for example, as the provision of funds with which to oversee operations in the reserves, the transfer of funds in the summer of 1921 from the Navy Department to the Bureau of Mines having been made for that purpose.

In the latter part of October, 1921, Dr. Bain was called to the Secretary's office with Mr. Ambrose; the Secretary was there, a representative of the Navy was there, who at the time the witness did not know, but who was Admiral Robison; for a part of the time Assistant Secretary Finney was there, and Mr. Safford, the Administrative Assistant, came in and [425—341] out of the room; according to his recollection, there were others there at different times in the course of a fairly long conversation, which was held with regard to the Naval Petroleum Reserves; notice had come to the witness from the Secretary's office asking him to come to that office for that conference; maps of the reserves were spread out upon the table; those present stood around the table and talked over conditions in the reserves and what should be done with regard to drainage; the witness cannot now remember specifically just what each person said in the exact course of the conversation; he remembers that the drainage which was taking place, or which had

(Testimony of H. Foster Bain.)

taken place, in section 1 as a result of drilling on Standard Oil section 36 was discussed; that the other boundary lines were considered; that the danger of additional drainage in Reserve No. 1 was under discussion; that the condition of Reserve No. 2, with the checkerboarding of public and private lands and the number of leases that had been given, was discussed, as was also the condition of the wells; there was some reference to Reserve No. 3 in Wyoming. The witness mentioned, or Mr. Ambrose mentioned and the witness concurred in, a conversation they had had in Denver with certain geologists with regard to Reserve No. 3 and the drainage there; all these matters were under discussion and the consideration of what should be done about it was the order of the day; Admiral Robison took part in the discussion; he was interested in what was being said and was concerned as to what amount of drainage there was, and where it was taking place, but the witness cannot specifically recall what the Admiral said. His only recollection as regards Assistant Secretary Finney at that time is as to his being present for at least part of the time and standing near the witness when the maps were being looked over. [426—342]

At this conference the Bureau of Mines gave the Secretary of the Interior and to Admiral Robison advice with respect to a policy to be followed in the handling of the reserves, which was this: "We advised the Secretary of the Interior and the representatives of the Navy that it was useless to at-

(Testimony of H. Foster Bain.)

tempt to hold oil in the ground in Reserve No. 2, and that it would be necessary to drill the remaining part of that territory as promptly as was consistent with good drilling practice. With regard to Reserve No. 1, we advised the immediate leasing of a strip along the north line of Section 2 in the eastern end of the reserve, a strip along the south line of Section 25 north of Section 36 in the west side, a strip along the northwest border line of Section 6 near the west end of the reserve, and the further consideration of other strips and other areas as conditions might be developed by drilling on these grounds;" advice was given in regard to making a study of Reserve No. 1 in order to determine upon a future policy; at the end of the conference, there was a summing up by Secretary Fall, with the consent, by silence if not by actual words (the witness does not remember about that) by the others there to the effect that the Bureau of Mines should immediately take steps to secure leases on the unleased part of Reserve No. 2, and that the specific strips in No. 1 above mentioned should be offered for lease by the Bureau of Mines.

The nine telegrams sent out November 14, 1921, to persons having some rights with respect to future leasing in Reserve No. 2 Plaintiff's Exhibits — and —, were drafted in the Petroleum Division of the Bureau of Mines, and were sent pursuant to the conference in the latter part of October about which the witness has testified as above set forth. Dr. Bain is familiar with the

(Testimony of H. Foster Bain.)

letter from the Secretary of the Navy, Mr. Denby, to Secretary of the Interior, Mr. Fall, bearing date [427—343] October 25, 1921, which is known as the "policy letter"; he was advised of the receipt of that letter at about the time of its receipt.

In doing the work above mentioned in respect to the Naval Reserves, the Bureau of Mines was acting in co-operation with other Bureaus, and in the actual handling of leases; at this time the making of leases was done by the General Land Office, as it had been done in the past; the participation of the Bureau of Mines, in this work was progressive, a larger and larger share of the responsibility coming to rest upon that Bureau, and it is hard to say at what particular time there was a change; in the Interior Department there is a General Land Office, and a Geological Survey; at or about the time of the conference held in the latter part of October above referred to, the subject of taking royalty oil and putting it in storage was discussed; witness is not certain whether Pearl Harbor was mentioned at that time; his present recollection is that Pearl Harbor came into the discussion some weeks later, and that at the time of the October conference, the thought was, as expressed by the Secretary of the Interior and Admiral Robison, as to the converting of the royalty crude into fuel oil, and the placing of it in storage, possibly on the leased areas, or at Pacific Coast points.

There came into the hands of Dr. Bain the letter of December 9, 1921, from the Navy Department,

(Testimony of H. Foster Bain.)

signed by Acting Secretary Roosevelt, addressed to the Secretary of the Interior (Plaintiff's Exhibit No. 62); the answer to that letter, made by Acting Secretary Finney, under date of December 10, 1921 (Plaintiff's Exhibit No. 63), was dictated by Secretary Finney in the witness' presence, and as a result of a discussion between them; at a number of conferences, which occurred subsequent to the October conference, instructions were received to arrange for the exchange of current [428—344] crude royalty oil in Naval Reserves for fuel oil for delivery to the Navy, and pursuant to those instructions, by telegraph, arrangements were made with the four pipe-lines then receiving crude oil to make a conversion and hold it subject to the Navy's orders; the Bureau was also instructed to take up with the various companies a discussion as to whether they would make a similar arrangement covering the whole of the following year; that subject was under correspondence in the succeeding weeks; officials of the Bureau discussed with the Navy officers the amount of oil they would need, and up to that time there was confusion as to whether the Naval officers cared to use the oil for current use of the Navy or put it into storage; when the letter of December 9 (Exhibit 62), came, with the plans and specifications accompanying it, it was evident to Mr. Ambrose and the witness and that there would not be enough oil to supply the Navy currently, and also to furnish the storage that they were asking for; this was brought to the at-

(Testimony of H. Foster Bain.)

tention of Assistant Secretary Finney. He wrote the letter of December 10th, with a view of getting a determination on the part of the Navy as to which they wanted to do. Prior to the writing of that letter, Admiral Robison had told the witness that a legal opinion had been rendered by the Solicitor or Judge Advocate-General of the Navy Department, which opinion the witness had not seen at the time the December 10th letter was written, and he suggested to Secretary Finney that it would be desirable to have it; it is fair to say that that letter of December 10th was drawn up by Secretary Finney in collaboration with the witness.

As regards the letter signed by Mr. Finney and sent to the Navy Department, dated December 14, 1921 (Exhibit No. 65), and the letter bearing the same date from the Navy to the Secretary of the Interior, replying to Secretary Finney's [429—345] letter of December 10, and directing that for the present the royalty oil be used for the Pearl Harbor project, the witness has not now in mind clearly Exhibit 65, but has the letter from the Navy (Exhibit 66) clearly in mind. He must have been familiar with both at the time. He asked Assistant Secretary Finney to write to Mr. Cotter the letter dated December 16, 1921 (Exhibit 67). At that time the witness had in his possession letter dated November 28, 1921, from Mr. Doheny to Secretary Fall (Exhibit No. 33) and it was on account of that letter that he asked Secretary Finney to write

(Testimony of H. Foster Bain.)

to Mr. Cotter. To the best recollection of the witness, Secretary Fall had handed the letter of November 28, 1921, to him; witness does not remember what Mr. Fall said when he handed witness that letter, but the Secretary had told witness shortly before that, that either he had asked Mr. Doheny or Mr. Doheny had volunteered to have, an estimate made of the cost of putting up storage to the extent of a million and a half barrels, and that estimate, such as it was, appeared in the letter of November 28, 1921.

Secretary Fall, before he left Washington for the West on December 1st, had told Dr. Bain to prepare a plan for carrying out the wishes of the Navy, and when the various papers referred to came along, including the letters of December 9th and December 14th from the Navy (Exhibits Nos. 62 and 66), which came to Secretary Finney after Secretary Fall had left, they were turned over to the witness with instructions to try to work out a plan which would accomplish what the Navy wanted, and it was pursuant to these instructions that witness asked Mr. Finney to write the letter of December 16th to Cotter.

After the witness presented the letter of November 28, 1921, to Secretary Finney, and asked him to write Cotter, the witness took the November 28th letter back to his office with him, and kept it with the papers relating to this case, it [430—346] being, in his estimation, an engineer's preliminary estimate of the probable cost; at later periods, the

(Testimony of H. Foster Bain.)

witness procured similar estimates from other sources as a guide to him in making up plans for the work; there was no official action that he knows of, other than as above testified, ever taken on the November 28th letter, and from that time on, the same was kept in the files of the Bureau of Mines, where the original remains until the present date.

Dr. Bain arranged to come to the Pacific Coast in connection with the preliminary steps in this Pearl Harbor project in the month of December, 1921, but prior to the time he left Washington, Mr. Cotter, complaint to the letter of December 16, 1921, called on Dr. Bain, that call being some time in the latter half of December.

The witness knew that Mr. Cotter was at that time an officer of the Pan American Petroleum & Transport Company, and he had known Cotter when the latter was private secretary to Franklin K. Lane, Secretary of the Interior, and the witness was assistant director of the Bureau of Mines during the war.

When Mr. Cotter called on the witness, as above testified, there was discussed the ways which the Navy plan might take, as to what kind of a contract could be made, and as to whether it would be possible to make such a contract with an oil company or an engineering company or a combination of the two; Dr. Bain asked Mr. Cotter to find out if his company would bid on proposals of this general type if they were worked out, and Cotter said he thought his company would. At or about that time he had

(Testimony of H. Foster Bain.)

conversations with Admiral Robison on this subject; he cannot place the date; they had frequent conversations; about this time, he learned from Admiral Robison that the latter had secured a definite promise from Mr. Doheny that his company would bid on a plan of this kind if it could be [431—347] reduced to a working basis.

Before leaving Washington, in December, 1921, in addition to the conference with Admiral Robison, witness conferred with Commander Sherman, project manager of the Bureau of Yards and Docks, Navy Department, who came to the office of the witness in connection with the plans and specifications for the first Pearl Harbor project; the witness cannot recall what, if anything, Commander Sherman said to him; whenever plans and specifications, at that or any other time, in connection with the first and the second Pearl Harbor projects were brought to the witness' office, or to the Interior Department Building, they were always brought by a uniformed officer of the Navy, never by messenger and never sent by mail; at times they reached the witness through the Secretary's office, and at times they came direct to him; he received no specific instructions that he recalls other than the phrase in Secretary Roosevelt's letter of December 9, which, quoting from memory, was to the effect that since these matters involved the war plans of the Navy, it was requested that they be treated as confidential as possible, and many subsequent papers that reached the witness'

(Testimony of H. Foster Bain.)

desk were stamped "Confidential," with a large rubber stamp.

Before leaving for the west in December, 1921, witness saw Mr. Gano Dunn, President of the J. G. White Engineering Corporation, under the following circumstances: When the plans and specifications from the Navy Department came to Dr. Bain's desk, he studied them and saw that the work would involve a large amount of engineering and that it would be necessary to have an engineering firm or engineering department construct the works. He knew the J. G. White Engineering Corporation by reputation, and had known many of the officers of that corporation in London, where the witness served on the Commission for the Relief of Belgium, the so-called "Hoover Commission"; [432—348] among the members of that commission was Mr. J. B. White, of the White Engineering Corporation, with whom Dr. Bain sought to get in touch when these plans and specifications came to his office; in this way, he was put in touch with Mr. Dunn, who was President of the corporation; there were long distance telephone conversations, and exchange of telegrams, and an appointment was made on the basis of which Mr. Dunn came down and discussed the matter with Dr. Bain.

Witness identified telegram dated December 16, 1921, from New York, addressed to witness, which, as Exhibit "RR," was introduced in evidence, and reads:

(Testimony of H. Foster Bain.)

DEFENDANTS' EXHIBIT "RR."

To H. Foster Bain,
Director Bureau of Mines,
Washington, D. C.

Mr. Ricard has telephoned Mr. White regarding possibility of J. C. White Corporation being of service in connection with some work in which you were interested. I shall be glad to come to Washington at your convenience if you will let me know when.

GANO DUNN,
President.
43 Exchange Place.

After the receipt of this telegram, witness talked with Mr. Dunn on the telephone, and made an appointment with him to come to Washington to discuss the matter, and Mr. Dunn came Wednesday, December 23, 1921. The witness had met Mr. Dunn prior to that time, but had not at the time realized it. He showed Mr. Dunn the preliminary plans, told him what his understanding was, and what the Navy wanted to do, and asked Dunn's advice as to what type of contract it would be possible to get from engineering firms, or others, to cover this work; they discussed various types of contracts, lump sum, cost plus, [433—349] fixed fee, cost-plus-percentage; they discussed the usual charges for financing and supervision, and various matters of that kind. Mr. Dunn was very generous and very free with his information, and gave

(Testimony of H. Foster Bain.)

Dr. Bain a large amount of data, and also promised to have prepared a preliminary approximate estimate of cost, which he did and which he later brought to witness before he later left Washington for the west, at which time they had a further conversation along the same general lines.

In the first conversation, Dr. Bain explained to Mr. Dunn the necessity, under the existing law and his instructions, to pay for the work with crude oil in the field, and asked Dunn whether his company could take such a contract, and Dunn replied that he thought it could be arranged, but was not sure, and that he would discuss the matter with his associates. The second conversation between the witness and Mr. Dunn occurred December 28th, and at that time Dunn told the witness that the White Company could not take such a contract unless a coincident or parallel contract was made with some oil company which would assure them a market for the oil which came to them. The witness does not recall at that time saying anything to Mr. Dunn about the Pan American Company; to the best of his recollection, Mr. Dunn did not at that time have any knowledge of the Pan American Company or any acquaintanceship with any of its officers.

Witness left Washington December 28, 1921, procuring before he left additional copies of specifications and plans from the Bureau of Yards and Docks, in their then state. Mr. Dunn and the witness had a long conversation as regards whether

(Testimony of H. Foster Bain.)

those plans and specifications were then complete and satisfactory, Dunn pointing out, what would have been clear to any man who examined the plans, that they were very incomplete, and that to make a bid on the basis of those plans would be [434—350] very difficult, except on some form of cost-plus-fee or percentage basis, and that to do the construction work at all would require very much more complete plans. The witness impressed upon Mr. Dunn the fact that the Navy had asked that the whole matter should be treated as confidential as possible, and he instructed Mr. Dunn and all of his contacts to obey the same rule, and secured Dunn's promise that that would be done.

During this same period, this subject matter was discussed by the witness with Mr. Ambrose, and he gave to Mr. Ambrose the same instructions regarding the confidential character of the subject.

In December, 1921, a Mr. Swanson was employed by the Bureau of Mines as Dr. Bain's secretary, and Swanson was on duty there at this period.

When the witness left Washington, on December 28th, he took with him a large roll of maps and plans covering the first Pearl Harbor project; his destination was Los Angeles and San Francisco; he stopped en route at Three Rivers, New Mexico, staying there over night, and seeing Secretary Fall; he told the Secretary of the plans which had been developed in rough outline, and what witness thought it would be feasible to do, and secured the

(Testimony of H. Foster Bain.)

Secretary's approval in general terms, subject to the working out of a contract. Dr. Bain told Mr. Fall that he was on his way to California to consult the large marketing companies there to see how many of them would be agreeable to entering into such an arrangement. The Secretary discussed this with Bain and approved what was being done. As regards what Dr. Bain told Mr. Fall, the former thought was feasible, at that time the witness' impression was that the thing which was feasible to do was to make an arrangement with some oil company to exchange crude for fuel oil to fill any tankage which might be built, and also agree to take any crude [435—351] oil which the Government might turn over to a contractor in exchange for tankage to be built. He told the Secretary what companies he intended to see in California. The witness knew the names of the companies; when Secretary Fall left Washington, December 1st, the witness had received no instructions from him on the subject of whom he was to see; he had nothing in writing with the names of those companies; it was simply in his mind; it will be recalled that the Department had exchange arrangements with four big companies out here at that time; and they were naturally selected by the fact that they were the companies receiving the oil; they were the Standard Oil Company, the Associated Oil Company, the Union Oil Company, and the General Petroleum Corporation, and the witness had determined in his own mind to see those

(Testimony of H. Foster Bain.)

people, and he so told Secretary Fall; as he has already testified, the witness had already before him Mr. Doheny's letter of November 28, 1921, and had talked with Mr. Cotter, so that the five companies he was coming to the coast to consult were the four above mentioned and the Pan American. Dr. Bain stayed at Three Rivers 24 hours, and arrived in Los Angeles the afternoon of January 2, 1922, leaving the night of the 3d for San Francisco. On the 3d he talked over the Pearl Harbor subject in a preliminary way with Mr. Doheny, Mr. Anderson, Dr. Norman Bridge, Mr. Danziger and Mr. Cotter, all officers of the Pan American Company, at their offices in the Security Building, in Los Angeles. At that preliminary conference, witness told the gentlemen named that the plans from the Navy for the Pearl Harbor project had been received; he spread out a set of plans on the table, left them with the Pan American officials for their consideration, and gave them a copy of the substance of the Judge Advocate General's opinion regarding the legality of it, and asked them to take the matter up as to whether they would be prepared to offer a bid covering these things; he [436—352] told them exactly what he had told Mr. Dunn about the confidential character of the subject, and he did this to all others with whom he came in contact in connection with this matter, to the best of his recollection; he was very careful to do that in every case where he had conferences on this subject.

(Testimony of H. Foster Bain.)

Dr. Bain arrived in San Francisco January 4, 1922, where he was joined by C. B. Bowie, resident engineer of the Bureau of Mines, and a few days later by A. W. Ambrose, who had been unable to leave Washington at the time witness did, and who came by way of Denver, and joined the witness in San Francisco. As a result of an appointment made by Mr. Bowie, the witness and Bowie went to the office of the Standard Oil Company of California, in San Francisco, to take up the discussion of three things: First, the exchange which had already been effected by telegraph for November and December crude oil; the exchange or possible exchange of crude oil for fuel oil on the basis as originally thought; and, third, the Pearl Harbor project.

A conference was arranged and held in the office of Mr. H. M. Storey of the Standard Oil Company, and there were present in addition to Mr. Storey, Dr. Bain and Mr. Bowie, Mr. Kingsbury, the President, and Mr. Sutro, the general counsel of the Standard; he does not remember whether Mr. Kingsbury and Mr. Sutro were present during the whole conversation; most of the conversation was with Mr. Storey. Dr. Bain showed the same or a similar set of blue-prints and the memorandum of specifications similar to the ones he had left with the Pan American Company, and gave him the same opportunity to make a bid if he cared to, or rather, asked him whether he would be willing to make a bid if it could be worked out on a busi-

(Testimony of H. Foster Bain.)

ness basis, and asked his advice as to the form in which it could be worked out on a business basis. Mr. Storey, after studying the matter over, said that the Standard Oil [437—353] Company would be interested in the exchange of oil, but that he did not want to do any construction work for the Government; that he would prefer to have his company stay out of that part of the work, and that he believed that the plan under which the construction work should be contracted to an engineering firm, and the exchange of oil contracted to an oil company, and the oil company should *agree purchase* from the engineering firm the oil which the engineering firm received in payment for the construction, was the correct plan.

Mr. Storey also stated that Ford, Bacon & Davis was an engineering firm in San Francisco with which the Standard Oil Company had had very substantial dealings; that they were very well satisfied with the work which that firm had done, and that he would recommend that firm to the Department for this work. The witness asked Mr. Storey for an introduction to the firm, and Mr. Storey called over Col. Black, of Ford, Bacon & Davis, and introduced Bain to him. The same plans were then gone over with Col. Black of Ford, Bacon & Davis, and the various gaps in the plans, the difficulties of bidding on such plans, were discussed, and the form in which such a bid might be made was discussed, and Bain left the plans with Col. Black with the understanding that he was

(Testimony of H. Foster Bain.)

going to study the matter and see whether or not his firm could make such a bid as had been outlined; and, second, he was going to prepare a preliminary estimate of cost for Bain's personal information, which he gave Bain later. Witness' recollection is that this estimate was mailed to him; but he and Col. Black had several conferences that spring. Dr. Bain saw Mr. Storey again on this visit to San Francisco, and they talked further about this matter; Dr. Bain left with the understanding that the matter was under consideration; at the time of the first visit, Mr. Sutro questioned the legality of the thing, but did not, in the presence of the witness at least, express an [428—354] opinion.

While in San Francisco early in January, 1922, Dr. Bain next saw, in regard to the Pearl Harbor project, Mr. D. M. Folsom, Assistant to the President of the General Petroleum Company, in the latter's office in the Alaska Commercial Building; he had, with Mr. Folsom, substantially the same conversation he had with Mr. Storey (as stated in this testimony above), and Mr. Folsom told Bain that he would lay the matter before Capt. John Barneson, President of the General Petroleum Company, and would arrange for a later meeting, which Bain might have with other officers of the company; on Dr. Bain's visit to Mr. Storey's office, he was accompanied by Mr. Bowie, and on the visit to Mr. Folsom's office, he was accompanied by one of the Bureau's engineers, he is

(Testimony of H. Foster Bain.)

not sure now whether it was Ambrose or Bowie, but it was one or the other; during the conversation between the witness and Mr. Folsom, Mr. Wile, the attorney for the company, came in for a few minutes.

During the same visit in San Francisco, in January, 1922, Dr. Bain saw the representatives of the Associated Oil Company, and the Pacific Oil Company, seeing them in that order, according to his recollection, though he is not certain as to the exact order of these conferences. The witness met at lunch at the Palace Hotel, Mr. Paul Shoup (the witness who testified in the case for the plaintiff "this morning," the testimony of this witness being taken in court on the afternoon of the same day that the witness Shoup had testified in plaintiff's case in chief) and Mr. A. C. McLaughlin, the latter being a long time friend of Dr. Bain; he had never before met Mr. Shoup. Dr. Bain was in court when Mr. Paul Shoup testified in this case this morning, and heard Mr. Shoup testify that the official of his company who would have a matter of this Pearl Harbor project in charge was Mr. McLaughlin; Dr. Bain saw [439—355] this Mr. McLaughlin in this courtroom before recess today, the same Mr. McLaughlin he had seen in San Francisco with Mr. Shoup. Mr. Bowie was present at the luncheon at the Palace Hotel in January, 1922, when Mr. McLaughlin introduced Shoup to Dr. Bain. This matter was discussed at the luncheon only in the most general fashion, the conver-

(Testimony of H. Foster Bain.)

sation at the luncheon had to do mainly with the condition of the reserves, their history, the necessity of drilling to prevent drainage, and the interest of the Pacific and the Associated Oil Companies in the lands, and the arrangement already made covering exchange, and the fact that the Government had under consideration larger plans for exchange. If the Pearl Harbor project was discussed in the hotel dining room, it was only in the most general terms. Subsequently, the witness had a discussion with Mr. McLaughlin and Mr. Henderson, who is also a vice president, he believes, of the Associated, and Mr. Jurs, who is the chief engineer of the Associated, in Mr. McLaughlin's office in the Sharon Building. At that time the witness laid before them a set of the blue-prints and plans, discussed with them what he had previously done and formulated his understanding of the conditions, told them the other companies that he had put this matter before, and this he did in each case that he spoke with the representatives of any of the companies; that is, when he saw the representatives of any one of the companies mentioned in this testimony, he told each one of them the others that the matter had been put before, or before whom it would be put, and he treated them all alike in that respect.

At the conference in Mr. McLaughlin's office, with the above-named persons present, there was discussed the possibility of making a satisfactory contract along the lines that the witness had in

(Testimony of H. Foster Bain.)

mind, and which he outlined to them, and Mr. Jurs was instructed by Mr. McLaughlin in Dr. Bain's [440—356] presence to make a preliminary estimate of cost. Mr. Jurs made this estimate very quickly, having it ready within 24 hours, and he gave Dr. Bain a copy, of which the witness identifies a photostat bearing in his handwriting in the corner the words "Made by Jurs in January for Associated Oil Co.," and which also bears a note lower down, in the witness' handwriting, reading "Large limit on unknown factors," which latter notation was made because Mr. Jurs stated, in handing this estimate to Mr. McLaughlin, in Dr. Bain's presence, that these were very approximate figures, due to the fact that the plans and specifications were so extremely general. Thereupon, the preliminary estimate thus made by Mr. Jurs, and identified by the witness, was marked Defendants' Exhibit "SS," and received in evidence and reads as follows:

DEFENDANTS' EXHIBIT "SS."

PRELIMINARY ESTIMATE OF COST TO
CONSTRUCT FUEL OIL STORAGE

Made by Jurs in Jan. for Associated Oil Co. (in
Bain's handwriting)

Based upon specifications and accompanying drawings Nos.—

94393 and 94398

94394 94399

94395 94400

7
3
3

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(Testimony of H. Foster Bain.)

94396 94749

94397 60660

Tank foundations, Excavations and Em-

bankments\$ 216,600

30 Tanks, erected and fitted 1,511,300

Oil and Drain Lines, upper tanks..... 68,900

Oil and Drain Lines, lower tanks..... 40,200

Oil Lines, wharf 14,300

Foam Fire Solution Lines, upper tanks.. 33,700

Foam Fire Solution Lines, lower tanks.. 28,600

Foam Fire Solution Electric Control Sys-
tem all tanks 32,000

Electric Lighting System 22,000

Oiling Embankments 33,000

Dredging 207,900

Concrete Quay Walls, Dolphin, Bulkhead
and Fill 286,900

Engineering, Superintendence, Miscella-
neous & Contingencies, 10%..... 249,500

TOTAL\$2,744,900

Large limit on unknown factors. (in Bain's hand-
writing)

JURS.

The witness continues that in the discussion with Mr. Jurs, Mr. McLaughlin and Mr. Henderson, certain of the specifications were analyzed, and Mr. Jurs' opinion was given to the [441—357] effect that changes could be made which would in no way decrease the value of the work, and which would make the cost less; Dr. Bain asked Mr. Jurs to fur-

(Testimony of H. Foster Bain.)

nish a memorandum of such changes, which the witness might submit to the Navy, and in response to this request, Mr. Jurs furnished the witness with a memorandum which was thereupon offered in evidence as Defendants' Exhibit "TT," and reads as follows:

DEFENDANTS' EXHIBIT "TT."

SUGGESTIONS TO ACCOMPANY ESTIMATE
OF COST OF FUEL OIL STORAGE.

By setting tanks farther apart, the fire hazard will be greatly reduced, and the cost of excavating lessened.

Ditch around upper side of tank foundations for a depth of one foot, and raise lower side of foundation approximately one foot, levelling out for a distance of eighteen inches from the tank.

Costs of earthwork around tanks will be substantially reduced without affecting the value of the embankments for restraining escaping oil, if the ground within the enclosures, and below the level of the tanks, is not filled.

It is believed that the placing of dry cement beneath tank bottoms will not equal the saturation of the sand fill with heavy oil. The lowering of the tanks into final position will probably dislodge the cement covering and allow it to be blown away.

The finished embankments should be sprayed with oil to prevent erosion and blowing dust.

Better protection will be assured the bottom plates

of tanks, if the under sides are carefully scaled and cleaned, and covered with three coats of graphic protective paint.

Swing pipes in tanks should be made single, and of large diameter.

Bottom plates of tanks should be $\frac{3}{8}$ " thick, and bottom angle ring should be not less than six inch, on account of tropical conditions.

The provision of a small steel sump in the bottom of each tank seems of doubtful value.

Two coats of white lead instead of one will be required to cover red priming coat on tank plates. Recommend spray application of paint.

Provision should be made for the distribution of water around tanks and embankments.

Pipe sizes should conform to standard practice. Four inch and six inch should be substituted for the three and one half inch and five inch, respectively.

Certain drawings are inconsistent in requiring eight and ten inch oil lines to be of both steel and cast iron, and some of the drain lines are required to be of both cast iron and terra cotta.

Smaller pipe lines should be galvanized, and larger lines should be dipped or otherwise protected against rapid tropical corrosion. [442—358]

The use of water should be required to insure thorough settling of foundations and embankments.

Paragraph 35 of specifications calls for all screwed pipe fittings. At least the larger sizes should be flanged.

(Testimony of H. Foster Bain.)

Paragraph 48 of specifications requires that wharf hose length be twenty feet. This should be increased to fifty feet unless other provision than is indicated is to be made. The time required for loading or unloading will be materially lessened by substituting eight inch hose for the six inch which is specified.

Derricks or other similar equipment should be provided for the expeditious handling of the wharf connecting hoses.

The in-shore loading connections on wharf are too close to shore to be of practical value.

Construction requirements will make necessary greater detail of wharf front than is afforded in the accompanying drawings.

Experience in concrete wharf construction indicates that piles and concrete exposed to action and spray of sea water should be coated with hot asphaltum to prevent spalling of concrete and corrosion of reinforcing steel.

On the foregoing exhibit, in the witness' handwriting, appears memorandum reading: "Prepared by Jurs on the basis of December plans and submitted to the Navy, H.F.B.," which memorandum witness placed on there simply as a memorandum of where it came from.

Nothing was said at the time in the January conference to which this testimony relates by the officials of the Associated Oil Company about getting the co-operation of any engineering company.

When Dr. Bain left San Francisco, he left with

(Testimony of H. Foster Bain.)

these officials of the Associated Oil Company the December plans and specifications that he has been testifying regarding.

While in San Francisco on this occasion, Dr. Bain had a further conference in the Southern Pacific Building, with Mr. Shoup, Mr. D'Heur, Mr. Lombardi, and part of the time, Mr. McLaughlin, these gentlemen all being officers of the Pacific and Associated oil companies, at which conferences the Naval Reserve No. 1 in particular was talked about, and a preliminary discussion was carried on which led to the agreement between the Pacific Oil Company and the Government with regard to an inner reserve, and area within which the Pacific Oil Company [443—359] agrees not to drill without giving six months' notice, and the Government makes the same agreement. This conversation eventuated in that agreement. There was also discussed bids which had been made for the strip lease in Section 26, Section 6 and Section 2; also Mr. Shoup suggested to the witness an idea to the effect that a lease, or an operating agreement, should or could be made between the Government and the Pacific Oil Company, covering all of the boundary lines, at least, and also the other land in Reserve No. 1, on a basis which would provide that the Pacific Oil Company, whenever it drilled a well on its land, would bring in a corresponding offsetting well on the Navy's land adjacent. The present recollection of the witness is that this was also to cover an agreement that the company would drill where the Navy

(Testimony of H. Foster Bain.)

directed, in addition. This did not result in a negotiation, but was a conversation, and the witness' recollection is not entirely clear on it. Dr. Bain urged that the only objection to such a plan would be that, however carefully the work might be inspected and watched, if at any time a large well came in on the Pacific Oil Company's land, and a small well on the Navy's land, we would be subject to criticism, and that, correspondingly, if there were large wells brought in on the Navy land and small wells on the Pacific land, Mr. Shoup and his staff would be subject to criticism, and that it seemed to witness unwise to attempt to make such an arrangement, but he undertook to put it before the Secretary of the Interior, which he did on his return. Either Mr. Bowie or Mr. Ambrose were present at this conference in addition to the officials of the oil company above named. At that conversation, according to the witness' recollection, the Pearl Harbor project was only referred to in very general terms, for the reason that he had had a specific and detailed conversation with Mr. McLaughlin who told witness that if any bid was made by either the Pacific Oil Company [444—360] or the Associated Oil Company on the Pearl Harbor project it would be made by the latter. Prior to the time Dr. Bain left San Francisco, in January, 1922, Mr. McLaughlin did not say anything to him as to whether his company would or would not bid on the Pearl Harbor project and the matter was left under consideration. Before leaving San Francisco, Dr.

(Testimony of H. Foster Bain.)

Bain saw Commander Landis of the Navy on this Pearl Harbor subject, showed Landis the plans, and told him what was under way.

From San Francisco, Dr. Bain returned to Los Angeles, where, pursuant to an appointment which had been arranged by Mr. Folsom, he met at lunch in the California Club Mr. Folsom and Mr. Barneson, Jr., officials of the General Petroleum Corporation, and one other officer of the company, and Mr. Wile, the company's attorney. On this occasion, Mr. Ambrose was with the witness. They did not get very far in discussing the Pearl Harbor matter, because Mr. Wile promptly announced his opinion that it was illegal, and that he would advise his company to have nothing to do with it. He said that if the power to exchange went as far as the Judge Advocate's opinion indicated that it did, then it was an unlimited power to exchange, and that it would give the Navy authority to exchange oil for a battleship, if they desired to do so, and that he was satisfied that that was without the intent of Congress. He furthermore stated that if the Judge Advocate-General was wrong, that there would be no statute of limitations to protect his company. The witness had given to the officers of all of the oil companies with whom he had had conferences, a copy of the abstract of the opinion of the Judge Advocate-General of the Navy, which appears in the letter of December 14, 1921, from the Navy to the Interior (Exhibit No. 66); in fact, that letter was his credentials to the various companies; and Mr.

(Testimony of H. Foster Bain.)

Wile had before him that abstract of the opinion of the Judge Advocate-General or showed a knowledge of it, in the [445—361] discussion at the California Club referred to above. The witness had already left copies of the Pearl Harbor plans with Mr. Folsom, but at his request they were later transferred to Col. Black, of Ford, Bacon & Davis, so that the latter might have a duplicate set. The conversation in Los Angeles closed the matter, so far as the General Petroleum Corporation was concerned, the upshot of that being that the officials of that company told Dr. Bain they would not be interested further.

On this same visit to Los Angeles, Dr. Bain called on the officers of the Union Oil Company at their building, being accompanied by Mr. Ambrose and Mr. Bowie; Mr. Stewart and Mr. St. Clair, officers of the Union Oil Company, were seen; witness does not know what their official positions were except that they were responsible officers of that company. Some little time was spent at the Union Oil Company's offices, and while there, they also met Mr. Clark, an officer of that company, and during the conversation with Mr. Clark and Mr. St. Clair, another officer of the company, Mr. Gregg, came in for a few minutes. In the conference with the officials of the Union Oil Company, there was first discussed the exchange arrangement which already had been made for the November and December oil, and the plans for exchange for the following year, and the witness told them that on account of the request of

(Testimony of H. Foster Bain.)

the Navy, as regards the Pearl Harbor project, the plans for the following year were to be changed; the witness had with him a copy of the Navy Department's letter of December 14th (Exhibit 66), a roll of the maps and plans and specifications similar to those he had shown the officers of the other companies; in that conversation with the Union Oil Company officials, as regarded the way the thing might be worked out, they said something to Dr. Bain, he cannot remember the phraseology, but in substance that they would be interested [446—362] in the exchange of oil, but did not want to take part in any construction program; the witness does not recall any specific reasons they gave; plans were not left with the officials of this company for the reason that it seemed to the witness improbable that they would be sufficiently interested to warrant it.

On the occasion of this visit to Los Angeles, the witness again saw Mr. Doheny, Mr. Anderson and Mr. Cotter, and perhaps other officials of the Pan American Company, in their office in the Security Building. He had on his previous visit left copies of the plans with the officers, with the suggestion that they reach a decision, and on this second visit he was told by Mr. Doheny that they would be glad to offer a bid on the proposals; the other men, whose names have been given by the witness, were present at the conference, which was not one where they sat down around a table.

The matter of Pearl Harbor project was not taken

(Testimony of H. Foster Bain.)

up with anybody else at this visit of the witness to Los Angeles, and San Francisco, except those mentioned in his testimony above.

Dr. Bain returned to Washington, arriving there January 22d or 23d, 1922; he was accompanied back to Washington by Mr. Ambrose, and on the train they talked over the Pearl Harbor subject, but did not, en route, approach any other oil or engineering company. Shortly after his return to Washington, Dr. Bain met Secretary Fall and Admiral Robison in the Secretary's office, and told them the result of these various conversations with these various oil companies, and that his judgment was that the Standard Oil Company would make a bid in connection with Ford, Bacon & Davis, in some form; that the Associated Oil Company would make a bid, and that the Pan American Company would make a bid; in other words, that he had secured a number of firms to make a bid upon the proposal. He told them of the objections which had been raised, of one [447—363] kind and another, and that he thought a proposal could be framed upon which the objections could be eliminated by a plan—the objections being such as Mr. Jurs' memorandum already in evidence—to engineering features in the plan; the objections already mentioned to the wide-openness of the specifications, the fact that it would make it extremely difficult for anyone to bid a lump sum on construction; that so many unknown factors existed; the objection Mr. Wile made to the legality of the proposal, and the questions Mr. Sutro had raised as to

(Testimony of H. Foster Bain.)

that legality. When the witness made this report to Secretary Fall and Admiral Robison, Mr. Ambrose was also there, according to witness' recollection. As regards the question of legality, Secretary Fall stated that the Judge Advocate's opinion was sound, that the power to exchange was broad enough for this purpose, and that Mr. Wile was perhaps advising his client on the basis of a cautious lawyer who desired to keep his client from getting into any possible trouble. The criticisms of the plans and specifications which the witness has mentioned were taken up with the Bureau of Yards and Docks of the Navy; the witness presented those things to the Navy, but whether he did so through Admiral Robison at this conference, he cannot say.

Following the last-mentioned conference, the witness drew up the proposals of February 15 (Exhibit No. 74); prior to that time he saw Lieutenant Keating and Admiral Robison, and perhaps Commander Sherman, though he is not clear about seeing the latter; his recollection is that he met Admiral Gregory later. Lieutenant Keating had been assigned as liaison officer, and reported to witness and acted as the agent for taking things to the Navy Department, and bringing back their opinions, and he discussed with the witness various points, such as those raised in the Jurs' memorandum; he also, at that time, began to prepare an estimate of cost; the witness [448—364] advised Keating of the estimates of costs which witness had at that time from Mr. Jurs and Mr. Dunn; this was all prior to

(Testimony of H. Foster Bain.)

February 15, 1922. He thinks he received the estimate from Col. Black later. Subsequent to February 15th the estimate of the Bureau of Yards and Docks was made. There was taken up prior to February 15th, with Commander Sherman technical details regarding tank construction. Witness made known to Admiral Robison and Lieutenant Keating the criticisms which had been made on the Pacific Coast with regard to what he had described as the wide-open character of the specifications and plans in their then state.

Before sending out the invitation for proposals which bears date February 15, 1922 (Exhibit No. 74), Dr. Bain had a further talk with Secretary Fall, telling the Secretary the substance of the proposal which was being prepared, and the persons to whom it was to be sent, and received his approval. He did not, so far as he remembers now, show the Secretary the written paper, and certainly Secretary Fall did not sit down and read it over and carefully criticise it. Dr. Bain saw Judge Finney frequently before sending out the February 15, 1922, invitation for proposals. Secretary Fall told Judge Finney and the witness to go ahead and handle this matter; that he was going to be busy on other things; witness does not remember the date on which this was said, but it was prior to February 15, 1922.

Under date of February 15, 1922, the witness sent a letter from his office in Washington to the Standard Oil Company, Ford, Bacon & Davis, the

(Testimony of H. Foster Bain.)

Associated Oil Company, the Pan American Company, the J. G. White Engineering Company, the letter of invitation for proposals accompanying the same, as sent to each addressee, being identical (Exhibit Nos. 73 and 74).

Thereupon, the witness was shown the original of this [449—365] February 15, 1922, communication, received by the Pan American Company, on which in handwriting appears this notation: "Copies sent to the J. G. White Engineering Corporation. H. F. B.," and he testifies that the same is in his handwriting. Across the top of the said exhibit in handwriting appear the words, "Attention J. J. Cotter." The witness is unable to testify as to the handwriting. He is familiar with the handwriting of Mr. Swanson, who was at that time his secretary, but looking at this notation on the February 15th letter, he cannot say whether or not that is Mr. Swanson's handwriting. This original of the February 15, 1922, invitation for proposal was thereupon received in evidence as Defendants' Exhibit "UU," and, except for the notations here testified to and set forth, is the same as Plaintiff's Exhibits 73 and 74.

From San Francisco, California, under date of January 11, 1922, Dr. Bain wrote to Mr. Dunn of the White Company, plaintiff's Exhibit 72, and subsequent to his returning to Washington, but prior to February 15, the witness saw Mr. Dunn frequently, and discussed the feasibility of carrying out this work, and various difficulties and details

(Testimony of H. Foster Bain,)

with regard to it; Dunn again urged the incompleteness of the specifications, and the necessity of having more data upon which to make a satisfactory bid. After Dr. Bain's conversation with Mr. Storey in San Francisco, and the bringing in of Ford, Bacon & Davis to Mr. Storey's office, and the suggesting that these two companies might work together in handling this matter, it occurred to the witness that it would be a good plan if, instead of Mr. Doheny's company handling this through their regular engineering staff, they could make a *contact* with a general engineering firm, and so he took the liberty of suggesting to Mr. Doheny that, having had a previous conversation with Mr. Dunn regarding the matter, he knew that the White Engineering Company [450—366] was interested, and he wrote to Mr. Dunn the above-referred to letter of January 11, 1922, plaintiff's Exhibit 72; he told Mr. Doheny about the J. G. White Company, either the first or second visit to Los Angeles in January. As to what further he did, if anything, about bringing together the representatives of the Pan American Company and Mr. Dunn, he saw Mr. Dunn and Mr. Cotter together, and is not certain but that they met in his office or that perhaps he did introduce them, but he has no recollection on that point.

Dr. Bain was not in Washington on February 17, 1922, but about February 20th there came to his attention the telegrams and letters dated February 17th (Exhibit No. 81), sent by Assistant

(Testimony of H. Foster Bain.)

Secretary Finney to the addressee of Bain's letter of February 15th, and the letter of February 21st, 1922 (Exhibit No. 86) amending Mr. Finney's letter of February 17th, was drafted in Dr. Bain's presence, and as a result of a conversation between the witness and Secretary Finney. As regards how this came about, the witness testifies that the first plan proposed in the February 15th proposals contemplated a contract with cost-plus-fixed-fee basis. That plan he had adopted for the reason that the plans and specifications submitted by the Navy would not permit a lump sum bid at any reasonable price, and that there was not the data there upon which one could make a definite contract bid, to construct, so he proposed the plan shown which contemplated that all the work done under this contract should be done under the advice and direction of the Navy, and in the wording which he put into the proposals, in his judgment, at that time and since, he fully safeguarded the Navy's interests. Witness realized that any contractor would need pay for supervision and correlation, and so he proposed that they should bid a fixed amount in advance as the total of their compensation. It [451—367] seemed to him that he had safeguarded the Navy's interests, and had done the best he could with the plans that were before him. While witness was away, Admiral Gregory wrote a memorandum in protest against any cost-plus contract; based upon his experience, and when witness returned, Admiral Gregory's

(Testimony of H. Foster Bain.)

memorandum and Secretary Finney's letter of February 17th were brought to his attention. In looking over the letter of February 17th, Dr. Bain saw that as it was worded, it would mean that the construction work only went forward as crude oil became available. The consequence would be that there would be inevitably very expensive construction work, because the rate of construction work would vary from time to time, and could not be adequately or accurately foretold. It was going to be a very expensive job in that way, so, on pointing that out, Secretary Finney sent out the letter dated February 21, 1922, (Exhibit 86), which took out of the proposals the phrase, "But not exceeding the value of the royalty oil already delivered." Prior to the sending out of Exhibit 86, and subsequent to the time Dr. Bain became acquainted with the contents of Exhibit 81, and of Admiral Gregory's memorandum of February 14th (Exhibit 79), he talked over the subject with Admiral Robison, Admiral Gregory and Lieutenant Keating of the Navy. After February 21st, and before March 1st, 1922, there being Pearl Harbor plans bearing the latter date, Dr. Bain had conferences or talks with Secretary Fall, and with Admiral Robison, with Secretary Finney, with Mr. Dunn, with Mr. Cotter, with Admiral Gregory, with Lieutenant Keating, and Mr. Ambrose and members of his own staff, and possibly others that he does not now remember, on the subject of the basis on which the proposals were to be received. Mr. Dunn came

(Testimony of H. Foster Bain.)

to see him during that time; he does not remember positively whether Dunn was accompanied by Cotter; they were together in his office frequently, and sometimes each came alone. Mr. Dunn was very much [452—368] disturbed at the second proposal, the February 17th proposal, and in substance told witness that it was very doubtful whether he could advise his client to make a bid on those proposals, because they required a lump-sum bid, when there was not sufficient data to permit such a bid, and that any lump-sum bid made on those proposals would have to be so high, to protect the proposer, that it would be unfair to the Government. At that time, as witness learned from Mr. Dunn, the latter was having conferences with Admiral Gregory and Admiral Robison. Between February 21st and March 1st, the witness went down to Admiral Gregory's office, and met him and some of the officers of his staff, and there was talked over the difficulties involved in the attempt to get a lump-sum bid on the inadequate information given in the proposals. Admiral Gregory said he appreciated the situation fully; he stated that the Bureau of Yards and Docks had a large amount of additional information, and that there was more information that he could get by cable, and that it would be possible to draw new plans and specifications, much more detailed, which in his judgment would permit of a lump-sum bid, and it was agreed between Admiral Gregory and Dr. Bain, and approved by Admiral Robison and

(Testimony of H. Foster Bain.)

Secretary Finney, that new plans and new proposals should be prepared; these plans were prepared and dated March 1st, 1922, and sent to witness' office, and under date of March 7, 1922, the revised proposals were sent out (Exhibit 91, 92).

After invitations for proposals are sent out by Government departments for bids, and while they are pending, and before the bid date, prospective bidders very frequently come to the department to discuss matters pending; there is nothing unusual about that at all that the witness knows of.

Dr. Bain had correspondence with Mr. McLaughlin of the Associated Oil Company prior to sending out on March 7th, as he has testified, of the revised invitations for proposals [453—369] upon the Navy's final specifications; from his office in Washington, under date of March 1, 1922, he wrote to Mr. A. C. McLaughlin, Associated Oil Company, Sharon Building, San Francisco, a letter, which, as Defendants' Exhibit "VV," was read in evidence and is as follows:

DEFENDANTS' EXHIBIT "VV."

My dear Mr. McLaughlin:

I have been trying to get time for some days to write to you. I am afraid you will have been very much confused by the various letters and telegrams that have reached you with reference to the naval storage matter. After the original plan had been approved and sent out the naval officers developed such strong feeling in favor of a lump sum bid that

this Department felt it advisable to suggest changes, as was done. Meanwhile, the Navy has collected a great deal more information than had first seemed possible to get. The detailed plans and specifications are to be made available to us today. Secretary Finney and I plan to start at once on the preparation of the general covering letter which will be sent out from here and which will supersede all earlier communications. This will, of course, come to you. The present plan is while asking for lump sum bids to cover the whole job is not to exclude the possibility of other forms of contract. In preparing a plan somewhat along the lines that you and I had discussed, it had seemed to me that it would be necessary for the protection of whoever took this contract to provide some payment for engineering supervision and correlation. That is why it was written in the original contract that the work might be done by a cost plus fixed fee basis. Undoubtedly it will be possible to sub-contract 75%, and perhaps all of the engineering work, but even so I think it is proper and right that the one who assumes the final responsibility for the whole matter should be in a position to protect himself so far as he might find it desirable to do so by using his own engineers or a general contracting firm. [454—370] In that connection, as you perhaps know, the Standard suggested Ford, Bacon and Davis as a firm with which it would be glad to work, and a similar relationship has been built up between the E. L. Doheny Company and the J. G. White Engineering Corporation. Today the Navy Department

referred to me the Stewart Engineering Corporation of New York, and the President, Mr. Stewart, told me that he understood that you were considering undertaking the work and were at least not known to have formed any such alliance with any general engineering corporation. I confirmed this and suggested to him that if he were interested he might write you direct and present his credentials and his reasons for believing he could be useful to you. He doubtless will do so. I know nothing about this corporation, but will be glad to be of any assistance to you in looking it up, although I assume you have your own channels for doing so that will be more satisfactory.

There are a good many people who hope to be considered on the sub-contracts if not the general work. One of them is the Western Pipe and Steel Company, which you know well and which is especially anxious to handle the tanks. The Hawaiian Dredging Company, Ltd., affiliated with the San Francisco Bridge Company, will be in an especially favorable position to consider the harbor work. If it should develop that the main contract goes to you, I will, of course, be glad to give you additional names of this sort as they come to me.

The matter is really proving a very complex one, mainly, as I see it, because of the insistence of the Navy in getting away from any cost plus basis. Please, however, have patience with us and we will hope to get it in such shape that will warrant you making a proposal along lines likely to be satisfactory. I am writing this personal letter so you

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(Testimony of H. Foster Bain.)

won't think you are in any way losing position by not being here on the [455—371] ground. It is possible that before it is actually closed it may be worth your while for you or someone representing you to come here. If so, I will notify you.

I am very glad the California people have come on to consider specifications, and I understand their conferences have been entirely satisfactory. I think you and I may look with some sense of congratulation on having got that matter started in the right direction.

With best wishes, I am,

Cordially yours,

H. FOSTER BAIN,

Director.

The paragraph in the foregoing exhibit commencing, "I am very glad the California people have come on to consider specifications," has no reference to the Pearl Harbor matter; the rest of the exhibit has.

In reply to the foregoing, the witness received at his office in the Bureau of Mines at Washington, letter dated at the Associated Oil Company's general offices in San Francisco, March 9, 1922, which he identifies, and which, as Defendants' Exhibit "XX," was read in evidence as follows:

DEFENDANTS' EXHIBIT "XX."

My dear Bain:

I have your very interesting letter of March 1st and am very much obliged to you for it. Not be-

ing familiar with the details of how this matter is being worked out in Washington, we are naturally more or less perplexed at this end.

There are several factors which seem to me to be of importance. In the first place, if lump sum bids for construction of the facilities and filling of the tanks are made by the oil companies, there will be introduced a very difficult factor for us to deal with in that we will be asked to bid on something which is entirely out of our line. It is true, [456—372] of course, that we can work with some engineering firm, but as I see it, our bid will then resolve itself into their bid. Again, there may be differences arise as between the Navy and the contractor for which we would be responsible and would be placed between the Navy and the contractor where we would surely be the "goat." You realize, of course, that in placing a bid to perform under these conditions, we would have to take into consideration all of these possible contingencies which would naturally increase the cost of the work to the Government.

Again, the inclusion of royalty oil from Reserve No. 1, as well as from Reserve No. 2, means that the successful bidder will have to duplicate the gathering facilities and the main line facilities of the Standard Oil Company which is the only Company now taking oil in quantity from that Reserve. It is true that we have a short six inch line from Reserve No. 1 which connects with the Union Oil Company's main line near Shale, but I do not believe that this line would be adequate to handle the situation, not only because of its limited capacity, but

also because it ends nowhere. These facts being well known would naturally result either in the addition to the bid of the cost of these facilities, or the Standard Oil Company getting the business. Since production in Reserve No. 1 is on the wane, I believe that to duplicate the Standard Oil Company's facilities in that area would be an economic waste.

The point that I am particularly anxious to bring out is that this proposal naturally resolves itself into two parts, (first) a bid to be made by an Engineering Company for construction of certain definite specified facilities, and (second) a bid by an Oil Company on the purchase of certain amounts of Government royalty and the sale to the Government of a certain amount of fuel oil delivered into facilities at Pearl Harbor. I cannot help but feel that the Government would save money [457—373] and at the same time obtain better results by keeping these two proposals entirely separate and distinct. This, of course, would be done by dealing with an Engineering firm in the one case and with an Oil Company in the other. The reason I believe the Government will save money is that an Oil Company, in my judgment, can make a closer figure in dealing only with the proposal that involves the factors which are well known and familiar to us. The minute we begin dealing with unknown and unfamiliar factors, it is necessary for us to make liberal allowances for any unforeseen contingencies which may arise.

(Testimony of H. Foster Bain.)

I shall be very glad to go to Washington and discuss this matter if I can be of any service.

Yours very truly,

A. C. McLAUGHLIN.

The witness replied to the foregoing by letter dated Washington, March 23, 1922, addressed to A. C. McLaughlin, Associated Oil Company, San Francisco, which letter he identifies, and the same is read in evidence as Defendant's Exhibit "YY," and is as follows:

DEFENDANTS' EXHIBIT "YY."

My dear McLaughlin:

I have hesitated to adopt the suggestion in your letter of March ninth relative to asking you to come on here and discuss the proposed oil exchange. It may be that before the matter is closed it will seem worth while to send you a telegram, and this is by way of warning.

I realize the difficulties you suggest in your letter, and I believe a telegram has already been sent to you indicating that you can, if you choose, bid on the basis of only the oil from No. 2, and with the idea of doing nothing but handling the exchange and the filling of the tanks. This will be all the easier since the Foundation Company is preparing to make [458—374] a separate and distinct bid on the provision of the tanks and storage facilities. It is possible that a similar bid will be made by Ford, Bacon and Davis. You might check this information at the San Francisco offices of these

companies. If I find any other company is likely to make such a separate bid I will let you know. I happen to know that at least one bid will be made covering the whole project by a responsible company, but it is entirely possible that a combination of two separate bids will prove to be better.

As I understand it, you are primarily interested in getting hold of the oil from reserve No. 2. It is entirely possible that even if some one else gets the contract you can purchase this oil, though if you deal indirectly this way the chances are the Government would not get quite the same benefit as if the exchange is made directly with you.

I sincerely hope it may prove feasible for you to make a proposal. I am sorry the matter has been so much delayed. This was necessary in view of the insistence that opportunity be given for getting data in Honolulu necessary to making a lump sum bid. I am very anxious that the delay shall not lead to the matter being discussed, at least publicly, since a complicated thing like this is much better presented as a definite accomplishment than as a project.

I had a very pleasant little visit with Mr. Shoup when he was here, and I look forward to having one with you either here or in California before long.

Cordially yours,

H. FOSTER BAIN, Director.

Thereupon counsel for plaintiff produced and the defendants offered in evidence telegram dated Washington, March 30, 1922, signed by H. Foster Bain,

(Testimony of H. Foster Bain.)

Director, to A. C. McLaughlin, [459—375] Associated Oil Company, San Francisco, California, and reading (Defendants' Exhibit "ZZ"):

DEFENDANTS' EXHIBIT "ZZ."

Desirable you come Washington at once concerning oil exchange. Please wire date expected arrival Important.

BAIN.

Counsel for the Government also produced and there was offered in evidence as Defendants' Exhibit "AAA," telegram dated San Francisco, California, March 31, 1922, addressed Dr. H. Foster Bain, Bureau of Mines, Washington, D. C., which was read as follows:

DEFENDANTS' EXHIBIT "AAA."

Your telegram planning to leave San Francisco next Thursday arriving Washington Monday.

A. C. McLAUGHLIN.

Referring to Plaintiff's Exhibit 95, signed Charles M. Black, the witness testifies that is the Col. Black of Ford, Bacon & Davis, who he met in San Francisco in January, 1922; when he received that letter, dated March 3, 1922, he sent the two sets of blueprints and specifications therein requested to Col. Black, under cover of Exhibit 96.

During the period which elapsed prior to the opening of the bids, the witness received from the Navy a list of persons and companies recommended for consideration for sub-contracting work, and he

760 *Pan American Petroleum Company et al.*

(Testimony of H. Foster Bain.)

sent copies of that list to each of the companies that had been asked to make proposals, doing this under cover of identical letter dated March 7, 1922, addressed to the White Engineering Company, the Standard Oil Company, the Associated Oil Company, Ford, Bacon & Davis, and the Pan American Company, one of which letters is Defendants' Exhibit "WW," and was read in evidence, and reads as follows: [460—376]

DEFENDANTS' EXHIBIT "WW."

Dear Sir:

The firms listed on the accompanying sheet have been suggested by the officers of the Navy Department as among those which might probably be asked to bid on sub-contracts in connection with the Navy Oil Exchange. The four marked with a cross have asked me to see that they have such opportunity and I undertook to see that their request should be laid before those to whom the proposals were sent.

You will doubtless recognize in the list the names of a number of strong and experienced concerns. The Western Pipe and Steel, Pittsburg Des Moines, and U. S. Steel Products have, to my personal knowledge, had good experience in building oil tanks. I shall be glad to be of any assistance possible in looking up these or any other firms applying to you in connection with this matter.

Cordially yours,

H. FOSTER BAIN,

Director.

(Testimony of H. Foster Bain.)

Enclosure No. 74305, which was sent out with the foregoing exhibit, consisted of a list of names as follows:

Charles C. Moore and Co., Sheldon Bldg., San Francisco, Cal.; Triest Contracting Corporation, 126 East 59th St., New York, N. Y.; Hawaiian Contracting Co., 1005 Wells Fargo Building, San Francisco, Cal.; The Frederick Snare Corporation, 8 West 40th St., New York, N. Y.; Puget Sound Bridge and Dredging Co., Seattle, Washington; Union Construction Co., 351 California St., San Francisco, Cal.; F. W. Lord Construction Co., 105 West 40th St., New York, N. Y.; John E. Danforth Co., 70 Ellicott St., Buffalo, N. Y.; Stewart Engineering Corporation, 186 5th Avenue, New York, N. Y.; U. S. Steel Products Co., George W. Kirkley, Agt., Wilkins Bldg., [460½—377] Washington, D. C.; Pittsburgh Des Moines Steel Co., Curry Building, Pittsburgh, Pa.; Chicago Bridge and Iron Co., 105th and Throop Sts., Chicago, Ill.; McClintic-Marshall Co., Pittsburgh, Pa.; Reter-Conley, Pittsburgh, Pa.; American Bridge Company, 30 Church St., New York, N. Y.; Western Pipe and Steel Co., San Francisco, Cal., Frederick Thompson, Agt., Willard Hotel, Washington, D. C.

In the foregoing list, a cross-mark appears alongside of four names, and the witness testified that is the cross-mark he made reference to in his above quoted letter of March 7, 1922. The clause providing for alternate proposals in the invitation for bids sent out under date of March 7 was composed by

(Testimony of H. Foster Bain.)

the witness and Secretary Finney worked with him in composing it, and no one else did, that he knows of. He does not recall any talk with the Navy officials about it. He does not recall anybody from the Pan American Company asking that that request for alternate proposals be included in that invitation. Mr. Dunn did bring out to witness the importance of making some form of proposal which would permit the widest possible bidding, and it was on that account, and also in accordance with Dr. Bain's own judgment, that in making the proposals of March 7, Secretary Finney and the witness included the clause referred to. As regards the suggestion which Mr. Dunn made, which he said he considered would allow the widest possible bidding, it was that there were still unknown features as described in the more detailed plans which the Navy had given, and that it might be impossible within the time limit, or inadvisable in any event, to attempt to make any lump sum bid covering every item, and in accordance with that, there was left the opening for an alternate proposal. Neither Mr. Dunn nor anybody for the Pan American Company submitted to the witness, or to his knowledge, a form of alternate proposal invitation. [461—378]

The occasion for the sending by the witness of his telegram of March 30th, 1922, Exhibit "ZZ," to Mr. McLaughlin, was that there were a great many inquiries at Dr. Bain's office from various contracting firms with regard to this project, and a certain amount of information about it became cur-

(Testimony of H. Foster Bain.)

rent in engineering circles, through inquiries being made by sub-contractors; among the critical problems in this contract was that with regard to the harbor work, and there was one firm, the Hawaiian Dredging Company, that was better prepared than any of the others to take up that work, because of having equipment on the ground; about this time, Mr. Dillingham, who was a responsible official of that company, had been in Washington, and witness had talked with him; it seemed to witness that it was desirable for Mr. McLaughlin to get in contact with all of these people, and have the best possible chance to bid; it had come to Dr. Bain's attention by that time that the Hawaiian Dredging Company, by reason of its location, and experience in Hawaii, was in better position than any other company to sub-contract for that part of the work, and he knew that that company was in contact with Mr. Dunn of the White Company, having been so told by Mr. Dillingham and Mr. Dunn.

Sometime in March, 1922, a representative of the Chicago Bridge & Iron Company called on the witness; this representative came in and said that he understood that the Department of the Interior was taking bids on the construction of tanks for the Navy at Pearl Harbor, and that his firm was an experienced firm, and would like to have an opportunity to bid on the contract; Dr. Bain told him that the contract would be made under the terms of the law which provided for payment in crude oil, an exchange arrangement, and that proposals were being

(Testimony of H. Foster Bain.)

asked, therefore, from oil companies or engineering companies that had made arrangements to work with oil companies [462—379] on such contracts. The witness further told the Chicago Bridge & Iron Company's representative that the name of his company had already been given to each proposer, or each person who had been asked to propose, as a concern which might be considered for subcontracts on the tanks; he went away apparently satisfied; referring to the correspondence of the 11th and 12th of April to the Department of the Chicago Bridge & Iron Company, and to the reference therein made, the communication on that subject to Senators William B. McKinley and Medill McCormick, Senators from the State of Illinois, the witness knew them, and wrote to them under date of April 12th and 14th, respectively, letters which, as Defendants' Exhibits "BBB" and "CCC," were thereupon introduced in evidence and read as follows:

DEFENDANTS' EXHIBIT "BBB."

Department of the Interior,

Bureau of Mines.

April 12, 1922.

Hon. William B. McKinley,

United States Senate.

My dear Senator: In response to the request made today by your secretary, I am sending you the following information relative to the contemplated construction of naval oil storage tanks:

Investigations made by this bureau brought out

the fact that the Government was suffering a considerable loss of oil in the two California naval Petroleum through decreased gas pressure and drainage of oil. This necessitated the adoption of a policy by the Interior Department of drilling these fields and storing the oil for the future needs of the Navy at such a place as the Navy would direct. Honolulu was selected by the Navy.

The program outlined by the Interior Department calls for the erection of storage tanks at Honolulu filled with a specified amount of fuel oil, in return for which there would be [463—380] exchanged a certain amount of crude oil from the California fields. In asking for bids under this program, the only companies with which the Interior Department could deal were those which are in a position to accept crude oil in exchange. Bids were asked on the basis that the bids would be made in number of barrels of crude oil in exchange, not money in payment. Plans and specifications were sent only to those companies which would state their intention of bidding on the entire project and on the basis stated above. It was realized that this construction work would involve considerable engineering work which one company might not be able to handle, and it was provided, therefore, that these portions of the work could be done by subcontract let by the major bidder, but the concern which bid direct to the Government would be held responsible. There was prepared a list of engineering concerns with which the Navy Department had been in con-

tact and for whom they had done satisfactory work. This list was sent as a suggested list of subcontractors to the concerns which signified their intention of bidding on the entire project. The Chicago Bridge & Iron Co., for which your inquiry was made, was on this list.

When the representative of the Chicago Bridge & Iron Co. called at this office he was given a list of all concerns, which, it was expected, would submit an entire bid and it was suggested that he get in touch with any or all of them.

Had the Chicago Bridge & Iron Co. been in a position to bid on the entire project and accept oil in exchange, I would have been more than glad to have given their representative a set of plans and specifications. Naturally, when they could not do this, I could not let them have a set of plans, as it would not have been proper to let them have the plans when they could not bid. Incidentally, this action was not taken [464—381] particularly against the Chicago Bridge & Iron Co. In each instance, where a firm was interested in a portion of the contract, the representative of the firm was given the list of concerns which had signified an intention of bidding on the entire project and it was suggested that they communicate with these firms with reference to the portions of the work which would be done by subcontract.

I trust that the above will enable you to inform the Chicago Bridge & Iron Co. that this matter was

handled without discrimination against any individual concern.

Sincerely yours,

H. FOSTER BAIN,

Director.

DEFENDANTS' EXHIBIT "CCC."

Department of the Interior,

Bureau of Mines.

April 14, 1922.

Hon. Medill McCormick,

United States Senate,

Washington, D. C.

My dear Senator: I hand you with this telegraphic correspondence between the Chicago Bridge & Iron Works and Secretary Fall, with a memorandum that the Secretary gave me.

I think that when the Chicago Bridge & Iron Works understand the situation they will be satisfied. This department on behalf of the Navy plans to let contracts and make arrangements whereby the naval reserves would be protected by drainage through private lands. Part of this policy involves the taking of the crude oil in the field, which is not itself available for naval use, and exchanging it for fuel oil, which suffers very little indeed from evaporation, and placing that in steel tanks as a reserve for the Navy. This has seemed to both departments to be the best way to carry out the intention of Congress that the lands should furnish a reserve of oil for naval use. Since no specific

(Testimony of H. Foster Bain.)

appropriation had been made for building the tanks, our exchange arrangements cover the trading of oil in the field for fuel oil in tanks, and [465—382] incident to this the oil companies with which the departments have been negotiating have in turn been asking for bids from various companies. The plans and specifications have been furnished to no construction companies, except those that were acting in immediate co-operation with the particular oil companies proposing to assume the responsibility for the exchange. I did, however, furnish to each of these companies a list of various responsible engineering and construction firms that had done good work for the Government and whose work both to the Interior and Navy would be satisfactory. In that list was the name of the Chicago Bridge & Iron Works. This was done approximately six weeks ago, so that so far as I could do so I endeavored to secure for that firm a part in the business. The department is not itself taking bids on these subcontracts.

Trusting that this will clear up the situation, and thanking you very much for taking it up with the department promptly, I am,

Cordially yours,

H. FOSTER BAIN,

Director.

After invitations were sent out under date of March 7, 1922, and prior to the receipt of bids, Mr. Dunn and Mr. Cotter talked to the witness regarding the necessity for an alternate proposal. He

(Testimony of H. Foster Bain.)

cannot discriminate now between conversations before and after March 7; he had no talk with Cotter before the bids were opened, as regards what sort of a bid the Pan American was going to put in, except that Cotter told him that they would put in a lump sum bid, and an alternate one.

Following the exchange of telegrams between the witness and Mr. McLaughlin of the Associated Company, dated March 30 and 31, and prior to April 15, Mr. McLaughlin came to Washington and saw the witness; Mr. McLaughlin arrived there within two weeks—it may have been within a week—of the opening [466—383] of the bids, and stayed there until after the bids were put in and he was formulating his bid in final shape during that time; and he asked Dr. Bain about the interpretation of various points, and the witness gave Mr. McLaughlin, to the best of his ability, what he thought would be the interpretation of the Department on things. The witness does not recall a meeting at his office at which Cotter of the Pan American, McLaughlin of the Associated, Ambrose and himself were present, when the formula for the exchange of crude for fuel oil was discussed; he does not recall that they were ever all together at one time; he recalls conversations with each of them, and by groups; that was one of the considerable difficulties that had to be worked out, the fact that we wanted to provide for an adjustment of the proposal sum to correspond to changes in price of crude, in price of fuel, and to correspond to the

(Testimony of H. Foster Bain.)

differences in the grade of crude which might be delivered. The question of the working out of a basis or formula to carry into effect what the witness has just suggested, was gone over with both Mr. McLaughlin and Mr. Cotter.

As already stated, a number of representatives of different construction and engineering companies came to Dr. Bain's office, and asked for plans and specifications, with a view of making bids; among these was the Foundation Company, which is a large engineering concern, which builds all kinds of structures in various parts of the country; one of their representatives came to the office of the witness, and asked for plans and specifications with a view to bidding. Dr. Bain told him exactly what he told the Chicago Bridge & Iron people, that we could only give him the plans and specifications if he was prepared to take pay in crude oil. He went away and came back after a day or two, and said that they would be prepared to make a bid on that basis. Witness does not remember what phrases were used, but he was given to understand that [467—384] the Standard Oil Company would be prepared to take the oil off of the hands of the Foundation Company, and on that basis gave the representative of the Foundation Company a set of plans, and expected a bid from that concern, and the first time he learned that the Foundation Company would not submit a bid was when the bids were actually opened in the Secretary's office. Exactly the same thing took place with the Pittsburgh & Des Moines

(Testimony of H. Foster Bain.)

Steel Company, as with the Foundation Company, and the witness expected a bid from the Pittsburgh & Des Moines Steel Company until the moment of the opening of the bids; a representative of the last-named company was present at the time the bids were opened. When, as shown by the minutes of the opening, Acting Secretary Finney announced that if any bids were in the Department that were not in his desk, and that subsequently it came to his desk after the hour of opening they would be considered, the making of which statement the witness recalls, nothing was said at that time by the representative of the Pittsburgh & Des Moines Company then present, about a bid from that company.

Prior to April 13, 1922, the witness received information to the effect that Ford, Bacon & Davis, who, as he has testified, were first brought into the matter by the executive of the Standard Oil Company at San Francisco, were figuring with the Associated Oil Company; Col. Black came to Dr. Bain's office two or three times during this discussion; on one occasion, he told the witness that following Mr. Sutro's opinion, the Standard Oil Company would not make a bid on the construction work; at another time, Mr. McLaughlin told the witness that he had made an arrangement with Ford, Bacon & Davis to make a bid in connection with the Associated Oil Company, instead of using his own engineering department as had been originally contemplated.

Secretary Fall left Washington for Three Rivers,

(Testimony of H. Foster Bain.)

[468—385] New Mexico, April 13, 1922; some days before that he asked witness how they were getting along on the Pearl Harbor project, and stated that he had nearly completed the negotiations with the Mammoth Oil Company, which resulted in the lease of Naval Reserve No. 3. When Dr. Bain told Mr. Fall that nothing more could be done until after April 15th, he said, "Well what have you been doing all this time, and why can't you?" Dr. Bain told him that after the change in the proposals of February 15, and the determination that no bids would be accepted except on a lump sum basis, that it had been necessary to get out additional plans and details, which took some time, and to send out new proposals, and that since this placed on the contractor a very large responsibility, it was necessary to allow the contractor time to visit Hawaii or to have it visited, to determine the matters of foundations, sites, materials, labor, and things of that sort, before he could make a bid, and that accordingly the date for the receipt of those bids had been put forward to April 15. This apparently was the first time that Secretary Fall realized that the change in the original proposals involved material delay, and he expressed impatience over this. He asked witness whether there was not some way to facilitate action. He asked witness who was going to bid, and was told, to the best of Dr. Bain's knowledge, who would bid. Dr. Bain told the Secretary the Pan American, the Associated, and the Standard would bid, and that the Foundation Company and the Pittsburgh

(Testimony of H. Foster Bain.)

& Des Moines Steel Company would probably bid on parts of the work; he also told the Secretary about the connection that it was expected the engineering companies and oil companies would have; up to that time, the witness knew, not only that the White Engineering Company would bid in connection with the Pan American Company, but that Ford, Bacon & Davis would bid in connection with the Associated, and he told the Secretary that; he told the Secretary [469—386] what he had understood from the representatives of the Foundation Company; as respects an arrangement with the Standard Oil, the witness cannot state positively that the Foundation Company's representative told him that he had made an arrangement with the Standard Oil Company, but that representative said something which gave witness that impression.

In the letter of March 9th, 1922, from Mr. McLaughlin to the witness (Exhibit "XX"), the writer discusses this situation as to an engineering company taking one part and an oil company another part, and in this conversation had just before April 12, with Secretary Fall, the witness told the Secretary that. In several conversations, going clear back to October, Secretary Fall had said in substance that if the Government could sell the oil and pay the money direct to the construction company, it would be simpler business and probably more economical; in this conversation in April, witness showed the Secretary Mr. McLaughlin's letter, and this subject was recalled. Witness knew of the let-

(Testimony of H. Foster Bain.)

ter dated April 12, 1922 (Exhibit No. 102), from Secretary Fall to the Secretary of the Navy, at the time it went out; he cannot remember positively whether it was dictated in his presence, or whether it followed his being in the Secretary's office, and the latter showing the letter immediately afterwards to him; referring to the legislation recommended in that letter, and the statement that contracts were being delayed in one way or another in order to give opportunity for this legislation, witness testifies that he had talked to the Secretary about delays in the things he has just mentioned, and the necessity of getting information from Hawaii, and also suggested that it was entirely possible that satisfactory bids might not be received on account of these various circumstances, including the legal doubt which had been expressed by some lawyers as to the possibility of acting in the [470—387] form called for by the proposals, the possibility or probability of having proposed legislation enacted was discussed by the Secretary with the witness; that is, Mr. Fall drafted that memorandum in the letter of April 12th, and read it to Dr. Bain, either from the letter or from a previous memorandum, witness does not recall which, and said he had not a doubt in the world that if Secretary Denby would send that to Congress that he could get that authority. Prior to the time Secretary Fall left Washington on April 13, 1922, he instructed Secretary Finney to receive and open the bids, that were to be received on April 15, and instructed the Bureau of Mines to co-operate

(Testimony of H. Foster Bain.)

with Secretary Finney in the study of those bids. Witness was present when the bids were opened on April 15, 1922. He recalls that there were also present Secretary Finney, the secretary of Mr. McLaughlin, though he does not remember his name; a Pittsburgh & Des Moines Steel Company man; Mr. Cotter of the Pan American Company; and the others whom the record will show; a stenographer was present recording the proceedings.

After the bids had been opened, and the representatives of the bidders had withdrawn, the witness and Secretary Finney had a conversation, Mr. Ambrose also being present, and there was a discussion of the bids and the fact that on the face of them, the Pan American bid B was the better bid, and the fact that the bids, both of the Pan American and of the Associated Oil Company, referred to extra piles and extra lengths of piles, would require consideration, and the fact that the Associated Oil Company bid, giving under guise of interpretation really a change in specifications, would need to be referred to the Navy to see if it was satisfactory before a decision could be made as to the bids; Secretary Finney turned the bids over to the Bureau of Mines, handing them to [471—388] either the witness or Mr. Ambrose, who were together; the instructions given by Secretary Finney at the time to Ambrose and witness was "find out about these bids and report." No instructions whatever were given to Dr. Bain at that time or at any time prior as to what the report should be, and no instructions what-

(Testimony of H. Foster Bain.)

ever that he knows of, of that kind, were ever given to Mr. Ambrose; the only instructions that the witness gave to Ambrose as to how he should consider the bids and what he should report was that he should find out from the Navy about those technical details; witness certainly did not give Ambrose any instructions with regard to whose bid he should recommend, and Secretary Finney did not give any such instructions to his knowledge, or in his presence, nor did anyone else to the witness' knowledge.

Upon leaving Secretary Finney's office, which is on the fifth floor of the Interior Department Building, the witness and Ambrose went to the office of the Director of the Bureau of Mines, on the second floor, and that afternoon, which was Saturday afternoon, and the next day, Sunday, those bids were studied by Mr. Ambrose, Mr. F. B. Tough, chief supervisor of oil leasing, someone else in Mr. Ambrose's division, whose name the witness does not now remember, and they had Lieutenant Keating, and he took up with someone in the Navy and reported back to Mr. Ambrose that those technical details of engineering were satisfactory; they apparently had a considerable discussion over the ratio which was worked out, and the form of the statement of the ratio to govern the exchange of oil, the ratio as stated by the Pan American bid was in different form from that of the Associated bid, and it was the testing of those formulas that occupied a considerable amount of time.

Dr. Bain left Washington for Pittsburgh, Sunday

(Testimony of H. Foster Bain.)

night, April 16, being absent just one day, and returned directly to Washington, where he arrived again the morning of April 18th. [472—389] He did not communicate on April 15th or 16th in any way with Secretary Fall, nor did the Secretary communicate with him. Prior to leaving Washington on Sunday night, April 16th, the report giving the analysis of the bids had not been drafted; the witness' recollection now is that the conclusion which would have to be drawn was fairly obvious, and that the Pan American bid B was the beter bid, provided that the request for a preferential lease could be properly defined and was satisfactory to the Department. The witness talked with Ambrose on that; he cannot be positive whether Ambrose expressed to him before he left Sunday night the conclusions he had reached, that is, in any degree of completeness. With regard to certain points, he had; after the bids were opened, witness talked with Admiral Robison on the telephone, and in a general way outlined to the Admiral the number of bids that had come in, and what they seemed to show; this conversation was before any recommendation had been made. Witness saw the paper headed "Memorandum to Secretary Finney," dated April 17, 1922, and signed "A. W. Ambrose" (Exhibit No. 119), on Tuesday, April 18th, after he returned from Pittsburgh, and discussed it with Secretary Finney; Mr. Finney had read the report, and felt that the matter should be referred to Secretary Fall, and witness agreed with him; Mr. Finney made witness

(Testimony of H. Foster Bain.)

acquainted with the contents of telegram to Secretary Fall, and Secretary Finney read the contents of Secretary Fall's reply, dated April 18. Witness cannot state positively that he saw Admiral Robison on the 18th or 19th of April; he was seeing him constantly, very frequently, but he cannot say positively he saw him on a definite day. Without regard, however, to specific dates, he was in conference with Admiral Robison subsequent to the time the bids were opened, and before the [473—390] draft of the contract was complete. These conferences amounted to making arrangements for drafting the contract in accordance with the recommendations and the approval which had by that time been received in Secretary Fall's telegram of April 18 (Exhibit 121). During this period of time, the witness saw Admiral Robison in witness' office. Mr. Williamson, a lawyer in the Department, assigned to the task by Secretary Finney, did the legal work of the drafting of the contract. It had been drafted on or about April 19th; when that draft of the contract was in process or had been gotten up, witness was present at a conversation which took place in Secretary Finney's office, when Mr. Cotter stated in substance that he felt it was very important that the Secretary of the Navy's signature should go on the contract as a direct party to it; witness took no part in that conversation, as it was a legal matter upon which his opinion was worth nothing; Secretary Finney said in substance that he agreed with Mr. Cotter; the matter was taken up with Secretary

(Testimony of H. Foster Bain.)

Fall by telegram; witness was aware of Secretary Fall's reply on the subject; it is the best recollection of the witness that while this thing was in process, Admiral Robison told him that the matter had received the approval of the Secretary of Navy; that is not a clear recollection, that is his best recollection at the moment.

During this period, in the witness' office, Mr. Cotter had stated that unless Secretary Denby were made a direct party to the contract, and unless there was some arrangement made for leasing a definite part of the reserve to the company, that he was not prepared to take up and recommend to his company proposal B, or the acceptance of the contract based on proposal B, and that he would prefer to have proposal A accepted; this was stated by Mr. Cotter between the time the bids were opened and the final signing of the contract, after one draft [474—391] had been made, but was under revision. With respect to some definite assurance in regard to some lease under the preferential right clause, Mr. Cotter in substance said that he had put in a good deal of work on this, and would have nothing to show to his company for his accomplishment unless he could show at least some leases that he had acquired.

Mr. Tough of the Bureau worked with Mr. Ambrose, as did someone else in the Bureau, in connection with this matter, in addition to what Lieutenant Keating did while the bids were being considered. Mr. Tough was at the time in charge of the leasing work of the Bureau on the oil and

(Testimony of H. Foster Bain.)

gas lands; he is now chief petroleum engineer, in the Bureau of Mines, and by reason of that position, the chief of the petroleum division of that Bureau, and the present head thereof.

After Mr. Cotter had made known his decision, with regard to Secretary Denby's becoming a part of the contract, and Secretary Fall's telegram, as witness already testified, arrangements were made to send Mr. Ambrose to Three Rivers to explain this, and other points, such, for example, as the highly complicated looking formula by which the ratio of exchange was to be governed; the definition of the preferential rights to lease; the particular areas which it was proposed to lease, and various technical matters in connection with the contract; the discussion, in effect, was that Secretary Fall, being far away and being a lawyer rather than a petroleum engineer, might like to have not only direct information as to what had taken place, but someone there that he could advise with in case he saw any reason to disapprove. Mr. Ambrose went West. After Mr. Cotter brought up the question with regard to getting some definite assurance of future leases in the reserve by virtue of the preferential right clause, the Bureau of Mines pointed out to Secretary Finney the particular tracts which could be properly leased, and [475—392] which would "in our judgment" need to be leased some time within not to exceed a year, pointing out the northeast quarter of Section 3 in the east part of the reserve, and the western

(Testimony of H. Foster Bain.)

portion of the eastern half of Section 34; Mr. Ambrose and the witness talked to Secretary Finney on that subject, and told him in substance that these were areas that were subject to drainage by decrease of gas pressure at the time, and it would shortly be subject to drainage by loss of oil; that it would be necessary to put them into production, and that we could see no objection to making that a part of the bargain at this time; as to what, if anything, Mr. Cotter or any other representative of the Pan American Company had to do with the selection of those two pieces of land, Mr. Cotter expressed approval, but he did not pick them out; he was told that they were picked out some time before the letter in record, April 25, 1922 (Exhibit "E" to Amended Bill of Complaint), was drafted; the royalties stated in that letter were arrived at by the Bureau of Mines on the basis of experience in leasing adjacent tracts of ground; as the witness remembers it, Mr. Cotter asked for the Interior Department regulation royalties, in response to which he was told that those tracts would not be leased on any such royalty; the petroleum division of the Bureau of Mines got up the schedule of royalties that appears in the letter signed by Mr. Finney and Mr. Denby, dated April 25. As to why the subject of that letter was not included in the body of the April 25 contract itself, that was because the contract was already drafted, and substantially complete, and this was an action which was to take place within a year

(Testimony of H. Foster Bain.)

rather than at the time. When Mr. Cotter was discussing his desire for definite assurance of future leasing, he said that the preferential right clause, as it was proposed to put it in the [476—393] contract, did not give his company anything; that clause, as it appears in the April 25th, 1922, contract, was drafted in the petroleum division of the Bureau of Mines.

Subsequent to the execution of the April 25, 1922, contract, the witness visited San Francisco, being there in May, 1922; while in San Francisco, he made arrangements so far as he could for the turning over to the Pan American Company of the accumulated oils previously arranged for on exchange contract; he encountered questions in that connection raised by Mr. Storey of the Standard Oil; at about this time, the middle of May, Mr. Cotter was in San Francisco, and in the Bureau of Mines Office in that city, Cotter and the witness had a conversation on this subject. There was a question raised by the Standard as to whether they would turn over to the Pan American Company, as a representative of the Government, the oils which had been accumulated since the first of November; witness was on his way to Alaska, and could not stay to clear the whole matter up; he suggested by telegrams to Washington, that Mr. Campbell, who was the Government's resident engineer, be made the representative of the Government for this purpose; that the companies turn over the oil to Mr. Campbell, and he turn them over then to the contractor under

(Testimony of H. Foster Bain.)

this contract; witness had to leave that as unfinished business in the hands of Mr. Ambrose, to whom, from San Francisco, under date of March 11, 1922, witness wrote a letter, which was thereupon offered in evidence as Defendants' Exhibit "DDD," and which, in so far as it relates to matters referred to in his testimony, reads as follows:

DEFENDANTS' EXHIBIT "DDD."

"The authority of Campbell therefore to give receipts for the oil and to supervise the gaging should be made perfectly clear and definite."

It is all the more important that the record should be [477—394] made good here since there is serious disposition to question the right of the Department to make the Pan American contract. Indeed, I understand that a proposal was considered to have one of the smaller companies bring a test suit in the District of Columbia to determine the Secretary's right. Mr. Storey and others negative this proposal since it was thought that a suit of this kind now would be used by those who are criticising the Department and simply make trouble. At the same time, the lawyers have taken such a technical attitude with regard to the contract that Mr. Storey, at least, is going to find it difficult to buy the oil from the Pan American, and it would make it hard for the latter to handle the situation. Mr. Cotter will work out a detailed plan of operation and you will of course know the details later. It is apparently going to be important to show de-

(Testimony of H. Foster Bain.)

livery by lessees to or through a properly accredited representative of the Government. We are to have a conference tomorrow morning with McLaughlin and if anything develops I will let you know.

Cordially yours,
(Signed) H. FOSTER BAIN."

On May 12, 1922, in the office of the Bureau of Mines in the Custom House, San Francisco, witness wrote a letter, the original of which he gave to Mr. Cotter, and a carbon of which he sent to Mr. Ambrose at Washington, and which, as Defendants' Exhibit "EEE," was offered in evidence and reads as follows:

DEFENDANTS' EXHIBIT "EEE."

Hon. Albert B. Fall,
Three Rivers, N. Mex.

Dear Mr. Secretary:

I have been here for the last few days arranging for a transfer of the accumulated royalty oil and future royalty oils to the Pan American Co. I have been surprised to find that the Standard and General Petroleum in particular are adopting a very technical attitude toward this transfer, going so far [478—395] as to raise a question as to whether either company would be safe in making such a transfer or in later handling any of the oil in case the Pan American desired to have them do so. As you will recall Mr. Sutro and Mr. Wyle have been doubtful as to the right of the depart-

ment to make the exchange contract. They now seem to have become positive that no such right exists and Mr. Storey is even interpreting the law so far as to question the right of the Standard to deliver oil to the Pan American on our order. I have arranged that Mr. Campbell, as representing the department, shall receive the oil and give a receipt for it, and while I am not a lawyer, my impression is that that should end the matter as far as the pipe-line companies are concerned. Of course, this is not a matter which primarily concerns the department since we have all been entirely clear in our minds as to the right of the Government to make this exchange and have in fact gone ahead and contracted for the exchange with the Pan American, and the latter is an entirely responsible concern that I assume ends it as far as we are concerned.

There is, however, another phase to it. None of us want Mr. Doheny to get into trouble, and I take it we will want to do anything we can to make it easy for him. I have been told that there was a definite proposal to have one of the smaller oil companies go into court and fight this contract with a view to getting a decision as to the right of the department to make such a bargain. This proposal was not carried through. Mr. Storey tells me that he objected to it, as he felt that it would embarrass the department and would give support to the trouble makers in Congress. He professes to be anxious and willing to do anything he can to

(Testimony of H. Foster Bain.)

help the department to carry out its plans, but to be in the awkward position of having an [479—396] opinion from his attorney which might be quoted against him in case the matter ever came up.

Out of all this has come the suggestion repeatedly that the opinion of the Attorney General be obtained as to the legality of the contract. I realize the objections to asking such an opinion, but I have thought it proper to let you know the difficulties that are being raised here so that you might reconsider the matter and decide as to whether you might not properly ask the Attorney General to put in writing what I have understood was his informal and verbal expression of opinion favorable to the action the department has taken. I am not certain that Mr. Doheny cares, but Mr. Cotter will see him tomorrow, and if it does seem to them important I am giving Mr. Cotter this letter to show you, so that you may know what I have found out here.

The wells on the north line of 2 are coming in in good shape, and Anderson has done excellent work in pushing them ahead.

I am sorry to bother you with this business while you are at home.

Cordially yours,

H. FOSTER BAIN,

Director.

This letter was not mailed, but was given by the witness to Mr. Cotter; he never received a reply from Mr. Fall, nor did Mr. Fall ever speak of the letter, and Mr. Cotter subsequently informed Dr.

(Testimony of H. Foster Bain.)

Bain that the letter was not sent to Mr. Fall; Cotter said he talked the matter over with Mr. Doheny, and that Mr. Doheny said it was unimportant; that he was satisfied with the authority to go ahead, and so Cotter did not deliver the May 12 letter to Secretary Fall; at the time that letter was written, there was not, so far as the witness knew, [480—397] pending any additional contracts to be made with the Pan American Company, or any company that Mr. Doheny had any interest in; when he referred in that letter to not making trouble, or not having trouble made for Mr. Doheny, or, to use his own language, "to do anything we can to make it easy for him," he had reference to the fact that under the contract, Mr. Doheny became a partner of the Government in carrying out an enterprise, and he wished to make it as easy to carry out the contract as possible, and to get the work done that the Navy wanted done; he used the personal name, Mr. Doheny, in referring "to his company, certainly." The objections referred to in that letter to submitting the matter formally to the Attorney General were, first, "the fact that the Department, having gone ahead and made the contract, to then ask for a legal opinion to fortify its action, would throw doubt on its own confidence in its judgment in making such a contract, and, second, was the fact that whenever you ask a lawyer for an opinion, you may get into the hands of a lawyer who is thinking only of strictly technical legal matters, and who gives you a highly technical opinion, and he has no

(Testimony of H. Foster Bain.)

responsibility whatever for carrying out a thing or getting anything done, and in the Government service there are a great many men whose business it is to pass the buck and to pass the responsibility on to somebody else; and when we ask for an opinion from another department, we never know what kind of a lawyer is going to pass on it. They have some very excellent lawyers in the Department of Justice, but when you ask for an opinion over there, you don't know whether it will get to one of them or somebody who is merely interested in building up a good record for himself, and never letting anything be done which might come back on him." [481—398]

The witness was familiar with the custom in the executive departments at Washington as to when opinions of the Attorney General were asked; they are asked when the department itself is in doubt.

Witness then went to Alaska on official business connected with the Department in May, 1922, and did not return to Washington until late in July, when he went there in response to a telegram from his secretary, who wished to have Dr. Bain act with him on the President's committee, composed of Secretary Hoover and others, in the distribution of coal during the strike, and he was so occupied until the strike was settled, in October, 1922. In that month, there came into Dr. Bain's possession a document relating to the oil situation in California and in the oil reserves, a photostat of which the witness identifies as Plaintiff's Exhibit 157. The witness received

(Testimony of H. Foster Bain.)

that paper, however, from Secretary Fall, in his office, some time in October, 1922; when Mr. Fall handed that paper to witness, he said, "take it up with the Admiral"; that is Admiral Robison, and he did not say anything more on that subject at that time. The witness did take that paper up with Admiral Robison within a week or two after receiving it from Mr. Fall, showing the Admiral the paper and also some memoranda which witness had prepared on the basis of telegraphic advice from Mr. Cutler, who was then acting in the Bureau's office at Bakersfield, which memoranda had to do with the prospective amount of oil to be won from Reserve No. 1, on the basis of various hypotheses as to the royalties and rates of production and things of that sort. Dr. Bain discussed conditions with the Admiral and also discussed with him the depression in the price of oil, and the way that was affecting the income on the previous contract, and the Government revenues; witness and Admiral Robison had a considerable [482—399] discussion of that kind on the whole oil situation. Admiral Robison suggested that he did not know how far the Navy was prepared to go at that time in provision of further storage, or in opening up the reserves, and that he would take it up and discuss it with his associates, and with the Secretary of the Navy; there was nothing else that the witness can remember in this discussion with Admiral Robison.

The next that Dr. Bain heard of the subject was some time very late in October or early in Novem-

(Testimony of H. Foster Bain.)

ber, Mr. Cotter came to his office and mentioned this memorandum (Exhibit 157) and asked witness what had been done about it, and Dr. Bain told Cotter that the Secretary had given it to witness to take up with the Admiral, and that he had taken it up with the Admiral, and that nothing more would be done unless the Navy wanted something done; witness told Cotter if he wanted to push the matter, or to have any further information about it, to go to the Navy.

As to when next witness learned anything on that subject, some time in November, 1922, Mr. Doheny's second memorandum came to Dr. Bain, through the Secretary's office; that memorandum being Exhibit 158, one copy of which was sent under cover of a letter of November 6, 1922 (Exhibit No. 157). Witness received instructions with respect to the subject matter of that memorandum from Secretary Fall, which instructions were to do nothing except as the Navy wanted it done; the Secretary at this time further said that it was Navy business; witness did not take this second memorandum up with anybody, but waited for the Navy to take it up with him, and they took it up almost immediately, Admiral Robison from the Navy Department taking it up. Prior to the receipt by the Interior Department of letter dated November 29, 1922, from the Secretary of Navy (Exhibit [483—400] 166), Admiral Robison told the witness that he was discussing the subject of the above-mentioned memorandum with the officials of the Navy, and he thought that

(Testimony of H. Foster Bain.)

the Navy would decide to go ahead; witness does not recall that anything was said in that discussion to him by Admiral Robison about Pearl Harbor.

After the talk with Admiral Robison which the witness has last testified to, the next thing he recalls was the receipt of the letter of November 29, 1922 (Plaintiff's Exhibit 166); his recollection is that that letter came to him through the Secretary's office; he does not recall any instructions given him orally or in writing by the Secretary in connection with that letter; after witness received the letter of November 29, he got hold of Mr. Cotter and Admiral Robison, and arranged for a meeting at the office of witness, to start negotiations on the basis of that letter. As to what, if anything, Admiral Robison said to witness regarding a lease of the reserve, or any part of it, Admiral Robison said that the Navy would lease the whole reserve if they got enough for it; that he was anxious to have drilling restricted as far as could be done, compatible with making the kind of a bargain that the Navy wanted; the matter as to what section of part of the reserve he wanted restrictions on came up later.

After his talks with Admiral Robison, witness had part in a series of negotiations prior to the execution of the December 11, 1922, contract; the negotiations occurred in his office in the Interior Department; the first meeting included Mr. Doheny, Mr. Anderson and Mr. Cotter of the Pan American Company; Mr. Ambrose, Admiral Robison and witness; there was a general discussion of what it was

(Testimony of H. Foster Bain.)

proposed to do, and how it should be done, and the preference right and its [484—401] restriction to the eastern part of the reserve. Following that general discussion, Mr. Doheny left, and through a series of days there were discussions participated in mainly by Mr. Anderson and Mr. Cotter on one side, and Mr. Ambrose and witness on the other, with Admiral Robison coming in from time to time and being communicated with by telephone in between. Dr. Bain's recollection is that Admiral Robison at the time was very busy with some appropriation matter before Congress, and could not be there all the time. In these discussions, Mr. Ambrose and the witness had before them the November 6, 1922, memorandum; there was no other written proposal before them except that and the November 29 letter. When the question of the royalties from the oil from Reserve No. 1 came up for discussion, Mr. Anderson of the Pan American Company proposed the Interior Department's regulation royalties, which provided royalties of from 12½ per cent to 20 per cent for oil of one Baume test and 12½ to 25 per cent for oil of another Baume test. When Anderson's proposition was made, Cotter, Ambrose and Admiral Robison and the witness were present; the reply made to Anderson was, "We could not possibly think of leasing him the ground on those royalties; we would have to have a great deal more"; then there was a fine row over royalties. Admiral Robison was present while the royalties were being discussed; he said he wanted a

(Testimony of H. Foster Bain.)

royalty which started with 14 $\frac{1}{2}$ per cent, instead of 12 $\frac{1}{2}$ per cent, and which ran up—witness has forgotten the limit, but materially above the regulation royalties. The officials of the Bureau of Mines supported Admiral Robison in his position “as we were acting for the Navy.” Admiral Robison gave us part of the information outside of the conference room, and at times took part in the conference himself, trying to impress Mr. Anderson with the [485—402] necessity of our getting a larger royalty, and with the fact that he could pay a larger royalty. Mr. Anderson was very firm that those royalties that we asked for were too high; the other details of the contract, as distinguished from the lease, were discussed also by the same parties. With the royalty situation as witness has testified, Mr. Ambrose prepared, or had prepared for witness, a large tabulation of what the actual result in barrels would be in applying various schedules of royalties to wells of various sizes; that is, assuming the wells were 20-barrel wells, or 50-barrel wells, or 100-barrel wells, what the net effect would be of different royalties, including the ones Mr. Anderson was contending for, the regulation royalties, and the ones that Admiral Robison wanted, the ones we had obtained in the Mammoth lease, and the ones we had obtained in various leases around in Reserve No. 1; it was a whole tabulation of the matter. This tabulation was gone over with Admiral Robison, and parts of it with Mr. Anderson; witness is not certain he ever showed the whole tabulation to

(Testimony of H. Foster Bain.)

Anderson. During these discussions, in addition to Anderson, Cotter of the Pan American Company was also always present; "We came finally to the point where we had been able to agree on every other matter except the royalties and the conference broke up on that point, Mr. Anderson saying that he would not accept the Admiral's royalties or anything except what he proposed"; so witness then took the sheet and these statements up to the office of Secretary Fall, and talked them over with him, and then he and witness worked out an intermediate or compromise set of royalties as being a fair basis, and one which perhaps could be agreed upon. These were worked out in pencil and typewritten copies made in the Secretary's office; Secretary Fall instructed the witness to take that up [486—403] with Admiral Robison; he also, either at witness' suggestion or at his own, or it was agreed that witness should give a copy to Mr. Cotter, and he would see if Mr. Doheny would take it up; the Secretary pointed out that if Mr. Anderson was firm in his position, the negotiations would probably fail because Mr. Doheny could hardly be in a position of forcing on one of his own men a royalty which his own man did not believe could be made to pay; witness did take the copies downstairs and gave one to Mr. Cotter and told him to take it up with Mr. Doheny, while the witness took it up with the Admiral; Admiral Robison studied it and came back and talked to witness and Mr. Ambrose; the conference at that time had broken up; Admiral Robison

(Testimony of H. Foster Bain.)

also went up and talked it over with Secretary Fall; witness was not present at this talk; Admiral Robison came back and stated he wanted to do some more trading; that he still thought he could get a higher royalty; there followed a further conference on the subject of royalties in Dr. Bain's office, at which there were present Admiral Robison, Mr. Ambrose and Dr. Bain, and Mr. Doheny, Mr. Anderson and Mr. Cotter. This was a few days before December 11; at that time Secretary Fall had received a letter from Mr. Doheny, dated December 8, 1922, and being Exhibit 167 in this case; the Secretary had received this letter from Mr. Doheny, and had handed it to witness, and then there was a further conference in witness' office, Mr. Doheny coming in with Mr. Anderson and Mr. Cotter; Admiral Robison was there; Admiral Robison still wanted to get a better royalty, and made a further proposal of some sort that witness does not remember, and Mr. Doheny got mad and threatened to leave, and conditions were strained there for a little while; then Admiral Robison thought it over, and there was some further talk, and finally the Admiral agreed to the schedule which was a compromise schedule, and [487—404] which went into the December 11, 1922, lease (Exhibit "D" to Amended Bill of Complaint).

The witness identified letter dated December 8, 1922, as one drafted by Secretary Fall and sent to Admiral Robison, which letter was thereupon

received in evidence, as Defendants' "FFF," and reads as follows:

DEFENDANTS' EXHIBIT "FFF."

My dear Admiral:

As you are aware, I immediately took up with the Pan American Co., through Colonel Doheny, the suggestions contained in the recent letter of Secretary Denby, concerning your additional requirements for the storage, etc., of naval oils. You have been in close touch with the experts of the Bureau of Mines and representatives of the Pan American Co. and Doheny.

There have been, as you know, some disputes, or failures to agree rather, concerning the amounts of royalty to be charged.

As the foundation for discussion, I made a tentative suggestion that the royalties should be based upon a 0-50 barrel production, to bear 12-1/2 per cent royalty, providing also for 30-35 per cent royalties on production over 200 barrels.

I have understood that you urged a minimum royalty of one-seventh, instead of a royalty of one-eighth, and, as I stated to you over the telephone, I should certainly not approve any contract based upon any royalties with which you were not in thorough agreement.

The Pan American people, or Colonel Doheny, upon the other hand, urged a minimum royalty based upon a larger production than 0-50, and had opposed larger royalties than 30-35 per cent.

However, I am this morning in receipt of a note from Colonel Doheny, a copy of which I am handing you herewith. In this note Colonel Doheny states that they have finally [488—405] concluded that they will accept the royalties "Which the Government has offered us."

I presume that he refers in this language to the royalties suggested by myself tentatively as affording ground for discussion and which I have just hereinbefore referred to, to wit:

0- 50 barrels, $12\frac{1}{2}$ per cent on oil of 30° gravity and over.

50-100 barrels, $14\frac{2}{7}$ per cent on 30° gravity;
 $16\frac{2}{3}$ per cent over 30° gravity.

100-150 barrels, $16\frac{2}{3}$ per cent on 30° gravity; 20 per cent over 30° gravity.

150-200 barrels, 20 per cent on 30° gravity; 25 per cent over 30° gravity.

200-500 barrels, 25 per cent on 30° gravity; 30 per cent over 30° gravity.

Over 500 barrels, 30 per cent on 30° gravity; 35 per cent over 30° gravity.

Unless these royalties are entirely satisfactory to you and unless the draft of the contract in other respects is entirely satisfactory, I will immediately notify Colonel Doheny of your conclusions.

I will not agree to nor sign any contract whatsoever in the way of a modification of the existing contract or otherwise which is not in every particular satisfactory to you, as you have been designated

(Testimony of H. Foster Bain.)

by the Secretary of the Navy to represent him personally in this matter.

Very respectfully yours,

ALBERT B. FALL,
Secretary of the Interior.

Witness was acquainted with the contents of the foregoing letter when it was dispatched; he is not certain whether he was present when it was drafted, or whether it was a telephone conversation with Admiral Robison referred to therein that he knew about. [489—406]

Witness identifies a communication dated December 9, 1922, as having been received at the Interior Department from Admiral Robison, and the same, as Exhibit "GGG," was thereupon read in evidence, and is as follows:

DEFENDANTS' EXHIBIT "GGG."

My dear Mr. Secretary:

In answer to your letter of December 8 concerning the proposed modifications in the contract of April 25, 1922, between the Government and the Pan American Petroleum & Transport Co., I have given very serious consideration to the royalties that the contractor is willing to pay on the additional leases, to which he has preferential right under the terms of the original contract. In view of the records of production in the oil field, of which naval reserve No. 1 is a part, it appears that the royalties as given by you in your letter of yesterday are materially in excess of the standard

(Testimony of H. Foster Bain.)

royalties and furnish the Government a material premium or bonus for the additional leases.

In view, further, of the great value to the Government of the immediate construction of additional naval facilities for the storage of oil and of the assumption on the part of the contractor of the entire risk of repayment through royalty oils, it appears desirable that the Government acquiesce in the royalties suggested by yourself.

I am going over the details of the proposed supplementary contract. This contract as now prepared appears satisfactory. I will give you definite information as soon as I have been advised by the legal authorities of the department.

Thanking you for your consideration in this matter and for the assistance that you are giving in the accomplishment of the national security, I am,

Very respectfully yours,

JOHN K. ROBISON,

Engineer in Chief, United States Navy.

[490—407]

Mr. Ambrose, Mr. Anderson and Mr. Cotter and Dr. Bain, worked on the drafting of the contract and lease of December 11, 1922. In connection with getting up the schedule of royalties in the way he has testified, the witness had before him the royalty bids previously received on lands in Naval Reserve No. 1. As regards recommendation made as to the royalties for the December 11, 1922, lease, the Bureau of Mines, Mr. Ambrose and himself in that Bureau, "recommended the lease on those terms,

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(Testimony of H. Foster Bain.)

the Navy decided whether the lease was to be made."

After the December contract had been drafted, but before it was signed, a copy of it was given to Admiral Robison for study; he had it two or three days; then there was received letter dated December 11, 1922, which the witness identifies, and which is Defendants' Exhibit "HHH," which was read in evidence and is as follows:

DEFENDANTS' EXHIBIT "HHH."

NAVY DEPARTMENT,
BUREAU OF ENGINEERING,
WASHINGTON.

11 December, 1922.

My dear Mr. Secretary:

The copy of the supplementary contract between the Government and the Pan-American Petroleum and Transport Company for accomplishing the completion of the oil storage in Pearl Harbor, etc., has been carefully reviewed by me and by the Judge Advocate General of the Navy. With the exception of a few verbal changes that have been noted thereon, this copy is entirely satisfactory to the Navy Department and is believed to be an advantageous one for the Government to enter upon.

I assume that the Interior Department will prepare the final contract for signature and unless

(Testimony of H. Foster Bain.)

otherwise directed will act accordingly.

Very respectfully,

J. K. ROBISON,

Engineer-in-Chief, U. S. Navy.
Chief of Bureau. [491—408]

After the receipt of this communication of December 11 from Admiral Robison, the drafts of the contract and lease of December 11 were recopied, where necessary; witness' recollection is that only a few pages had to be recopied. Witness was present at the time the contract was signed by Secretary Fall; this was done in the Secretary's office, there being present Mr. Doheny, Mr. Cotter and Dr. Bain. Dr. Bain presented the contract and lease to Secretary Fall; it had previously been signed by Mr. Doheny in the office of the witness; when witness presented it to Secretary Fall, he told the Secretary this was a contract that had been worked up; the Secretary at that time, to the witness' knowledge, had seen the letter of December 11 from Admiral Robison last above quoted; Secretary Fall had not seen the contract or any draft thereof prior to that time; when the drafts were presented to Secretary Fall, he read the same through carefully, he asked if it was all right, addressing the whole party; witness answered that it was; Admiral Robison was not there, so far as witness recollects; Mr. Fall signed the contract and lease and the same was taken down to the Navy Department by Mr. Cotter; witness was not present when Secretary Denby signed it, but was

(Testimony of H. Foster Bain.)

informed when the papers had been signed by Secretary Denby. After Mr. Doheny had signed the contract in Dr. Bain's office, and before Dr. Bain and Messrs. Doheny and Cotter went up to Secretary Fall's office, Admiral Robison, who was present, telephoned down to the Navy Department and asked Secretary Denby to remain there until he could bring the papers down for signature.

Subsequent to the signing of the contract of December 11, there was received by the Interior Department, at about the time of their dates, letter dated January 17, 1923, signed by Admiral Gregory, and letter dated January 19, 1923, signed [492—409] "Theodore Roosevelt, Acting Secretary of the Navy"; there was explained to the Court that the last referred to letter bore a rubber stamp impress and the word "Confidential" in large letters, with the explanation to the Court that the character of this stamp was not evident from the mere copying of the word in typewriting; the witness testified that that word was stamped there on many papers, not all of them.

Thereupon there was offered and received in evidence the above referred to letter, dated January 17, 1923, which was marked on the letterhead of the Bureau of Yards and Docks, Navy Department, Washington, D. C., and the same was marked Exhibit "III," and reads as follows:

DEFENDANTS' EXHIBIT "III."

From: Chief of Bureau of Yards and Docks.
To: The Secretary of the Interior.
Subject: Additional Fuel Oil Storage, Naval Station, Pearl Harbor, T. H.

Reference: (a) Agreement between Pan-American Petroleum and Transport Company and the United States of America by the Secretary of the Interior and the Secretary of the Navy, dated December 11, 1922.

(b) Approval of the Secretary of the Navy, dated January 16, 1923, on report of Yard Development Board, dated January 10, 1923, regarding location of oil storage tanks at Naval Station, Pearl Harbor, T. H.

Inclosures: (A) Three sets of specification No. 4800.

(B) Three sets of blue-prints (Six plans each).

1. I have had prepared a set of plans and specifications covering the additional storage for petroleum products at the Naval Station, Pearl Harbor, which is to be constructed and filled in connection with the exchange of royalty oil obtained from the Naval Petroleum Reserves. The work is covered by six drawings as follows:

Sheet Bureau

No.	Serial No.	Description.
1	98168	General Plan.
2	98231	General Plan Gasoline Storage.
3	98169	Lubricating Oil Storage Building.
4	98027	150,000-barrel Tank.
5	98026	80,000-barrel Tank.
6	98170	225,000-gallon Gasoline Tank.

[493—410]

2. The specification describes the construction to be performed, and includes the General Provisions which form a part of all Yards and Docks, Navy Department contracts for public works.

3. The specification is complete but the drawings, while they show the scope and some of the details of the work, will be supplemented by further detailed drawings, which will be provided as the work proceeds.

4. Additional sets of drawings will be furnished in any number which you may require. It is my intention to have the specification printed; after which, copies will be substituted for the blue-prints forwarded herewith and additional copies will then be available in such number as may be necessary.

5. In view of the fact that this project is embodied in the war plans of the Navy Department, it is requested that all matters in connection therewith be held as confidential as practicable.

L. E. GREGORY.

Thereupon there was offered and read in evidence the above referred to letter of January 18, 1923, which, as Defendants' Exhibit "JJJ," was read as follows:

DEFENDANTS' EXHIBIT "JJJ."
THE SECRETARY OF THE NAVY,
WASHINGTON.

18 January, 1923.

Confidential.

My dear Mr. Secretary:

In further reference to contract dated 11 December, 1922, with the Pan American Petroleum and Transport Company wherein it is provided that the contractor will cause to be constructed, at Pearl Harbor, T. H., storage for specified amount of petroleum products,—there was delivered, by representative of the Navy Department, on 17 January, 1923, to the Director of the Bureau of Mines, Department of the [494—411] Interior, a copy of specifications No. 4800 and certain plans. These specifications and plans were prepared by Rear Admiral L. E. Gregory (CEC), Chief of the Bureau of Yards and Docks of this Department, and were delivered to your Department for use in accordance with Article 1, paragraph 2, of the contract of 11 December, 1922.

Since, under the contract, the date of final completion of this project is dependent upon the date of placing the formal order with the contractor, it is requested that steps be taken by the Department

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of the Interior to formally place with the constructor at the earliest practicable date the order to proceed with the construction of these storage facilities at Pearl Harbor, T. H.

Very sincerely yours,

THEODORE ROOSEVELT,
Acting Secretary of the Navy.

Witness identified letter from the Secretary of the Interior to the Pan American Petroleum & Transport Company, bearing date January 19, 1923, which, as Defendants' Exhibit "KKK," was read in evidence and is as follows:

DEFENDANTS' EXHIBIT "KKK."

Pan American Petroleum and Transport Co.,
120 Broadway,
New York, N. Y.

Gentlemen:

In accordance with the contract between you and the Government made April 25, 1922, and the supplementary contract of December 11, 1922, you are hereby authorized and directed to proceed at once with the construction of the additional storage facilities called for in the attached specifications and plans, to wit; Specifications and plans No. 4800 prepared by the Bureau of Yards and Docks of the Navy Department.

As provided in the contract, the work is to be completed within two years from date of delivery of specifications to-day. [495—412]

As further provided, the work is to be done at

(Testimony of H. Foster Bain.)

cost and such cost will be audited in the same manner as is now being followed under the contract of April 25, 1922. It is further understood that you will procure sub-contracts let on competitive bidding for at least 80% of the work. It is also understood that the Chief of the Bureau of Yards and Docks, Admiral L. E. Gregory, heretofore authorized to represent the Secretary of the Interior in supervision of construction under your contract, shall have as complete control as he may desire to exercise over the letting of the subcontracts and the supervision of sub-contracted work and over the purchase of materials, apparatus and supplies for and the supervision of the remainder of the work.

The manner for conducting this work proposed by the J. G. White Engineering Corporation under date of December 26, 1922, has been examined and found satisfactory and you are hereby authorized to adopt and follow it in the construction herein ordered.

A copy of a letter from the Acting Secretary of the Navy, Theodore Roosevelt, of January 18, 1923, requesting and authorizing this Department to issue to you this formal order to proceed with the work of construction is herewith attached.

Your acknowledgment of the receipt of this letter is requested.

Respectfully,

(Signed) ALBERT B. FALL,

Secretary.

And for Secretary Navy, at his request.

(Testimony of H. Foster Bain.)

The witness drafted the foregoing letter, dated January 19, 1923, which Secretary Fall signed; the words, "And for Secretary Navy, at his request," are in the handwriting of Secretary Fall. [496—413]

Thereupon there was offered and received in evidence the following communications, Defendants' Exhibit "LLL":

DEFENDANTS' EXHIBIT "LLL."

19 January, 1923.

The Secretary of the Interior,
Department of the Interior,
Washington, D. C.

Dear Sir:

Receipt is acknowledged of your letter dated January 19, 1923, directing that we proceed at once with the construction of the additional storage facilities called for in the plans and specifications transmitted with said letter, being specifications and plans No. 4800 prepared by the Bureau of Yards and Docks of the Navy Department, and the instructions contained therein will be complied with.

Respectfully,

PAN AMERICAN PETROLEUM &
TRANS. CO.

By J. J. COTTER,
Vice-President.

JJC-j.

The witness recalls that, whereas, by the terms of the contract of April 25, 1922, the 1,500,000

(Testimony of H. Foster Bain.)

barrels of fuel oil were to be delivered at Pearl Harbor after the construction, in quantities equal to the royalty crude oil then available to be turned over in exchange to the contractor, by the December 11, 1922, contract, that was changed so as to give the Government the right to call for the fuel oil and direct its delivery regardless of the availability of royalty crude to be delivered to the contractor; pursuant to that change, there was taken up, after the making of the December 11, 1922, contract, with the contractor, the matter of delivering that 1,500,000 barrels. There came to the witness' possession letter dated January 16, 1923, addressed to the Secretary of the Interior and the Secretary of the Navy, signed "Pan American Petroleum and Transport Company, by Jos. J. Cotter, Vice President"; witness discussed it with Admiral Robison. [497—414] As Exhibit "MMM" said letter was received in evidence and reads as follows:

DEFENDANTS' EXHIBIT "MMM."

16 January, 1923.

The Secretary of the Interior,

The Secretary of the Navy,

Washington, D. C.

Sirs:

Under the provisions of our contract with the United States of America dated April 25, 1922, we agreed to furnish in exchange for Government royalty crude oil from Naval Petroleum Reserves

810 *Pan American Petroleum Company et al.*

One and Two in the State of California, 1,500,000 barrels of fuel oil delivered into storage at Pearl Harbor, T. H.

The value at which this fuel oil is to be charged to the Government in this exchange was provided to be the Bay Point, California, market price thereof at date of delivery. That price as stated in said contract was \$1.50 per barrel. That price is now \$1.00 per barrel.

We have been informally advised that the Government desires to take advantage of this present price of fuel oil and to fill the 1,500,000 barrels of storage at Pearl Harbor, T. H., as soon as practicable, and we have been informally requested to inform the Government of the best price at which this entire quantity of fuel oil can be furnished to be delivered as the storage tanks now under construction at Pearl Harbor, T. H., are completed and ready to receive same.

We have a construction estimate from which it appears practicable to commence the delivery of this oil now and to complete such delivery of the 1,500,000 about October 31st of this year. We have made inquiry as to the procuring of this fuel oil and find that it can be procured for delivery over this period of time to our tankers at Port Costa, California, at \$.90 per barrel, which, in view of the fact [498—415] that it was not our intention that any profit should accrue to us by reason of the purchasing of this fuel oil whether or not it were possible for us to secure same at less than the Bay

(Testimony of H. Foster Bain.)

Point, California, market price, would make the charge to the Government therefor delivered at Pearl Harbor, T. H., \$1.36- $\frac{2}{3}$ per barrel.

Will you please advise us of the Government's wishes in this connection.

Respectfully,

PAN AMERICAN PETROLEUM &
TRANSPORT CO.

By JOS. J. COTTER,

Vice-President.

Prior to the receipt of that letter, witness had asked Mr. Cotter when his company would be prepared to put the oil in tanks, and he stated he would find out how rapidly the tanks could be made ready for the oil; witness also asked Cotter to ascertain the prices at which the company was prepared to put the oil in the tanks; that is witness' understanding of Mr. Cotter's references to having been "informally advised" of the Government's desire, contained in the last quoted exhibit.

There also was a discussion among Admiral Robison and the witness and Mr. Cotter with regard to the contract providing that the contractor should get the market price; in that respect, witness said that the contract provided for the market price, which was \$1 per barrel; Admiral Robison contended that while this was so, the contract also intended that there should be no profit made out of the transaction, and there was a triangular discussion there among Robison, Cotter and Bain as to what price the Pan American should charge for

(Testimony of H. Foster Bain.)

this oil; Mr. Cotter said he would take the question up with the officers of his company, and reach a decision, and he agreed, on behalf of the company, ultimately that the price should be [499—416] 90 cents a barrel, or 10 cents less than the agreed market price; in the discussion referred to, Mr. Cotter had said that he thought that his company was entitled to the market price, but that he would take it up.

The Petroleum Division of the Bureau of Mines checked on the market price of fuel oil at that time at San Francisco Bay points, the points specified in the contract for the delivery of oil; it was ascertained that the market price of that oil was a dollar a barrel at these places; witness submitted this information to Admiral Robison; Admiral Robison thought a better price might be obtained; he consulted the Bureau of Supplies and Accounts in the Navy Department, and they thought a better price might be obtained, so Admiral Robison stated; witness went to Admiral Robison's office; the Admiral called in the Chief of the Bureau of Supplies and Accounts and some other officer of that Bureau; a consultation was had as to the price; the prices which had been paid by the Shipping Board at that time were brought up, and Admiral Robison suggested or said that the Bureau of Supplies and Accounts should endeavor to get a better price, and witness stated that if they could get a better price, we would have the contractor put it in at that better price; so they made an attempt to do that, and re-

ported back after a few days, that they could get no better market price than a dollar per barrel.

Thereupon there was offered and received in evidence, as Defendants' Exhibit "NNN," the following communication, dated January 19, 1923, it being agreed by counsel for the Government and defendants that the signer is Rear Admiral David Potter, Paymaster General, Chief of the Bureau of Supplies and Accounts of the Navy, which Bureau is the one referred to by the witness Bain in his testimony above: [500—417]

DEFENDANTS' EXHIBIT "NNN."

19 January, 1923.

The Bureau of Mines,
Department of the Interior,
Washington, D. C.

Attention: Dr. H. F. Bain.

Dear Mr. Bain:

The Bureau of Supplies and Accounts understands that the Pan American Petroleum and Transport Company has made an offer of \$1.36- $\frac{2}{3}$ as the adjustment rate per barrel for delivery of 1,500,000 barrels of fuel oil into naval storage tanks at Pearl Harbor erected under the contract between the Pan American Petroleum and Transport Company and the Departments of the Interior and Navy, dated 25 April, 1922. This rate is not acceptable, at present.

The Bureau of Supplies and Accounts believes it possible to obtain delivery of the 1,500,000 barrels

of fuel oil into naval storage tanks at Pearl Harbor at less than \$1.36- $\frac{2}{3}$ per barrel. The Navy has at the present time a contract for six months covering delivery of fuel oil for current use into naval storage tanks at Pearl Harbor at \$1.28 per barrel. The United States Shipping Board has a contract covering a period of eighteen months for delivery at West Coast points of approximately 40,000 barrels per month at \$.81 per barrel and with the going rate of transportation added thereto makes the price being paid by the Shipping Board about \$1.00 per barrel, at Pearl Harbor.

In view of these facts the Bureau of Supplies and Accounts is not willing to accept the offer of the Pan American Petroleum and Transport Company until it has been able to determine that the rate offered is the best obtainable under the contract.

You will be advised further as soon as practicable.

Respectfully,

DAVID POTTER,

Paymaster General of the Navy.

(Red crayon)

Chief has seen

W

Copy to: Bureau of Engineering. [501—418]

Thereupon there was offered in evidence a communication dated January 25, 1923, from Admiral David Potter, Chief of the Bureau of Supplies and Accounts, to Secretary of the Navy, via the Bureau of Engineering, which was marked Defendants' Exhibit "000," and reads as follows:

DEFENDANTS' EXHIBIT "OOO."

SUBJECT: Department of Interior's and Navy
Department's Contract with the
Pan American Petroleum and
Transport Company of April 25,
1922.

1. On January 15, 1923, by reference from the Chief of the Bureau of Engineering, it was learned that under the contract referred to, the Pan American Petroleum and Transport Company had offered to make delivery of 1,500,000 barrels of fuel oil into naval storage tanks at Pearl Harbor at an adjustment rate of $\$1.36\frac{2}{3}$,

2. In view of the fact that the Navy has a six months contract with the Union Oil Company of California for the delivery of fuel oil for current use at Pearl Harbor, at a price of \$1.28 per barrel, and in view of the fact that the Shipping Board has an eighteen months contract for the delivery of fuel on the West Coast at \$.81 per barrel, which increased by the present transportation rate of the Shipping Board would make a price of about \$1.00 per barrel at Pearl Harbor, this Bureau thought it advisable to secure special quotations for the delivery of fuel oil at Pearl Harbor in order that, if lower prices were secured than the adjustment rate offered by the Pan American Petroleum and Transport Company, that company might be persuaded to accept an adjustment rate as low as prices that might be quoted to the Bureau by the test indicated.

816 *Pan American Petroleum Company et al.*

This Bureau therefore communicated with the Bureau of Mines of the Department of the Interior and stated that the adjustment rate of $\$1.36\frac{2}{3}$ should not be regarded as acceptable until further information was received.

3. In accordance with the above plan, quotations have [502—419] been secured from the following companies:

Associated Oil Company—\$1.00 per barrel at San Pedro. \$1.40 per barrel delivered at Pearl Harbor.

General Petroleum Corp.—\$1.00 per barrel at San Pedro.

Union Oil Company—\$1.00 per barrel at Port San Luis.

Standard Oil Company of California—\$1.40 per barrel delivered at Pearl Harbor.

Shell Oil Company— $\$.97\frac{1}{2}$ per barrel at Martinez for 500,000 barrels only.

All bids were for the full quantity of 1,500,000 barrels with the exception of the Shell Oil Company.

4. The Bureau has not been able to obtain a price for the purpose of comparison lower than that understood to have been offered by the Pan American Petroleum and Transport Company as above referred to, viz.: $\$1.36\frac{2}{3}$.

5. It is requested that Supplies and Accounts be advised of the action that may be taken in this matter.

DAVID POTTER.

(Testimony of H. Foster Bain.)

At the foot of the foregoing exhibit, in pencil, appears the following: "Chief has seen W.," which counsel for the parties stipulate is a memorandum placed thereon by Commander Woodson of the Bureau of Engineering, and indicates that the last quoted letter was seen by Admiral Robison.

Witness Bain thereupon testified that he prepared a letter to be signed by the Secretary of the Interior, to be sent to the Pan American Petroleum and Transport Company, in reply to that company's letter of January 16, 1923 (Defendants' Exhibit "MMM"), and sent the draft of that letter to the Navy Department, from which Department it was returned with a memorandum signed by Admiral Robison, dated January 26, 1923, in which memorandum it is stated, "your letter is satisfactory," referring to the above-mentioned draft of letter to be sent to the Pan American Petroleum and Transport Company; accompanying Admiral Robison's memorandum was also a letter to the Secretary of the [503—420] Interior, dated January 26, 1923, signed "Edwin Denby"; thereupon the letter to the defendant company, which the witness had drafted, was dated January 26, 1923, and was forwarded to the addressee; witness identifies the memorandum and letter thus referred to, and the same were offered and received in evidence as Defendants' Exhibits "PPP," "QQQ," "RRR." Exhibit "PPP" is memorandum from the Navy Department, for the Director of the Bureau of Mines, dated January 26, 1923, reading as follows:

DEFENDANTS' EXHIBIT "PPP."

So far as I can see, your letter is satisfactory.

I am enclosing Secretary of the Navy's endorsement upon the project.

As near as I can see, this ends our job with the Pan American Company. (As to gaging, we will, for the time being, gage and test at Honolulu as provided for in the terms of the original contract. If, in practice, any serious difficulties are involved, I am sure that a change to Port Costa can be brought about.)

All that the Pan American has got to do now is to go ahead and carry out the terms of their contract of December eleventh; and we will have a first-class plant at Pearl Harbor,—Let us congratulate each other.

(Signed) JOHN K. ROBISON,
Engineer-in-Chief, U. S. N.

Exhibit "QQQ" was a letter dated at Washington, January 26, 1923, addressed to Hon. Albert B. Fall, Secretary of the Interior, and reads as follows:

DEFENDANTS' EXHIBIT "QQQ."

Sir:

The within proposal of the Pan American Petroleum and Transport Company, to furnish 1,500,000 barrels of fuel oil for storage at Pearl Harbor, T. H., is recommended for immediate acceptance. [504—421]

This Department has made investigation, and has been unable to obtain a price lower than that offered

by the Pan American Petroleum and Transport Company in the within letter.

For the security of the national defense, it is necessary that the supply of this 1,500,000 barrels of fuel oil be made as soon as possible.

Respectfully,

EDWIN DENBY.

Exhibit "RRR" is the letter referred to as "satisfactory" in the above Exhibit "PPP," and is dated at Washington, January 26, 1923, addressed to the Pan American Petroleum and Transport Company, and reads as follows:

DEFENDANTS' EXHIBIT "RRR."

Gentlemen:

In response to your letter of January 16 and in accordance with your contract with this Department of April 25, 1922, as approved by the Secretary of the Navy, and your supplementary contract of December 11, 1922, and in accordance with the expressed wish of the Secretary of the Navy as per his letter of today, of which copy is attached, I hereby authorize and direct you to purchase 1,500,000 bbl. of fuel oil on the Pacific Coast and to deliver the same into storage at Pearl Harbor.

It is understood the price to be paid shall be ninety cents per barrel which added to the heretofore agreed transportation charge will make the price of the oil in storage at Pearl Harbor \$1.36- $\frac{2}{3}$ per barrel; that deliveries into storage shall begin in February and be completed as nearly as may be

820 *Pan American Petroleum Company et al.*

on or before November 1, 1923, and that the terms of acceptance and payment for this fuel oil shall be as specified in the contracts mentioned.

Respectfully,

ALBERT B. FALL,
Secretary. [505—422]

Thereupon there was received in evidence the following letter as Defendants' Exhibit "SSS":

DEFENDANTS' EXHIBIT "SSS."

April 26, 1923.

The Secretary of the Interior,
Washington, D. C.

Dear Mr. Secretary:

Reference is made to the letter of the Secretary of the Interior addressed to this Company under date of January 26, 1923, directing this Company to purchase 1,500,000 barrels of fuel oil on the Pacific Coast and to deliver same into storage at Pearl Harbor.

In this letter it was stated: "It is understood the price to be paid shall be ninety cents per barrel which added to the heretofore agreed transportation charge will make the price of the oil in storage at Pearl Harbor \$1.36- $\frac{2}{3}$ per barrel." The direction to purchase this oil was made pursuant to our contract dated April 25, 1922, with the Secretary of the Interior and the Secretary of the Navy, and under that contract the price to be charged the Government for this fuel oil was provided to be the Bay Point, California, market price thereof at date

of delivery, plus our charge for tanker transportation to Pearl Harbor which was $46\frac{2}{3}\text{¢}$ per barrel.

At the date of the Secretary's letter (January 26th) the Bay Point, California, price of this oil was \$1.00 per barrel, but through negotiation we were able to procure this 1,500,000 barrels of oil on the Pacific Coast at 90¢ per barrel, which added to the transportation charge of $46\frac{2}{3}\text{¢}$ results in the price of $\$1.36\frac{2}{3}$ per barrel, as stated in the Secretary's letter.

In addition to procuring this oil at the price of 90¢ or 10¢ less than the market price, we were able to make an arrangement with the company from whom we purchased same (the Associated Oil Company) under which we were given the benefit of the following provision: "It is understood between [506—423] us that should open sales price of fuel oil on San Francisco Bay (which is now \$1.00 per barrel) decline, the price of ninety cents (\$.90) will decline likewise."

The purpose of this letter is to notify the Department of this provision and to state that should decline in price to us occur, such decline in price will inure to the Government.

Respectfully,

PAN AMERICAN PETROLEUM &
TRANSPORT COMPANY

JJC-r.

By JOS. J. COTTER,
Vice-President.

There was next introduced in evidence Defendants' Exhibit "TTT," being letter dated at Wash-

(Testimony of H. Foster Bain.)

ington, May 3, 1923, addressed to Mr. J. J. Cotter, Pan American Petroleum & Transport Company, New York, and reading:

DEFENDANTS' EXHIBIT "TTT."

Dear Mr. Cotter:

I am very glad to have your informative letter of April 26th, in which you outline the negotiations directed towards purchasing 1,500,000 barrels of fuel oil for Navy Storage at Pearl Harbor.

Although this contract was made for the benefit of the Navy Department, this Department, as well, appreciates your work in having consummated the provision that, should the price of fuel oil decline while the contract is in effect, such decline in price will be shared in by the government.

Very truly yours,

E. C. FINNEY,

First Assistant Secretary.

The witness Bain, continuing, testified that in the matter of operations under the contract of April 25, 1922, the supplemental contract of December 11th, and the lease bearing the latter date, the part taken by the field force of the Washington office of the Bureau of Mines is that the field force receives and gages the oil on the various leases, keeps account of the amount, and the grade, and the record of prices, [507—424] and certifies these; the office force audits all of the accounts on both sides of the ledger in this contract. The headquarters of this particular division of the field

(Testimony of H. Foster Bain.)

force are at Taft, California; the Bureau of Mines plays no particular part in connection with the work at Pearl Harbor, which is handled by the Bureau of Yards and Docks, Navy Department.

Dr. Bain recalls an invitation for bids on lands in Section 2 Section 6 and Section 25, Naval Reserve No. 1, which invitation was sent out November 30, 1921; the decision to lease those particular strips of ground was made at the October conference, 1921, to which he has testified; the Bureau of Mines was directed to take steps to consummate leases; a list of the names of the principal companies operating in that district was submitted and was approved by the Secretary of the Interior, Mr. Fall, as the ones to whom offers should be made. When the announcement was made that these lands would be leased, various other people asked for the privilege of bidding, and were given the privilege of bidding. The actual details as to the leasing were handled by the Petroleum Division of the Bureau of Mines, in co-operation with the general land office. The bids that came in for the strip in Section 6 and Section 25 were not satisfactory, and it was recommended that that ground be not leased. The lease in Section 2 was made; the October conference, to which witness refers, is that at which Admiral Robison was present; witness has no recollection as regards whether that matter was taken up with Admiral Robison after bids were received; there was discussed with witness the transaction which resulted in the delivery

(Testimony of H. Foster Bain.)

to the Government of a quitclaim deed from White and Coffin to Section 2 in Reserve No. 1, the discussion being with Secretary Finney, Mr. Ambrose and Mr. Cotter; [508—425] witness is not positive whether he discussed it with Secretary Fall or not; the recommendation made by the Bureau of Mines was to the effect that if a lease was given in return for that quitclaim deed, it should not extend beyond the center of the section, and should cover only the unleased portion of the north half, rather than the whole section. The witness knew at the time of the transaction in which lease was given to Ramsey, as assignee of the United Midway Oil Land Company, and to the Pan American Company, in Section 1, which leases bear date December 14, 1921; he discussed that transaction with Mr. Finney, and again he is not positive whether he personally discussed it with Mr. Fall or not; he did not personally make any recommendation on the subject, but the Petroleum Division was called upon to arrange a program of development and royalties for these leases when they were written; the decision as to whether a lease should be made or not was not made in the Bureau of Mines; witness is not positive whether the Bureau made any recommendation as to what lands should be included in those leases. Witness recollects a discussion in the Petroleum Division as to the advisability of leasing the rest of Section 1; he had a discussion with Mr. Ambrose and some of the other engineers who were on duty at that time, and they

(Testimony of H. Foster Bain.)

pointed out to Dr. Bain that, as the information then available indicated, the southern half of Section 1 would be so far down the dip that a lease on that would not be worth much of anything, so that if the Secretary decided to lease the whole of Section 1, as a matter of fact he was not leasing very much of value except the little northern part.

At the October conference, already testified to, in the general summary at the close of the conference, Secretary Fall said to the whole conference, and asked confirmation of those present, as to whether he had the matter straight in his [509—426] mind, substantially this: "If we lease these strips it will decrease the gas pressure in the strips next adjacent and it will mean that we must progressively lease further and further to the extent of the sand," and the representatives of the Bureau of Mines present stated that that was their understanding and interpretation of the facts; in a discussion with Mr. Ambrose and the other engineers in regard to Section 1 above referred to, this matter was referred to in connection with this additional leasing in Sections 1 and 2, but just where and when and in what words, the witness does not remember.

The witness knows Mr. Mark L. Requa, who is a mining engineer, resident in San Francisco, and was the active man in the Nevada Petroleum Company, and who served as head of the Oil Division in the Fuel Administration during the war; witness has read the so-called "Requa Report" with

(Testimony of H. Foster Bain.)

respect to Naval oil reserves, made in 1916; he discussed that report with the men in the Petroleum Division, and with Admiral Robison, Mr. Finney and Secretary Fall; he cannot fix the date, but it was during the progress of the matters he is testifying regarding, and, while not positive, he believes it was prior to December 11, 1922; that would be his best recollection; the Requa Report thus referred to, the witness identified as a paper shown to him, dated San Francisco, California, December 16, 1916, and the same was marked Defendants' Exhibit "UUU," for identification. Witness also identified a communication dated November 30, 1923, addressed to the Hon. Reed Smoot, Chairman of Committee on Public Lands and Surveys of the United States Senate, and a communication dated November 7, 1923, addressed to H. Foster Bain, Director of the United States Bureau of Mines, Washington, D. C., and testified that the last mentioned was received by him, and the first mentioned was sent by him, to Senator Smoot, and that that was done in his line of duty. Counsel for the plaintiff and [510—427] defendants agreed in open court on the authenticity of the said document, and the same was thereupon marked Defendants' Exhibits "VVV" and "WWW" for identification.

Dr. Bain recalls the communication dated August 27, 1921, from the American Oil Engineering Corporation, addressed to Secretary of the Interior, which is Plaintiff's Exhibit No. 55; that communication came to his attention, having come to his office

(Testimony of H. Foster Bain.)

from the Secretary's office; witness asked Mr. Safford who was the administrative assistant to the Secretary, whether it required any answer, whether he should just file it, and there is a memorandum on that letter, with Mr. Safford's initials, reading "Just file"; Dr. Bain examined that communication at the time it came to him, and he has in mind the proposition therein contained in general terms; the Bureau of Mines was not asked for a decision on that subject. He did not give consideration to the proposition contained in that letter prior to any action thereon; any consideration he has given to that subject has been later; he is aware of the fact that in that letter reference is made to a similar letter written under date of September 27, 1920, to the then Secretary of the Navy, Mr. Daniels, copy of which witness recalls having seen; he had *never* informed of any action taken by the Navy Department in 1920 or 1921, or at any other time, on that subject.

As to the subject already referred to in the testimony about an arrangement with the pipe-line companies to exchange crude for fuel oil, covering the months of November and December, 1921, the witness testified that at the time the Navy asked that that matter be taken up in the fall of 1921, the oil coming from the various leases was being sold and the money was being turned into the miscellaneous receipts of the treasury; the Navy wanted to get possession of this oil, and [511—428] had started correspondence with the Department clear back in

(Testimony of H. Foster Bain.)

January with that in view, and it was decided at the October conference immediately to make arrangements to take oil in kind; the oil was then flowing to the four pipe-line companies, the Standard, the Union, the General Petroleum, and the Pacific-Associated group; the Bureau of Mines, following the October conference, and by direction of the Secretary, made arrangements with each company by telegraph, to take the crude oil in exchange for fuel oil, and hold the latter subject to disposition by the Navy; this arrangement was on a basis which substantially amounted to equivalence of price, though not always expressed in that form; by the expression "equivalence in price" is meant \$1.10 worth of crude oil to be exchanged for \$1.10 worth of fuel oil, the fuel oil price being fixed by the market price at tidewater, and the crude oil price by the posted price of the District. None of these four companies was asked to bid for, or submit a proposition to take, oil from what might be called the other companies' territory, and they did not so bid; there was no newspaper advertisement for bids, or competition preceding this arrangement; there was no newspaper advertisement nor bids for leasing a part of Sections 2, 6 and 25, about which the witness has already testified; the various persons who were invited to bid in that instance were notified by letter, or if they came to the office, as some of them did, they were given copies of the proposals there.

Some months ago witness had calculations made

(Testimony of H. Foster Bain.)

showing the average royalty received by the United States from oils in Naval Reserve No. 1, this average being on the whole amount up to the date of that calculation; the results found are thus summarized: Up to the end of 1923, from all the oils produced in all leases in force on Naval Reserve No. 1, the [512—429] Government had received an average royalty of a fraction over 31 per cent; excluding the royalties received from any wells in Reserve No. 1, except those coming under leases with the defendant Pan American Petroleum Company, dated June 5, 1922, and December 11, 1922, the average royalty received by the Government was, as of that time, 28 per cent; according to a calculation made by the Bureau of Mines, later than the foregoing, and during the year 1924, after there had been some interruption of operations as a result of the investigation, the average royalty received by the Government under the June 25 and December 11, 1922, leases, was 26 per cent. To the best of witness' recollection, the average royalty received by the Government from all the leases in Naval Reserve No. 2, is 18 per cent, or very close to it.

At the beginning of the direct examination of the witness H. Foster Bain, there was placed on a blackboard in the courtroom, in view of the Court, a large map, and the same was exhibited to the Judge, with the statement that for the record a smaller map, copy thereof, would be produced and offered in evidence; at this point such smaller copy was produced and offered and received in evidence,

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(Testimony of H. Foster Bain.)

counsel for the plaintiff consenting, and the same is appended to this statement of the evidence as Defendants' Exhibit "XXX."

Toward the close of the direct examination of the witness Bain, it was stipulated between counsel for the plaintiff and for defendants, that the witness had testified before Congressional Committees in 1921, 1922, 1923 and 1924, and it was agreed that the printed reports of such said hearings correctly reported his said testimony, and that if it should be made to appear hereafter that any of his said testimony is material in this case, the same may be received in evidence from the printed reports of the said hearings. [513—430]

Cross-examination.

On cross-examination Dr. Bain testified that he is not clear in his recollection as to when Secretary Fall first made any statement to him about the use of royalty oil in the construction of storage tanks; he is not clear whether the Secretary said anything to him about it before the October conference or not, but he did mention it at the October conference; the Secretary was away from the end of July to October 17, or thereabouts, and the witness got back about October 20th, and he is not sure that the Secretary ever spoke to him on that subject before that time; the October conference which the witness attended could not have been on October 22, the date fixed by a letter of Secretary Denby, drawn by Admiral Robison, under date of October 25, because the witness did not return to Washing-

(Testimony of H. Foster Bain.)

ton until Sunday, October 23; there must have been another conference which he did not attend; the conference attended by him was held before the October 25th letter, called the "Policy Letter," was written, and at that conference, to the best of witness' recollection, witness recalls the first reference by Secretary Fall to oil tankage being filled with royalty oil, as a consideration; at this conference Admiral Robison and Secretary Fall were present; Secretary Fall said that he had been considering a plan for using the royalty oil for tankage; witness does not remember that he said that Mr. Doheny had agreed to make a bid; he said, referring to an earlier conference with Mr. Doheny, he was satisfied that Mr. Doheny would make a bid; he did not at that time say that he was expecting a communication from Mr. Doheny on the subject; at that time there was a discussion as to how the matter could be handled; the discussion did not go to the extent of how we could get a contractor to do it; the discussion then all ran to the point of making a direct exchange with an oil company, it was only after witness got the [514—431] detailed plans from the Navy, and saw what an amount of engineering work there was concerned in it, that he became satisfied it was necessary to bring an engineering firm into it; at the conference late in October, details were not discussed as to actual storage or place, but there was some mention of details; at that conference it was said by some present, substantially, though the witness is not certain that it was defined

(Testimony of H. Foster Bain.)

in this way, that the pressing need of the Navy would be for current use oil, and that the tankage project should wait upon an excess of royalty oil; from the time of that conference and all through the month of November, witness had conferences with Secretary Fall on the subject, and some time in the month of November the Secretary told witness that he was expecting a communication from Mr. Doheny, which would give Mr. Doheny's engineers' ideas of the cost of this tankage, and so when the letter of November 28, 1921, was handed to witness, he understood it to be the letter that Mr. Fall had been expecting from Mr. Doheny; Secretary Fall did not at the time tell witness that he was expecting a communication from Mr. Doheny, or when he handed the witness the communication, say to witness that it would be necessary no doubt to grant further leases to Mr. Doheny; the letter was taken by the witness for reference, and he read it; witness saw in the November 28, 1921, letter the language: "Therefore, were we to construct the tanks and furnish the oil on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserve and to be leased to us it would require a return to us in royalty oil," of so much, but he did not give that matter any consideration at all; it passed right over his head; he was thinking only of the estimate, and that letter was put by him with some other papers, Mr. Jurs' estimate and some others, in [515—432] the safe in his office, and was not in the general files of the

(Testimony of H. Foster Bain.)

Department, and when the general files were certified to the Senate Committee, this letter was not certified over with them, and was subsequently found; witness does not recall Secretary Fall saying anything to him about any further leases to the Pan American Company in connection with this project; Secretary Fall had the matter up quite actively with the witness between November 29 and December 1, the date he left, because Dr. Bain's Bureau was to be charged with whatever duties there were in connection with it in his absence; the witness does not remember ever having seen the letter of November 29, 1921, Exhibit 34, to Admiral Robison; he may have seen it, but he does not remember it; as to the November 28th letter, Dr. Bain's only recollection on that is that at the time Secretary Fall went away, he handed Dr. Bain the estimate made by Mr. Doheny's engineers; that was the only thing that stuck in his mind, and that is the letter of November 28th; before he went away, and at the same time he handed witness this paper, Secretary Fall gave witness instructions that when the Admiral and the Navy Department sent over the plans, "we should proceed to develop a method of carrying out the Navy's wishes in this matter."

At the conference of late October, there was a discussion as to whether the obtaining of storage by using royalty oil instead of money would constitute an exchange or whether it would constitute a sale and purchase, and Secretary Fall gave it as his opinion that it would be a true exchange, at that

(Testimony of H. Foster Bain.)

conference mention was made of the fact that the Navy had no money appropriation for such purpose, and that the Navy could not build this tankage out of any appropriation it had, and would have to use royalty oil for that purpose if it was going to do it at all; Secretary Fall had already thought it out, and announced that in his opinion this would be a true exchange; [516—433] he did not go through any line of reasoning, but simply said that was his judgment; there was no suggestion made there that there be any inquiry from any Government officer as to the legality of the proposition; some such phrase as "Would it be legal?" was used in that discussion, and Secretary Fall said he thought it would. The witness, upon being asked whether before Secretary Fall left, on December 1st, Mr. Cotter told the witness that the Pan American Company would make a bid on this tankage proposition, answered that he cannot fix the date exactly, but Mr. Cotter told him that along about that time; as to when Admiral Robison told witness he had been in touch with Mr. Doheny, and that Mr. Doheny would make an offer on this work, the witness can only say "along about that time"; he cannot fix the exact date; when witness asked Secretary Finney to write the letter of December 16, 1921, being Exhibit 67, the bid he had in mind was a bid on the Pearl Harbor project; he was not ready at that time to take bids; he had not then shown Mr. Doheny's office, or any representative of the Pan American Company, plans and specifications; as

(Testimony of H. Foster Bain.)

to what he meant by saying that Mr. Doheny's bid would be handled by the New York office, to the best of his recollection, Mr. Cotter told him that the matter would be handled by that office; he had been in touch with Mr. Cotter before December 16, on the subject, just when he does not know, but it may have been almost any day then; the difficulty in attempting to fix dates is this: Pearl Harbor as a project was mentioned before the actual bringing over of plans and specifications, and witness does not remember the exact date that the word "Pearl Harbor" first came into the conference; it was after that came into the discussion, whether it was before December 1 or November 29 or not, that witness was in touch with Mr. Cotter on the thing and learned that when it was handled by his company [517—434] it would be handled through the New York office; he cannot be any more definite than to say then that it was about that time that he talked to Cotter on the subject; he cannot say whether it was before December 1st, when Secretary Fall left Washington, or after; he cannot say when the Pearl Harbor project was first mentioned, whether it was October 25 or after, except that the Pearl Harbor project was first mentioned before Secretary Fall left the city, and witness also saw Mr. Cotter after Secretary Fall left Washington; he did not see, to his own knowledge, Cotter before that time about the Pearl Harbor project; it was after December 1st that Cotter told witness that their bid would be made in the New York

(Testimony of H. Foster Bain.)

office; as to what the witness meant in the letter of December 16, in the statement that he would like to get the Pan American bid into some sort of shape before he went west, the word "bid" is an inaccurate word, that should not have been used; it is difficult to say what word should have been used; he was trying to formulate a plan and find out a proposal upon which people could bid, and he was seeking help as to how to formulate a proposal upon which they could bid, and he was seeking help from the Vice-president of the Pan American Company, who was then located in Washington; Mr. Cotter had been in the Interior Department under a previous administration, and the witness knew him quite well, and Cotter was acting then either as an officer or attorney, or both, for the Pan American Company, and had headquarters in Washington, and witness saw Cotter; as to the time when he saw him, from the correspondence he would judge that the Pearl Harbor matter was discussed with Cotter after December 16th, and before December 23d, on which date witness wrote Mr. Fall; on or about that date, too, witness asked Mr. Cotter to arrange for witness to meet Mr. Anderson when he came West; between December 16 and [518—435] December 23, Cotter gave witness ideas as to the form of contract, but the witness does not remember in detail what ideas were suggested, because there were so many plans that changed backwards and forwards; he cannot now give any idea what Cotter's suggestions were; referring to the state-

(Testimony of H. Foster Bain.)

ment in letter dated December 23, 1921, from witness to Secretary Fall, Exhibit 70, that, "I am going west primarily to consult with the Standard and such other companies as we may determine in conference between us should be taken into account, with regard to the tankage plan of the Navy. I have seen Mr. Cotter and he is getting for us additional data now," this was additional data which Cotter hoped to get with regard to the cost of various sorts of elements that entered into the specifications which Dr. Bain had by that time, that is, the first general specifications; also it was necessary to get data as to the cost of transportation of oil from the coast to Honolulu, and things of that sort; Dr. Bain left Washington December 28, 1922, for the West, and Mr. Cotter traveled with him as far as Three Rivers, New Mexico, and there the witness got off to see Secretary Fall; Mr. Cotter at that point just stepped off the train and greeted the Secretary, and got back on the train. Twenty-four hours later the witness proceeded to Los Angeles, where he was met by Mr. Cotter in the Southern Pacific station; the project was discussed between the witness and Mr. Cotter on the way West, but as to whether he got any further light or data from Cotter at that time, he does not remember the details; upon arrival in Los Angeles, Mr. Cotter and Mr. Anderson met the witness, and they attended a football game that afternoon, and the next day he met the officers of the Pan American Company at their offices, there being a number of the officials of

(Testimony of H. Foster Bain.)

the company present; the witness' recollection is not clear that Mr. Doheny gave a positive [519—436] answer as to whether a bid would be submitted on this matter at that meeting; his recollection is that it was laid before the Board of Directors there, and that when the witness came back, the following week, Mr. Doheny gave him the positive answer. At this time witness had a bundle of blueprints showing in merest outline the things the Navy wanted at Pearl Harbor; there were some typewritten pages accompanying this, and he is not clear now whether they were only the pages which were sent from the Navy, or whether he had added a page or two as a suggested outline; those that came from the Navy consisted of what might be called skeleton specifications, to go with the skeleton plans; witness had in the meantime thought about what ought to go into the project, or be covered by it, but whether he had reduced them to writing at the time he does not recall. One suggestion made by the witness at that time to the Pan American Company was that the probable plan of handling the matter would be that an oil company would take the crude oil and make the fuel oil exchange, and as to construction, arrange in some way to take the construction company's oil off of its hands, or to pay the construction company cash in return for the crude oil that the oil company would get; that was only one suggestion, and the suggestion to use the engineering company independently was not made in any detail at that time, because it

(Testimony of H. Foster Bain.)

was an idea developed more in detail after witness talked with Mr. Storey in San Francisco.

The witness had gotten in touch, as he testified on direct, with Mr. Gano Dunn of the J. G. White Engineering Company, and made an appointment by which Mr. Dunn came to Washington and saw witness there, shortly before witness left for Three Rivers; on December 28 witness wrote Mr. Dunn, quoting to him a part of the Judge Advocate General's opinion touching the question of exchange, which letter, as Plaintiff's Exhibit [520—437] 245, was read in evidence, in part, as follows:

PLAINTIFF'S EXHIBIT No. 245.

"My dear Dunn:

Referring to our conversation this morning as to the right of the Interior Department to exchange royalty oil produced on Naval Petroleum Reserves for fuel oil and to erect storage for fuel oil, for your information I wish to quote you from a letter to the Secretary of the Interior signed by the Secretary of the Navy, dated December 14, 1921. The Secretary of the Navy writes as follows": (Then follows quotation from the said letter to the Secretary of the Navy, which in turn quoted the Judge Advocate General's opinion already offered in evidence.)

By the foregoing exhibit, witness fixes this conversation with Mr. Dunn as the day before he left Washington for Three Rivers; in that conversation Mr. Dunn asked, "Is there authority?" for ex-

(Testimony of H. Foster Bain.)

changing oil for tankage; Mr. Dunn is not a lawyer, so the witness quoted to him the Judge Advocate's opinion that there was authority. Under date of December 29, 1921, Mr. Dunn from New York, wrote Mr. A. W. Ambrose, Bureau of Mines, Washington, D. C., letter which was read in evidence as Plaintiff's Exhibit No. 246, and is as follows:

PLAINTIFF'S EXHIBIT No. 246.

My dear Mr. Ambrose:

I have this morning your letter of yesterday, for which I am very much obliged, and I return as promised one of the extra copies made in our office of the specifications for the Sandwich Islands job, which I hope will be of use to you.

I appreciate the attention you and Director Bain have given to the tentative proposal I have made on behalf of the J. G. White Engineering Corporation. I hope to amplify this proposal on the Director's return from the Coast and if he brings back any new conditions, to modify it to suit those conditions. [521—438]

Wishing you a very happy New Year, I am,

Sincerely yours,

GANO DUNN,
President.

The witness would not call what Mr. Dunn had submitted a "tentative proposal"; Mr. Dunn had told witness in conversation that his company would be glad to consider this matter, and that at

(Testimony of H. Foster Bain.)

the proper time he would make a proposal, but there was no paper or anything of that kind then.

At the conference with officers of the Standard Oil Company in San Francisco in January, 1922, neither Mr. Sutro nor anyone else there said that the Standard could not bid on the construction; Mr. Sutro did not go that far; witness handed the Standard Oil Company officials all the extracts from the Judge Advocate General's opinion; the copy was on the table when Mr. Black, of Ford, Bacon & Davis, came into the Standard Oil Company's office.

Witness met Mr. Weil at the second conference with officials of the General Petroleum Company, and Mr. Weil expressed very grave doubts, graver than Mr. Sutro; the latter apparently had not made up his mind; Mr. Weil asked why the opinion of the Attorney General was not obtained; witness does not remember Mr. Weil saying that his company would not consider it unless the opinion of the Attorney General was obtained, but would consider it if the Department got that opinion; witness would not say Mr. Weil did not say that; Dr. Bain remembers telling Mr. Weil that he did not care to get the Attorney General's opinion, stating to him substantially what he has already testified, that the Department itself was entirely satisfied with the opinion; that the Navy Department was satisfied it had legal authority to go ahead, and the objections stated in witness' direct testimony to raising any question about it, about getting a technical [522—439] lawyer in on

(Testimony of H. Foster Bain.)

the thing; when witness returned to Washington, he asked Secretary Finney if it would not be a good plan to get the Solicitor's opinion; asked whether he thought that the Solicitor was a technical lawyer, and that he was one of those "go-ahead" fellows who would give a good opinion, the witness replied, "I thought he was the Solicitor of the Department"; he made the suggestion that it might be well to take the opinion of the Solicitor of the Department, and the opinion of the Attorney General; he made that suggestion prior to making the contract of April 25, 1922, in conversation with Secretary Fall, early in the transaction; he reported to Secretary Fall the opinions of Mr. Sutro and Mr. Weil, as they had been expressed to witness, making this report a few days after he wrote to Judge Finney on January 25; he is not certain at that time he suggested to Secretary Fall that it would be well to get the opinion of the Department of Justice, as he had already done so in the previous October or November, that is, witness raised that question at the very first, as to whether it should be done; if it were done then, of course it could not have the slightest embarrassing feature to Mr. Doheny.

About March 4, 1922, witness received a letter from Col. Black, of Ford, Bacon & Davis, Exhibit 95, enclosing copy of Mr. Sutro's opinion, and he replied in his letter of March 4, Exhibit 96; as to whom he gave his opinion to for study, witness passed it over to Secretary Finney, and also, his recollection is, to Secretary Fall; he did not have

(Testimony of H. Foster Bain.)

anyone else study it; he did not report the result of the studies to Col. Black, unless that was done verbally, his recollection is that he told Col. Black that the Department stood on its ground, that it had adequate legal authority to do the work.

The statement in the letter of Dr. Bain to Col. Black that "I think we will be able to arrange a form of bidding which will meet the principal objections he (referring to [523—440] *Sutro*) has in mind," witness says meant the form of bidding that was sent out March 7; at that time Secretary Finney and witness were formulating the proposals that went out on March 7; in the judgment of witness, these proposals met the objection that the Navy could not legally exchange royalty oil for tankage; as to what attorneys witness had reference to in his statement in his letter to Col. Black reading, "I am sure we can back our plan with good legal opinion since the matter happens to have been examined by attorneys outside as well as inside of the service," Mr. Dunn told the witness that the attorneys of his company had told him that it was legal; witness does not remember Col. Black giving him copy of opinion of Davis, Auerbach & Cornell, New York lawyers, against the legality of the plan; he has a hazy recollection of Col. Black saying something about having taken their opinion, and that it was adverse.

Regarding the statement in the letter to Col. Black, "I will give you the results later," Col. Black was down to witness' office in Washington

(Testimony of H. Foster Bain.)

once or twice, and talked about the thing, and witness sent Black the proposals of March 7. Before the bids came in, Mr. W. F. Herrin, legal adviser of the Associated Oil Company, discussed with witness legal questions regarding the plan; Mr. Herrin and Mr. McLaughlin saw the witness and Secretary Fall when Mr. McLaughlin arrived in Washington, a week or ten days before the bids were opened; Mr. Herrin had a discussion with Secretary Fall as to whether the plan was legal or not; he did not at that time say in Dr. Bain's presence that he would not permit the Associated Company to bid, except conditionally on Congress approving the plan; the witness is clear on that; Mr. McLaughlin did so advise witness before the bids were put in, and before April 15, 1922, he knew that Mr. Herrin had given that opinion to Mr. McLaughlin, [524—441] and that something would be done in the bid to provide for that, but he did not know what particular form that would take; the witness did not know that there was no intent to go to Congress at that time to get any such ratification.

Dr. Bain knew, from a conference with Mr. Storey and Mr. Sutro had with him in Washington in March, 1922, that the Standard Oil Company would not undertake to bid on the construction; the persons or corporations in the oil industry to whom he had sent invitations consisted of the Associated Oil Company, who he knew would bid only conditionally, the Standard, who he knew would bid not

(Testimony of H. Foster Bain.)

at all on the construction, and the Pan American, and that there would be but a single bid from an oil concern covering the whole thing; from correspondence, and from conversation with Mr. McLaughlin, Dr. Bain knew that the Associated Company would not bid on the No. 1 Reserve oil; that they were only interested and only expected to bid on No. 2 oil, but what they might finally decide to do, he could not say. Referring to Dr. Bain's letter of March 23, 1922, Exhibit "YY," to Mr. McLaughlin, in which it is stated that it is entirely possible that even if someone else gets the contract, the Associated can purchase the oil from Reserve No. 2, that is exactly what they did; except for some gathering lines that carried oil to the pipelines, the Pan American Company had no lines, and no refinery in this territory; the Pan American Company had not then much oil territory; they had either all or part of Section 6, just outside of the reserve No. 1, and portions of Sections 1 and 2, and it would be necessary for the Pan American Company to market the oil it took from the Government, if it took any in exchange; having in mind that the Pan American Company might be the successful bidder, witness suggested in his letter to Mr. McLaughlin that if it was, Mr. McLaughlin's company could no [525—442] doubt secure this royalty oil.

On March 30, 1922, Dr. Bain wrote a letter addressed to Mr. A. C. McLaughlin, Associated Oil Company, San Francisco, which, as Plaintiff's Ex-

hibit 247, was read in evidence and reads as follows:

PLAINTIFF'S EXHIBIT No. 247.

My dear McLaughlin:

We are having a good many inquiries from San Francisco with regard to particulars of the project in view and I suspect that these come indirectly from you. The whole matter is one which is not easy to settle, and I believe it will be worth your while to be here on April fifteenth and prepared to stay two or three days. It will take some little time to compare the bids and perhaps there will be slight differences of opinion to be adjusted where a personal conference would smooth things out quickly. The Secretary is very anxious to get the matter closed out as promptly as possible.

It also occurs to me that it is entirely possible that even if some other company is the successful bidder on the project as a whole you might be able to make a private arrangement to get control of the crude oil from Reserve No. 2, which I gathered from our conversations is the thing you are most interested in. With these two possibilities in view I feel warranted in making the suggestion that you plan to be down here. At any rate we can have a good visit and lay the foundation for future co-operation.

Cordially yours,

H. FOSTER BAIN,
Director.

(Testimony of H. Foster Bain.)

The foregoing letter was written after Dr. Bain's conference with Secretary Fall referred to in his direct examination, in which the Secretary expressed his anxiety to get the thing closed, and his impatience that it would have to wait until April 15; after the above letter was written, and after the receipt by witness of telegram already in evidence, stating that Mr. McLaughlin would start for Washington on a certain date, Mr. McLaughlin arrived in Washington, and after he had been there several days, and in the meantime had been working on his bid, the witness learned that he was not going to make a bid except with some sort of reservation about Congress' consent.

Immediately preceding the writing by the witness of Exhibit [526—443] 247, in a conversation with Secretary Fall, the latter said he would like to see the thing put through, if necessary, by private negotiation, by calling these people to Washington and cleaning it up and getting rid of it; he asked the witness if that could be done, and Dr. Bain advised him it could not; as to the date of that conversation, it must have been immediately preceding the letter to Mr. McLaughlin last above quoted. As regards letter of April 12, 1922, Exhibit 102, Dr. Bain did not call Secretary Fall's attention to any misstatement in that letter; he was not conscious of any; the statement therein, "I am therefore holding up the proposed contracts indirectly by taking abundant time for the consideration of bids, etc., with the hope that meantime

(Testimony of H. Foster Bain.)

this amendment may be adopted and that we may obtain the results suggested by the large saving which I am confident will accrue," is the Secretary's language; the first contract, the Mammoth contract, at that time had been signed, and the Secretary was holding it up; the Mammoth contract had been let by private negotiations, without bids; bids had not come in from the Pan American, and witness had just advised the Secretary that they could not come in and be considered until April 15; at the time the letter was written, the proposed contracts included, first, the Mammoth contract, which had already been signed, and which the Secretary was holding in his desk at that time; the other contract was the one which had not yet been made, and could not be made because the bids were not in.

In the Bureau, the work was done on Sunday analyzing the bids received April 15; in those days, work was done frequently in that Bureau on Sunday. No word was received from Secretary Fall to hold those bids up until the thing could be sent to Congress.

At the time Secretary Fall sent his letter to Secretary Denby, dated April 12, he said to witness that he had not a [527—444] doubt in the world that Denby could get that legislation if he would just ask for it, and that it would simplify matters very greatly; witness understood by that that the legislation would enable the selling and buying of oil; witness did not understand that the proposed

(Testimony of H. Foster Bain.)

legislation would be a ratification of the contracts about to be made; to his mind, the language, "Provided, further, that storage of fuel oil from Naval Reserves may be provided either by exchange of oil for such storage," etc., is clear to the witness; further, it was Dr. Bain's understanding when that letter was written that the foregoing phrase, if enacted into law, would amount to a ratification of an exchange contract; at the time, the thing he was thinking about was the part referring to an authority to sell the royalty oil for cash, and to use the cash for construction contracts; he paid no attention to the above quoted phrase in it; at that time, Dr. Bain knew that the Mammoth oil contract had been signed by Secretary Fall, but he is not sure whether a copy had then been delivered to the other party to the contract.

Secretary Fall left Washington April 13, having told witness to open the bids, check them, and make a report to him; the witness' understanding then was that he did not have the right to independent action, but that that was reserved to Secretary Fall; it was our understanding that we were to recommend; witness cannot remember the name of the representative of the Foundation Company who came to witness' office, and from whom witness gathered the impression that that company was going to cooperate with the Standard Oil Company in some way in the making of a bid; this representative, the first time he came in, asked for plans and specifications, and said that his company

(Testimony of H. Foster Bain.)

desired to make a bid on the work; a day or two later, the plans and specifications [528—445] were sent him; witness identified a letter from the Foundation Company, dated March 22, 1922, acknowledging receipt of plans and specifications, and states that that comports with his memory of about the time the representative of that company called; he does not recall ever hearing from him again. (The letter referred to, upon request, was shown to counsel for defendants, and hereafter appears in evidence as Exhibit "YYY.")

Dr. Bain thereupon identified letter dated April 15, 1922, written to Mr. A. I. Findley, Editor of the "Iron Age," New York, as having been written by him, and the same was received in evidence as Plaintiff's Exhibit 248, and reads as follows:

PLAINTIFF'S EXHIBIT No. 248.

Dear Mr. Findley:

I very much appreciate your coming around and am particularly sorry to have missed your call yesterday. I would have liked to talk with you a little about that Pearl Harbor business. We are not permitted to give out any definite information at present concerning the engineering features. The work under consideration, is part of a general policy developed between the Navy and the Department of the Interior. You will recall, doubtless, that some years ago considerable areas in the oil fields were set aside for naval reserves. Owing to the fact that the Government title was not com-

plete to all of the lands studies have shown that there has been serious drainage of the Government property. In two California reserves at least \$8,000,000 worth of oil has been taken from under Government lands by neighboring wells. To prevent similar and larger losses in the future the Department is now leasing lands where necessary to secure offset wells and proposes to take the oil from below ground in such situations and exchange it for fuel oil which shall be put in storage for the Navy. The crude oil at the wells is not, of course, available for naval use and if put in storage there would be serious losses through evaporation, so it is first being exchanged for fuel oil, where evaporation losses are very light, and this in turn put in storage at points convenient for the Navy. As an incident to that the oil companies making the exchanges have been taking sub-bids preparatory to making proposals for furnishing the storage. The particular piece of work to which your attention was called is a part of the confidential war preparations of the Navy, though naturally when contracts are let and construction begins there will be some necessary publicity. It is impossible to give any information on any particular project, as the details are being handled by the Secretaries alone.

I have appreciated very much your cooperation in this matter, and I will be very grateful if you will not quote either me or the Department in mak-

(Testimony of H. Foster Bain.)

ing use of the information given you above.

Cordially yours,

H. FOSTER BAIN,

Director. [529-446]

The witness identified letter dated April 15, 1922, as having been written by him to C. J. Stark, "Iron Trade Review," Cleveland, Ohio, which, as Plaintiff's Exhibit No. 249, was read in evidence as follows:

PLAINTIFF'S EXHIBIT No. 249.

Dear Mr. Stark:

Sometime since you will remember an exchange of telegrams between us with reference to some oil storage plans for the Navy of which you had heard. I am unable to give you very much in detail, but there is no reason why you should not have the following information:

The work under consideration is part of a general policy developed between the Navy and the Department of the Interior. You will recall, doubtless, that some years ago considerable areas in the oil fields were set aside for naval reserves. Owing to the fact that the Government title was not complete to all of the lands studies have shown that there has been serious drainage of the Government property. In two California reserves at least \$8,000,000 worth of oil has been taken from under Government lands by neighboring wells. To prevent similar and larger losses in the future the Department is now leasing lands where necessary to

(Testimony of H. Foster Bain.)

secure off-set wells and proposes to take the oil from below ground in such situations and exchange it for fuel oil which shall be put in storage for the Navy. The crude oil at the wells is not, of course, available for naval use and if put in storage there would be serious losses through evaporation, so it is first being exchanged for fuel oil, where evaporation losses are very light, and this in turn put in storage at points convenient for the Navy. As an incident to that the oil companies making the exchanges have been taking sub-bids preparatory to making proposals for furnishing the storage. The particular piece of work to which your attention was called is a part of the confidential war preparations of the Navy, though naturally when contracts are let and construction begins there will be some necessary publicity. It is impossible to give any information on any particular project, as the details are being handled by the Secretaries alone.

I have appreciated very much your cooperation in this matter, and I will be very grateful if you will not quote either me or the Department in making use of the information given you above.

Cordially yours,

H. FOSTER BAIN,

Director.

By the phrase in the last-quoted exhibit, "It is impossible to give any information on any particular project, as the details are being handled by the Secretaries alone," he could not give out anything without the Secretary's authority; of course,

(Testimony of H. Foster Bain.)

he was acting with the Secretary, and Robison was acting with the Secretary; Secretary Fall was not at that time conversant with all the details; it is impossible to say how [530—447] much of them he was conversant with.

The "Iron Trade Review" had telegraphed from Cleveland prior to March 28, 1922, for information, and witness replied to that publication by telegraph, which he either sent or framed for the Secretary to send; witness identifies the letter from the "Iron Trade Review," dated Cleveland, March 29, 1922, and testified that that letter substantially states the telegram which had been sent that publication in the circumstances above narrated. Said letter was addressed to Secretary Fall, and, as Plaintiff's Exhibit 250, was read in evidence, as follows:

PLAINTIFF'S EXHIBIT No. 250.

Dear Sir:

Acknowledgment of your wire of yesterday, asking us not to publish at present, for military reasons, the information concerning the opening of bids by the navy for fuel oil tanks at Pearl Harbor, Hawaii, herewith is formally made.

We wired you last night as follows:

'Your request not to publish information regarding oil tanks for navy Pearl Harbor acknowledged. Matter will not be published on grounds given by you. Appreciate your prompt release this matter when advisable.'

(Testimony of H. Foster Bain.)

We were glad to honor your request in this matter and trust that as soon as the circumstances permit, that you will release this news to us as it is information of considerable value to the steel industry.

Sincerely yours,

THE IRON TRADE REVIEW.

C. J. STARK, Editor.

Plaintiff's Exhibit No. 251 is telegram, fully quoted in the foregoing letter.

Replying to the question, "Was there any instruction to you not to give out information about the Mammoth contract and the bidding on the Pearl Harbor project?" Dr. Bain testified that there was the original request of the Navy to treat all those matters as confidential; up to the time that request came through his office, he does not recall that there was any instruction of secrecy; witness was furnished the names of 12 or 14 sub-contractors to the Associated and Standard Oil Companies, and knew that part of the matter would be taken up [531—448] with some or all of them; the furnishing of material, the purchase of pumps, for example, could be taken up with the sub-contractor or sub-contracting concerns without telling them where and what the project was; he does not recall whether the list of approved sub-contractors from the Bureau of Yards and Docks was furnished the Foundation Company or Pittsburgh & Des Moines Steel Company; the latter was on the approved sub-contractors list; a set of plans and specifications was furnished the Pittsburgh-Des Moines Company, after the first of

(Testimony of H. Foster Bain.)

April, the exact date not being recalled; witness knew before bids were opened that the White Engineering Company had up with the Pittsburgh-Des Moines Company the question whether the latter would sub-contract for tankage; witness' best recollection is that he sent the list of approved sub-contractors to every bidder, and that recollection is that the list was sent to the Standard Oil Company of California.

In the files, there should be a letter of transmittal to the companies to which the list was sent; just prior to the time bids were opened, Dr. Bain knew that from the Pan American Company there would be a complete bid, and that that company would submit an alternate bid. Secretary Fall did not request witness to arrange the invitation for bids dated March 7, so as to permit the Pan American to make an alternate bid; witness is clear on that; he is quite sure that Secretary Fall never made any such request to him; he knows that Gano Dunn made a request, which was that the alternative be made as wide open as possible in the sense of giving the bidder as much latitude as possible; that subject was also discussed with Mr. Cotter before March 7; Mr. Cotter said he wanted an opportunity to put in an alternative bid, but did not tell the witness that he was going to put in an alternative bid that involved the preferential right to leases on the whole Reserve, [532—449] and witness is quite clear that he never knew that any such alternative bid was to be put in until he saw it when the bids

(Testimony of H. Foster Bain.)

were opened; there was no such bid put in; he is wrong about that, that is a mistaken recollection; there was a bid conditioned upon a preferential right to lease throughout the whole reserve, but that was not put in the contract; witness did not know that any such alternative proposition was to be put in until he saw the bids opened, and did not know the nature of the alternative bid that either Mr. Cotter or Mr. Dunn had in mind. He could frame an invitation for an alternative bid, as he did frame it, without the slightest knowledge of what alternative these men had in mind, because the alternative which was discussed by Dr. Bain and Mr. Dunn was an alternative under which it would be possible to bid on the contract in case it was impossible to get sub-contracts covering the whole construction; Mr. Dunn explained to witness that he could get firm sub-contracts on perhaps 80 or 90 per cent of the work, but that there were some other elements to be sub-contracted for, on which he, or anybody else, might have to bid a unit price, because they did not have full information; and therefore witness framed an alternative request in the invitation for bids, in such a way that if any bidder found it impossible to make a lump sum bid on the whole job of construction, the bidder would be permitted to put in a lump sum bid, based upon firm sub-contracts for not less than $66\frac{2}{3}$ per cent of the whole work, and another form of bid to take care of the work remaining over and above the $66\frac{2}{3}$ per cent; that is the alternative he had dis-

(Testimony of H. Foster Bain.)

cussed with Mr. Dunn and Mr. Cotter. The second alternative permitted by the invitation was this: In the earlier requests it had been insisted that a bidder say how many barrels of fuel oil he would give against one barrel of crude oil of a certain gravity, and in the later [533—450] one the bidder was permitted to bid fuel oil against crude oil in a proportionate number of barrels, if he could make a firm bid that way, and the Pan American availed itself of that alternative; they told him that they were able to make a lump sum bid because they had gotten the full information.

The invitation for bids framed by witness, as far as alternatives were concerned, was not intended to invite an alternative proposal that involved leasing any part of the reserve; witness had no information prior to the opening of the bids from any concern that an alternative proposal would be submitted involving the leasing of the reserve; nothing had been said to witness by Secretary Fall about an intent, in connection with the contract proposed to be made for Pearl Harbor to lease any portion of the reserve to any of the bidders except that witness had proposed, in both sets of proposals, that the Government would agree to give leases enough to bring the production up to a certain minimum amount. In all the invitations for bids that the witness had put out, he stated, substantially, what royalty oil the Government would expect to run per annum from the leases, and that if production from the existing leases ran down to such an ex-

(Testimony of H. Foster Bain.)

tent as to unduly extend the time of the performance of the contract by the Government, the Government would, in the discretion of the Secretary, grant further leases to bring the amount of royalty oil to the approximation stated in the invitation for bids; so that in those invitations it had been suggested that if the Navy royalty oil was not running to pay for this job within a fair time, some leases would be given so that there would be more royalty oil; that had nothing to do with drainage; that had to do with paying the contractor; witness does not know what arrangement was made between the Associated Oil Company and the Pan American Company, after the contract of April 25 was made for the sale of royalty oil by the Pan American; he [534—451] is not certain that arrangement was consummated in May, 1922; Dr. Bain left Washington to go West to arrange for delivery of the accumulated royalty oil late in April or early in May. He was in San Francisco early in May, and he was not then arranging for the delivery of that oil to the Associated, as vendee of the Pan American; he did not know then who the vendee was; as regards giving out information, witness, to the best of his knowledge, governed himself according to the Department of the Interior memorandum of April 13, 1922, Exhibit 114. He was familiar with the fact that Secretary Fall communicated the contents of that memorandum to Secretary Denby; he cannot fix the date on which information concerning the date of award of the

(Testimony of H. Foster Bain.)

Pan American contract was first given out, without reference to the record; that is a public matter here. He was present at discussions regarding whether information should or should not be given, which were participated in by Secretary Finney, Mr. Safford, Admiral Robison, and Mr. Swanson, the witness' secretary. The witness has no particular familiarity with advertisement and issuance of invitations for bids for other public work.

When he went to Three Rivers and met Secretary Fall there, he told Secretary Fall the oil companies he was going to take this matter up with, and the Secretary agreed; the witness saw Mr. Cotter and Mr. Dunn frequently between February 15 and April 15; but he does not remember seeing them almost daily; Mr. Cotter was stationed in Washington during that period, but he spent a great deal of time in New York; witness saw these gentlemen in New York not more than twice between February 15 and April 15; he had a great many interviews with Mr. Dunn and Mr. Cotter between February 15 and April 15, but he could not give the number; shortly after February 15 the first subject of discussion was the difficulty of bidding under the invitation that was then outstanding, and Mr. Dunn [535—452] and Mr. Cotter explained to the witness that unless the specifications were altered, they could not bid; the specifications were then altered; he did consult with Mr. Dunn and Mr. Cotter regarding the form of the invitations of March 7, 1922, before it was in final shape, and was

(Testimony of H. Foster Bain.)

issued, in the sense of showing them the plans and asking their approval; he discussed with Mr. Dunn, as an engineer, the sort of proposals it would be necessary for an engineering firm to have, as the matter of covering the possibility of not being able to get lump sum bids on everything involved in that alternative proposal; but not in the sense of drafting, or joint drafting, or anything of that nature; after the issuance of the invitation for bids dated March 7, there arose a question of how bidders should state the ratio of fuel oil to royalty oil, and Mr. Cotter submitted a ratio that his company was about to use in its bid, and Ambrose, with witness' knowledge, tested that ratio to find out if it was sound; the first ratio was found to be uncertain; witness is not certain as to the origin of the first ratio; it might have been originated in the Bureau of Mines, or it might have originated with Mr. Cotter alone; he does not think it was originated by Mr. Dunn; that was brought to or discussed with the Bureau as to whether it was a ratio they could work with; it was found to be uncertain; there were certain cases in which it failed to work; they finally did bring witness a ratio which seemed to test out for all quantities of crude oil as against fuel oil; there was also considerable discussion between them and witness as to this proposal sum which should go up or down in barrels of oil, depending upon the price of oil and upon the quantities of construction and extras; witness does not know that there was ever discussed the par-

(Testimony of H. Foster Bain.)

ticular form of bidding providing that the proposal sum in barrels of oil should be one which might go up and down from day to day, so as to take care of these [536—453] differences in prices; he does not know that the words "proposal sum" were used in discussions prior to the opening of the bids, or that that idea crept in; but that the amount which should be paid in oil should vary with the market price of crude, the market price for fuel, and the difference in gravity of the various amounts delivered from the leases was under discussion, and what language would cover that case; but Dr. Bain's recollection is that the actual language that was adopted he never saw until the bids were opened; no official of the Government discussed in the presence of witness the advisability of divulging, in the sense of proposals which should be printed as an advertisement in the newspapers; Secretary Finney insisted that bids should be taken upon this contract and arrangement; as regards whether any method was taken to notify any other construction concerns other than the Foundation Company or the Pittsburgh-Des Moines Company, there was Ford, Bacon & Davis, J. G. White & Company, and the correspondence with regard to the Stuart Engineering Company; witness discussed the matter with the president of the Stuart Engineering Company; he submitted the matter to oil companies other than those he has mentioned in his testimony. Secretary Finney stated his position with regard to the taking of bids early in the negotia-

(Testimony of H. Foster Bain.)

tions, at the very beginning; his impression is that it was before the letter of December 9 from the Navy was received.

The question of what leases should be agreed upon in the letter of April 25, 1922, Exhibit 125, was taken up with the witness before that letter was delivered; the purpose of those two leases was to supply more royalty oil to the contractor, to anticipate the fact that the Government would have to take care of drainage on these particular pieces of land; witness was asked whether in the letter written by him November 7, 1923, [537—454] to Senator Smoot, which he identified on direct examination, he did not state that the sole purpose of Exhibit 125 was to supply royalty oil to the contractor, and answered that he does not recall what was written in there on that point; thereupon, counsel asked him whether in that letter he did not say this: "These original leases were in order to increase the amount of royalty oil that accrued and would become applicable on the contract, and by so much shorten the time the contractor would need to wait to secure a return of the money he needed to construct immediate storage facilities"; and the answer was in the affirmative, witness adding that that did not exclude another idea, though, and the other idea was in mind at the time. The preparation by the witness of the above-referred to letter of November 7, 1922, to Senator Smoot, took about three weeks; in writing that, evidently he overlooked the other idea that was in mind in making leases made

(Testimony of H. Foster Bain.)

under the April 25, 1922, letter; as regards what Mr. Cotter said as to the reason why he wanted these leases, he said that he wanted something to show his company as a direct benefit; that in his judgment the contract as made was not one out of which his company could make any money; that all they got out of it was the use of their ships for carrying oil a certain number of months, and that all the rest was to be done at cost, and he did not want to go before his company and present a contract for signing unless he could show something as a result. At this time there was never mentioned Mr. Doheny's letter of November 28th; Cotter, in addition, stated what he has above set forth, adding that the preferential right was worthless; in response to which, witness "joshed him" and did not agree that it was worthless; witness thought it might become very valuable; in a general way, witness had an idea how much petroleum there could possibly be recovered from [538—455] Reserve No. 1; the Bureau of Mines had not made any estimate at that time, but he had the Geological Survey estimate; the Geological Survey has made two estimates on that, one of two hundred and fifty million and another of one hundred million barrels; by the time of the conversation between Mr. Cotter and witness, the preferential right had been restricted to the eastern half; in the witness' view, the eastern half was more valuable than the western; witness has no knowledge as to whether the award letter, dated April 18, was delivered to Mr.

(Testimony of H. Foster Bain.)

Cotter on the morning of that day personally; he was not present when it was delivered, and has no recollection on the subject; Dr. Bain received at his office on April 18 letter from Mr. Dunn of the White Corporation, dated April 17, 1922, addressed to witness, and reading (Exhibit 252):

PLAINTIFF'S EXHIBIT No. 252.

Dear Mr. Bain.

As per program, Mr. Cotter and I are going down tonight and will be at your office about nine o'clock tomorrow Tuesday morning.

Very truly yours,

GANO DUNN,

President.

Witness does not remember a letter dated April 17, 1922, from Mr. Dunn to Mr. Ambrose, reading (Plaintiff's Exhibit 253):

PLAINTIFF'S EXHIBIT No. 253.

Dear Mr. Ambrose:

Mr. Cotter has just told me of your telephone conversation. He and I are both coming down tonight and will be in Mr. Bain's or your office tomorrow Tuesday morning about nine o'clock.

and does not know what the telephone conversation therein referred to was; he was not present when Mr. Ambrose's report was rendered on the bids, and has no information regarding it, but knows by the record it was rendered; he learned the contents of the Ambrose report when he go back from Pitts-

(Testimony of H. Foster Bain.)

burgh; he saws Messrs. Cotter and Dunn early in the morning of the 18th; on the opening of the bids of April 15, it appeared at once that the Standard Oil Company had bid only on exchange of fuel oil for royalty oil; that was not [539-456] the thing the Government was particularly interested in, it wanted the whole job done, and that ruled that bid out at once; it appeared immediately when the bids were opened that the Associated Oil Company had bid only for Reserve No. 2 oil, which would extend the contract for a long period of years, and that they had bid only conditionally upon the submission of the matter to Congress; that did not rule that bid out; witness had it in mind to submit the matter to Congress if that company had bid the lower amount; that was discussed there in the Secretary's office, that if it had been the lowest amount, we would promptly have taken it up with Congress; it was apparent the moment the bids were opened that their bid was not the lowest amount on the proposal sum, but there was a consideration as to whether the changes specified in the Associated Company's bid amounted to anything, and there was the question how it would be worked out on that extra length of piles and differences in amount of dredging whether that would influence the Associated Oil Company as against the Pan American bid; witness does not remember that the Associated bid on the extra length of piles was exactly the same as the bid by the Pan American Company; he simply remembers that there were these things that had to be considered; it did

(Testimony of H. Foster Bain.)

not take the rest of Saturday and all day Sunday to work out that matter; they did not put in all their time on that thing; after witness returned to Washington on April 18, he saw both Mr. Ambrose and Mr. Finney; as to the telegraphic correspondence of that day, some of those telegrams Secretary Finney told witness he had sent, and he read them to witness; he does not recall which was which; he does not know what time Secretary Fall's approval came in, or what time in the day the award was made; he knows that Ambrose started for Three Rivers April 20, and he knows of the [540—457] telegram to go ahead, dated April 23. In the meantime, work was being done on the drafting of the contract; this was being done in the office of witness, and he was called in on it from time to time, to discuss particular points; the contract very closely follows Proposal B, and it was not a difficult matter to draft it in that form, so that the matter was ready when Secretary Fall could send his O. K., and when the Navy should give it approval; the latter came to witness from Admiral Robison.

Dr. Bain does not recall having seen upon his return from Alaska in the summer of 1922, letter of July 28, 1922, from Mr. Cotter, as vice-president of the Pan American Company, to Secretary Fall, Exhibit No. 140; he discussed the suspension of drilling with Secretary Fall, but Secretary Fall told witness that a request for that suspension had come from the Pan American Company, and there was discussed suspension of drilling not only in the Cal-

(Testimony of H. Foster Bain.)

ifornia reserves, but in the other reserves, and in the Osage Nation, and determined upon the general policy on account of the tremendous over-production of oil at that time. In letter to Senator Smoot of November 30, 1923, witness stated that a memorandum from Mr. Doheny came to his possession in August, 1922; that was an evident mistake in the date, he knows now that it was in October; that evidently is a mistake because he checked it up when he showed that memorandum to Admiral Robison, and he knows he did not have it long in his possession before. As to where he got the data upon which to base the statement made in his above mentioned letter, to Senator Smoot, that "the most careful consideration was given to a memorandum proposal submitted by Mr. E. L. Doheny to the Secretary in August, 1922," the proposal came to witness from the Secretary; witness does not know how long it was in the Secretary's possession; when the Secretary gave it to Dr. Bain, he told him to take it up with the Admiral; witness telegraphed to [541—458] Mr. Cutler and asked for certain data and made some calculations on that data, and then saw Admiral Robison, and discussed it; that was in the first half of October; he is clear now that that was the time when he had that paper in hand. As to the statement in the aforementioned letter from the witness to Senator Smoot, reading: "This proposal was handed me by the secretary for study and I at once took up with the Bureau of Engineers concerned in Washington and California, the va-

(Testimony of H. Foster Bain.)

rious problems connected with it. I also promptly consulted with Admiral Robison, the special representative of the Secretary of the Navy, and began tentative formulation of a contract along the lines indicated," that is what the witness did in October, he formulated a tentative plan in his mind; the plan set forth in Mr. Doheny's memorandum was very far from plain enough; in the first place, it did not offer the Government enough; in saying he was formulating a plan, witness means he was thinking over the matter as to what should be asked for and what should be gotten, and what form the negotiations should take; he took the subject up with Admiral Robison very shortly after the Secretary handed him the memorandum, and Admiral Robison said that his personal desire was to go ahead, but that he would take it up with his associates in the Navy, and see if they were prepared to do anything of this sort; by "going ahead" was meant providing a larger amount of storage for the Navy, and giving a lease upon a substantial part of Reserve No. 1; in the conversation with Admiral Robison, it is the recollection of the witness that Pearl Harbor was only one of the places mentioned; there were mentioned Pacific Coast points, as a general phrase; Admiral Robison was talking about further storage at Pearl Harbor and other Pacific Coast ports to be constructed under a new contract, and the [542—459] giving of a lease on the reserve as a consideration for that, and witness formulated plans in his mind in very general terms. He had reached no

(Testimony of H. Foster Bain.)

conclusion about it, except as to how he would go at it, before the second memorandum from Mr. Doheny came in; that memorandum came to witness through the Secretary's office, but he does not know how soon after its date on November 6; after receiving this second memorandum, he had conferences with Admiral Robison from time to time, starting almost immediately, and Admiral Robison gave witness in general terms information as to what was being done in the Navy in connection with consideration as to whether the policy should be adopted or not saying that it was being considered by the different branches of the Navy and that a decision would be reached later. To the best of Dr. Bain's recollection, he took the matter up with representatives of the Pan American Company only after a formal request, dated November 29, was received from the Navy Department; the matter was being discussed with Admiral Robison, and turned over in the witness' own mind, from some time early in October until after November 29; the letter of November 29 was the first positive go ahead order on that contract received by the Interior Department; then witness got in touch with Mr. Cotter and, through him, with Mr. Doheny and Mr. Anderson, and men of Dr. Bain's own staff, and Admiral Robison.

In the negotiations that followed, there were many questions of which that relating to royalty was only one; there was a very heated discussion over the number of sections in the west half of the

(Testimony of H. Foster Bain.)

reserve which should be opened to immediate drilling, and there was a discussion over the number of strings of tools which should be kept in operation, over the items under which the Navy or the Government might order the lessee to drill in what we called among ourselves the [543-460] reserved part of the west half; over the terms of abandonment; over whether we would under any consideration give notice to the Pacific Oil Company to open up the inner reserve; there were a great many things like that; witness had Mr. Ambrose make some royalty calculations to guide him in his negotiations with regard to the royalty. When the split was reached with these men, witness, with Secretary Fall, in his office, named or suggested a scale of royalties that the Government would think right; prior to that time, he did not have all of the tabulations he has spoken of; that was gradually developed. The representatives of the Government started with the royalties on the strip in the north part of Section 2 as a basis for negotiations, the royalties there being 12½ per cent to 35 per cent of oil of over 30 degrees Baume; that lease, which had been bid for, and which the Pan American Company had been the successful bidder for, was taken as one of the bases for discussion; there were also original bids on the north strip of Section 1, and the bids that had been received on Sections 25 and 26, which had not been considered satisfactory; his recollection is that the General Petroleum bid on Section 25 was only for the regulation royalty; by this time

(Testimony of H. Foster Bain.)

we also had the Belridge royalties, which were higher than those in the north strip of Section 2, there being a different system of brackets.

In these negotiations, Admiral Robison wanted to start with $14\frac{2}{3}$ per cent, rather than $12\frac{1}{2}$ per cent, and to that Mr. Anderson did not agree; witness compared the royalties that were suggested by him with the regulation royalty which was suggested by the other side, but he did not say they compromised in between them somewhere; we compromised on the whole list, that is, not in between them as regards [544—461] a particular bracket; they did not go through and split the difference on each bracket, but made a general run or step-up that was different from either of the suggested ones; witness made a calculation to see whether or not the schedule that was finally suggested as a compromise could bring better or worse royalties in the long run than the regulation royalties; and "in our judgment" the schedule adopted was better than the regulation royalty schedule, because of "our estimate" as to what the average yield per well would be; he does not recall what the estimated average yield per well was, but remembers that that was calculated and that entered into the adjustment; he does not remember the detailed figures at this time, but they were all gone into carefully at that time, and calculations made; by taking the total production of all wells that produced for a substantial part of a month, and dividing that by the number of wells, and then dividing the result by the number of

(Testimony of H. Foster Bain.)

days in the month, there is arrived at the average production per well per day per calendar month, and that average production is divided in levels, and to the first 20 or first 50 barrels, whatever the first bracket is, is applied the lowest percentage, and to the next bracket between 20 and 50, or whatever it is, is applied the next percentage, and so on; when there has been exhausted the average of one well for one day, say 200 barrels, there is then applied the royalties in the different brackets to that proportion of the total production which is represented by the proportions of a single well; it is a contemplated mathematical proposition, and there are tables for calculating it, which are used. In speaking of the average production per well per day, a very high level, like a thousand or two thousand barrels, is not taken by itself and the royalty calculated all the way up, but that is lumped with the small wells, and then there is [545—462] obtained the average of a well, and then the brackets are applied. Witness knows that the larger number of the wells in Reserve No. 2 have been leased to persons who had equities under the Leasing Act, and that the upward limit in those leases is 25 per cent; the only leases that were granted by competitive bidding in Reserve No. 2 are a small number, not over a dozen, recently granted; a comparison of royalties in No. 2 with royalties in No. 1 is not a fair one. There are very considerable differences to be dealt with in entirely different situations; there are very great differences, and it cannot be taken at its face at all.

(Testimony of H. Foster Bain.)

The Pan American Company has not developed the land in Reserve No. 1 with any speed since the lease of December 11, 1922, was entered into, because in view of the depression, the Government has not pushed them to develop with speed; they drilled every well they were asked to drill up to the time of the receivership; it is not good business to drill under conditions as they have existed up to this time, even in those parts of the reserves where there are no restrictions; the price of oil is still very low, and there is still a flood of oil on the market; if the Navy had not been anxious for the storage facilities, the lease could have waited.

In the autumn of 1922, there was discussion of competitive bidding for leases in Reserve No. 1 only in this sense: That it was recognized that it would be first necessary to exhaust the possibilities of negotiation with the Pan American Company for the eastern half under the preference right; at the time when the break came over the royalties and other things, the Government officials seriously discussed among themselves how else they would get at this and who else they would go to. There was a discussion between Secretary Fall and the witness of a possible break, not as to whether it would be thrown open to bidding, but as to what next negotiations to [546—463] take up, or whether any would be taken up.

Upon being asked whether he recalled a conversation at which Secretary Fall and Admiral Robison, shortly before November 29, 1922, at which

(Testimony of H. Foster Bain.)

Admiral Robison verbally announced the decision of the Navy as to the leasing of Reserve No. 1, he has a recollection of a conference at which Secretary Fall, Admiral Robison and the witness were present, at which the Admiral said, "It is all right; go ahead," but whether that was with reference to Reserve No. 1 or the Wyoming lease, he does not remember; the Wyoming lease had been made in April, 1922, but he is now trying to remember things that occurred two or three years ago; witness remembers, and so told counsel for the Government in Washington on this subject a few weeks ago, that Admiral Robison authorized the Interior Department to go ahead, and that witness knew it; Admiral Robison said to witness words to this effect: "Well, the matter is settled; we are going ahead with the additional storage. The Navy Department badly needs additional storage at Pearl Harbor. It is not certain how long I may hold my present position. Administrations change, and if the matter is postponed, the acquirement of storage may never be accomplished. It has been decided to go ahead at once with an additional project for 2,700,000 barrels at Pearl Harbor," but witness cannot be positive now that this was said in Secretary Fall's office, or in the presence of Secretary Fall; witness does not recall that after that statement Secretary Fall turned to Admiral Robison and asked him to have the Navy write him a letter on the subject, and he does not recall so telling plaintiff's counsel; the last quoted statement of

(Testimony of H. Foster Bain.)

Admiral Robison was not with reference to the Mammoth lease, but had to do with this.

The term "Published field price" in the industry means [547—464] the price at which the company agrees to take any amount of oil which may be offered at the well on that particular day, or until further notice. The witness' understanding of the agreement in the December 11, 1922, contract with the Pan American Company, that it would carry oil to tidewater free, is this: That if there is ever a difference in the price of crude of a certain grade, as between the Naval Reserve and tidewater (San Pedro, for example), that the Government will then get its crude carried down to San Pedro, California, and sold at the San Pedro price, without charge for bringing it down; that the Government crude will be carried down there free, and will be sold to the company, or the Government get credit for it at the San Pedro price, rather than the Elk Hills price. Mr. Cotter first insisted that Secretary Denby be made a party to the contract of April 25, 1922, saying that the Pan American Company would not go with Proposal B unless Secretary Denby was made a party, nor unless the lease for certain small areas was guaranteed within 12 months. Witness, upon being asked, "He (Cotter) did not couple the joinder of Secretary Denby then with proposal A but with proposal B, or did he say that the company would not sign any contract unless Secretary Denby was a party?" answered, "I am not certain about that."

(Testimony of H. Foster Bain.)

Witness identifies memorandum dated February 4, 1922, as having passed through his hands to the Secretary of the Interior, and the same was marked Plaintiff's Exhibit No. 254, and is the identical memorandum which is Defendants' Exhibit "U-2."

Dr. Bain does not recall any instructions from Secretary Fall concerning the giving out of information or withholding of information as to the lease of December 11, 1922; the question of what publicity should be given this was taken up [548—465] at once and discussed with Admiral Robison, and at or about that time the Navy Department gave out a news story. Witness identifies as having been written by Mr. Ambrose to Mr. Campbell of the Bureau of Mines at Bakersfield, letter dated January 16, 1923, and states that the footnote in handwriting was placed there by himself and the said communication was thereupon read in evidence as Plaintiff's Exhibit No. 255, and is as follows:

PLAINTIFF'S EXHIBIT No. 255.

My dear Campbell:

I have your letter regarding the confidential nature of the recent lease to the Pan American Petroleum and Transport Co. I think it would be well to review for your information some of the general details of this contract.

The Secretary of the Navy wrote the Secretary of the Interior advising that they wished to enlarge immediately the storage facilities at Pearl Harbor

and did not wish to wait until the completion of the present project and its payment from the present royalty oils, and requested the Secretary of the Interior to co-operate with representatives of the Navy Department in providing immediately for additional storage facilities at Pearl Harbor and other places upon the best terms that could be made. Accordingly, an agreement was made with the Pan American Petroleum and Transport Co., which is considered very confidential, and a copy of the agreement relative to storage facilities, etc., has not been sent you because it contains figures on the amount of storage, its location, etc., which the Navy considers confidential and of military value and is very anxious that it not be published. It requires, according to the best estimates, an early advancement by the Pan American Company of between \$12,000,000 and \$15,000,000 and they will have to take their chance on getting payment for this from the royalty oils from the reserves.

You have a copy of the lease which practically gives them a lease on the eastern half of the reserve and requires that they drill necessary offset wells on the western half of the reserve in case the Government feels that drainage is taking place from wells on the bordering territory. Obviously, the Navy is not anxious for any more to be said about this than is absolutely necessary, and the Secretary has directed the representatives of the Bureau in Washington to maintain the whole matter confidential as this was requested by the Navy.

As a result we have referred all inquiries to the Navy Department and are letting them make whatever announcements or give whatever information they desire, and I suggest that in so far as possible your office should take the same attitude. I appreciate that this puts you in a somewhat difficult position, but inasmuch as the Naval reserves are considered a part of the National Defense, and as long as the Navy requests us to keep this information confidential, I think that is the best way for us to keep in the clear in the matter.

The press announcement of the Navy was to the effect that the Pan American would drill such wells as were necessary immediately to prevent drainage, and I understand [549—466] that they are not planning to drill additional wells on the eastern half of the reserve at the present prices of oil. The Government, of course, does not desire that they maintain the reserve indefinitely when the price of oil is better than it is today, as we are required to pay 5% interest on their advancements. Inasmuch as their bonds bear 8% of course they obviously would be anxious to liquidate expenditures as soon as possible.

With this information before you I think that you should still not give the lease out for public inspection, but I see no harm in advising people that they will drill necessary offsets on the west half of the reserve and have a right to drill on the east half.

Very truly yours,

A. W. AMBROSE.

(Testimony of H. Foster Bain.)

(In ink:) They are to drill at once wells to offset the gas wells in Sec. 36 but these are not planned to go beyond the gas sand now despite the right of the P. A. to so drill them if they wish.

Asked whether he understood that the Navy did not desire the fact of the lease (in December, 1922) to be given out, the witness answered, "They didn't desire the lease itself to be given out." Mr. Ambrose, who wrote the last above quoted letter, was in court yesterday; he was the chief petroleum technologist, and is the gentleman who has been referred to in the testimony as having been present on various occasions, and have to do with many matters.

(Thereupon, it was agreed between counsel for plaintiff and for defendants that the said Ambrose had been in attendance upon the trial in this court for a week previous to yesterday.) Note: "Yesterday" was October 31, 1924.

Redirect Examination.

The defendants offered in evidence letter dated New York, March 22, 1922, identified by the witness Bain during his cross-examination, which, as Defendants' Exhibit "YYY," was thereupon received in evidence, and reads as follows:

(Testimony of H. Foster Bain.)

DEFENDANTS' EXHIBIT "YYY."

Bureau of Mines,
U. S. Government,
Washington, D. C.

Gentlemen:

In connection with the proposed construction work in Hawaii, which we understand is to be paid for in crude oil at a price to be agreed upon, said oil to be delivered somewhere in California.

We have an assurance of a source of disposal of this [550—467] oil and, therefore, request a set of plans and specifications for the work proposed with a view to making you a formal tender on it.

Thanking you for your courtesy in this matter, we are

Very truly yours,
THE FOUNDATION COMPANY.
(Sgd.) H. J. DEUTSCHBEIN,
V. P. & Gen'l. Mgr.

The witness testified that it was in response to this last quoted letter, and a previous conversation with a representative of the company, that he caused to be sent to the Foundation Company a copy of the plans and specifications; after that letter, dated March 22, was received, and until the bids were opened on April 15, witness did not have any information from the Foundation Company indicating that that company would not submit a formal tender as in the March 22 (last quoted) letter stated.

Mr. Doheny's letter of November 28, 1921, to

(Testimony of H. Foster Bain.)

Secretary Fall, was kept in the safe in witness' office, with the Jurs' estimate, the contracts themselves, the bonds securing the contracts, the plans and specifications, and the letters which led up to the contracts; they were all tied together; these papers were kept in the safe until some time during the Senate investigation, when, with other papers, they were put in what is called the "Naval Petroleum" files in the Bureau; all of these papers were kept in the safe, and not a part of the general files.

With respect to the information that the Pan American Company had through Mr. Cotter and Mr. Dunn about the terms of the alternate bids that were requested, that company did not have any information from the witness or from the Government, so far as he knew, that the Associated Company did not have; witness tried to give Mr. McLaughlin the same information; he does not recall that anyone else asked him about the terms of the alternate bids; the invitations to bid were [551—468] sent to the persons mentioned in the witness' testimony, in exactly the same form that they were sent to the Pan American Company.

As regards information which the Pan American Company had at the time the bids were submitted, which enabled it to submit a lump sum bid, that company had no information that the witness knows of from him or from the Government that every other one of those concerns he has mentioned did not have; with regard to conditions at Hawaii and

(Testimony of H. Foster Bain.)

the dredging and work to be done there, prior to April 15, witness had placed the J. G. White Company, and the Ford, Bacon & Davis Company in contact with the Hawaiian Dredging Company, and he knew that both companies had had negotiations with Mr. Dillingham of that Company; that is the same Hawaiian Dredging Company whose name witness gave Mr. McLaughlin of the Associated; while he was turning over in his mind, between October 22 and the time when there was received the Navy's letter of November 29, 1922, the subject matter of Mr. Doheny's memorandum regarding the oil situation in California, he had other matters which he turned over in his mind. He was very busy. He was very far from devoting his entire time during that period to formulating plans with respect to the Pearl Harbor project.

As regards comparing royalties received in Reserve No. 1, and the average royalties received from Reserve No. 2, a direct comparison cannot be made between any sets of figures that involve averages without taking into account the source of the averages, and what they mean and what they imply. While at the time of the December 11 lease, in view of conditions and the large amount of oil that was being produced in California, the conditions in that part of Reserve No. 1, where the Pacific Oil Company's sections alternate with those owned by the Government, there was not any need of immediate [552—469] drilling or leasing on account of drainage; the Bureau of Mines was

(Testimony of H. Foster Bain.)

very far from considering that that could go on indefinitely; the Bureau of Mines had at that time proceeded with its studies on that subject, and had communicated to Admiral Robison its views, which were that from time to time it would be necessary to lease additional areas, and at any time the Navy might be called upon to defend something like 60 miles of boundary by drilling at once.

As regards the opinion of some New York lawyers he was asked about on cross-examination, and as to whether he ever heard the opinion of the law firm of Cravath, Henderson & DeGersdorff, with respect to the authority to exchange under the Act of June 4, 1920, the witness has not any clear recollection of that, as he did not consider legal matters his part of the work.

Before leaving Washington for Pittsburgh, on the night of April 16, 1922, witness had gone over with Mr. Ambrose the subject matter of the latter's report of April 17, in the "Memorandum to Secretary Finney," but the report itself was not then completed; that is, the language of the report; witness' present recollection is that at the time he left the city, Mr. Ambrose had not yet received a final answer through Lieutenant Keating on some of the matters with regard to construction.

The witness Bain having been excused, there was next offered and received in evidence the following documents:

Defendants' Exhibit "ZZZ," being a letter dated at Washington, July 18, 1923, addressed to the Secretary of the Navy and reading:

DEFENDANTS' EXHIBIT "ZZZ."

Dear Mr. Secretary:

I am enclosing for your consideration a copy of letter received from Mr. E. P. Campbell, Deputy Supervisor of Oil and Gas Leasing Operations in the California District. This letter explains a difficulty met in the field because of the confidential character of the contracts [553—470] entered into with, and the leases of, Naval Reserve lands granted to the Pan American Petroleum and Transport Company.

This Department assumes that in the making of contracts covering Naval Reserve lands and in supervising the construction and filling of petroleum storage it is acting as agent for the Navy Department. The Bureau of Mines is instructed that in the care of papers relating to these subjects it shall consider them as separate from those arising out of the Interior Department operations and refer to the Navy Department any request it receives for copies of such documents or for data not answerable from information previously released by the Navy. This attitude, as Mr. Campbell's letter points out, leads to embarrassing situations and to misunderstandings on the part of those who do not realize the nature of this information. Indeed it is possible that in safeguarding the details of

these contracts an unnecessary degree of secrecy is maintained.

In this connection I suggest for consideration:

- (1) The leading facts in Pan American contract No. 4800 were authoritatively published at time of execution and the California press featured the news at considerable length.
- (2) The larger California oil producing companies issue maps, excellent in execution, accurate in detail and closely up to date. A photostat copy of such map is attached. From some source the compiler has secured reliable information regarding the land included in the Elk Hills lease all of which is shown as controlled by the Pan American.
- (3) In the carrying out of its contract obligations the lessee is drilling numerous wells scattered, as to location, over the tract leased and dotting the hills with new and conspicuous derricks. These are known by all persons in touch with the oil industry in that district to be the property of the Elk Hills Petroleum Co., a subsidiary of the Pan American Petroleum Co.

To summarize: All but the intimate details of both contract and lease is already fully known to the industry. For the Bureau of Mines representatives to profess ignorance is a questionable advantage and may prove to be a definite injury.

I, therefore, ask if, in your judgment, it would be detrimental to public interest if the Bureau of

Mines permits its field representatives, when questioned on this subject, to give the legal subdivisions covered by such leases while referring inquiries regarding other details to the Navy Department.

Respectfully,

E. C. FINNEY,
Acting Secretary.

Defendants' Exhibit "A4," being a letter dated at Washington, July 23, 1923, addressed to the Secretary of the Interior, reading: [554—471]

DEFENDANTS' EXHIBIT "A4."

My dear Mr. Secretary:

Your letter of July 18, concerning the publication of information regarding leases of the Naval Petroleum Reserves, has been received and has been given careful consideration.

Since the military features of the national defense enter largely into considerations of this nature, it is believed that a degree of secrecy has surrounded the whole undertaking that is probably not necessary. There has been no disposition on the part of this Department, to treat these leases in their entirety so confidential, it being desired to retain as confidential only the amounts and location of the resulting petroleum products when placed in storage. It is realized that, being physically of some size, these cannot be really kept secret, yet it is not desired to spread the information that these reserves of petroleum products are in existence or are planned.

As a matter of fact, the contracts have been recorded as public documents and are, therefore, available to any citizen of the United States who will expend the trouble and funds necessary to obtain copies in the customary official manner.

In order that embarrassing situations which arise in the administration of these Reserves may be removed, it is considered by this Department that it would be permissible for the Bureau of Mines or its representatives to give to the petroleum industry or others legitimately interested therein, such details concerning these leases as may be pertinent except those mentioned above.

Very respectfully,
THEODORE ROOSEVELT,
Acting.

Defendants' Exhibit "B4," being a telegram dated at Washington, August 8, 1922.

DEFENDANTS' EXHIBIT "B4."

Evening Herald,

Los Angeles, California.

I have instructed representative Department to restrict drilling and production everywhere so far as possible and not to speed up any program except when necessary to preserve Government oil property from Salt Water incursions or Drainage by other parties oil situation in California very much affected by recent developments near Los Angeles upon which the Shell Company and Royal Dutch in their official reports are congratulating

their respective or common stockholders paragraph government production is only approximately five per cent total in United States and Government policy can hence have little effect on total production. I am extending drilling on Government permits granted under lease law on application permittees to utmost limit of statutory authority.

FALL,

Secretary. [555—472]

Testimony of Gano Dunn, for Defendants.

GANO DUNN, a witness called on behalf of the defendants, testified that he resides in New York and is connected with the J. G. White Engineering Corporation, having been President thereof since 1913. The J. G. White Engineering Corporation are engineers and constructors to design, advise, supervise, erect, construct and create all kinds of engineering structures for public utilities and other industrial purposes, doing business all over the world, except in England. He knows Mr. E. L. Doheny, having first met him February 16, 1922, in New York. Prior to that time he had never met Mr. Doheny or had any business with him or the Pan American companies. He knows Mr. Joseph J. Cotter, having first met him the latter part of January, 1922, in the office of Director Bain of the Bureau of Mines. The witness first met Director Bain in 1917 or 1918, when the witness was a member of the Nitrate Commission of the War Department, but only knew him slightly at that

(Testimony of Gano Dunn.)

time. The witness next met Director Bain when he went down to the latter's office in response to a telephone communication and other communications, and talked to him about this Pearl Harbor matter, the first communication having been on December 16, 1921. The witness met Doctor Bain on December 23, 1921. The first communication referred to was the telegram in evidence dated December 16, 1921, from the witness to Doctor Bain, which starts out by saying that the witness had received a message from Mr. Riccard through Mr. White. Subsequent to sending that telegram, he called Doctor Bain on the telephone but got no information about the Pearl Harbor project then because it was so confidential Doctor Bain said he could not talk about it over the telephone but when the witness went down in response to the appointment then made, Doctor Bain told him about it for the first time. He had taken with him one of the other officers of his company and Doctor Bain, it turned out, knew this other officer, so he said "I want to impress upon both of you that the matter I am about to talk about is one of extreme confidence. It deals with the Navy plans for the national defense. It is regarded by them as so confidential that the plans and specifications I am about to show you have been brought over to me by uniformed commissioned officers, and I want to impress upon you that this matter is really and truly confidential." Whereupon they both said they would [556—473] regard it as such. Doc-

(Testimony of Gano Dunn.)

tor Bain then explained that there was an arrangement between the Navy Department and the Interior Department whereby the Interior Department was acting on behalf of the Navy to bring about the construction of a great naval fuel base at Pearl Harbor. Witness had known about Pearl Harbor as a very great coaling station and was interested in it because also it was in the Hawaiian Islands where his company had constructed some great trans-oceanic radio stations for the Radio Corporation. He knew he could do good work there, so his interest was thereby increased. Mr. Bain produced a rather full set of specifications and some drawings, and asked witness to read them over, which he did very carefully. Doctor Bain asked him if his company would be willing to make a bid on constructing the works called for in those specifications. Doctor Bain explained, however, that the work could not be paid for in money; that it had to be paid for in oil. Witness told him, to his surprise, that witness' company dealt in oil; that it bought oil for the bunkering of ships and of necessity had to deal in it in that way; that it also purchased oil for fuel for certain steam and electric central stations which it had built, among them a station near Los Angeles, at Redondo, that it would consider putting in a bid on the basis of taking its pay in oil, but it was a new and complicated matter and witness would have to talk it over with his associates, and possibly some of his directors. Witness outlined to Doctor Bain the nature

(Testimony of Gano Dunn.)

of the work the White Company did; told him it never had taken a lump-sum contract in its history and never would, because it always held to the relation of agent to a principal and not contractor with an adverse interest to make a profit. Witness took away from that conference when he left, under injunctions of secrecy, the specifications that were there, and, he believes, one or two drawings, but not all the drawings that were involved. There were some that were yet to come over from the Navy Department.

Henry A. Lardner, Vice-President of the White Company, was the other officer of that company that the witness had with him at the time.

Doctor Bain was short of copies of these specifications. He had used up those he had and he was short of stenographers, and the witness made some extra [557—474] copies for him and for the White Company's own use, and sent one or two of them back. He talked the matter over with his associate officers, and also with several of the White Company directors, or members of its Executive Committee. They felt that the witness was too optimistic and enthusiastic about taking pay for a contract of that kind in oil, and they objected to his contemplating doing it.

At the time of this conversation on December 23d, Doctor Bain did not say anything to witness or give him anything relating to an opinion expressed by any legal officer of the Government.

He saw Doctor Bain on December 28, 1921, after

(Testimony of Gano Dunn.)

witness' consultations with his associates in the White Company at Doctor Bain's office in Washington.

When witness brought home the specifications and drawings, Doctor Bain later supplied some of the lacking drawings, and witness put his organization at work upon making an estimate of what the whole project would cost, which Doctor Bain very much wanted. That estimate was composed of a number of separate groups, tanks, foundations, wharves, and other things. Witness assembled those elements hurriedly and took the assembly sheet of that estimate down to Doctor Bain, and from that sheet made him an oral proposal of what the White Company would be willing to do. Witness told him that if the matter rested upon the White Company's willingness to accept payment in crude oil as he at first proposed, witness couldn't do it, and the White Company was out of it, but suggested that similar difficulty would be found with other people, and also told him that it seemed to witness an arrangement with an oil company whereby the oil that an engineering constructor would accept in payment could be taken off his hands and turned into cash, could be made; that that kind of an arrangement would work out for the best all around in constructing the facilities and in filling them with oil since, necessarily, it involved two separate and distinct kinds of bids. Doctor Bain said that he had about come to the same conclusion and therefore he allowed witness

(Testimony of Gano Dunn.)

to talk to him and to outline a proposal on the basis and on the assumption that while the White Company was to take its pay in oil, there was to be an obligation created by a parallel contract [558—475] between the White Company and whatever other company took the oil contract to take that oil off the White Company's hands and give them cash for it. On that basis, witness gave Doctor Bain an estimate that the job would cost \$2,380,000, and that the White Company would supervise the construction of it for a fee of ten per cent of that cost.

Witness did not tell Doctor Bain that the White Company would undertake to do the job for the two million plus that he had spoken of—under no circumstances; and witness did not even make a written proposal because he did not want to give Doctor Bain the idea that witness' proposal then was more than tentative. The specifications were incomplete, and he was anxious to avoid a misunderstanding by leaving Doctor Bain a written proposal at the time which could be only approximate on account of the incompleteness of the specifications.

Witness discussed with Doctor Bain very fully and completely the then character of the specifications. Doctor Bain thought the specifications were rather complete. They were composed of many pages of typewritten matter and very elaborate looking drawings, but witness pointed out that while there were many pages of descriptive matter and

(Testimony of Gano Dunn.)

in general pretty good specifications, there were some wide-open holes in them. The amount of excavation had not been determined; the depth of dredging had not been determined; and many other things had not been determined. So that an estimate could be with very great difficulty made, and only by allowing very large amounts for contingencies and unknown features.

The conference with Doctor Bain on the 28th of December was nearly, if not all the morning. Doctor Bain said that since witness' previous conference with him he had been thinking over the things they discussed, and those things had been confirmed by witness' then conference with Doctor Bain, and that the need of co-operation between engineering companies and oil companies had been very apparent; that the Department was already in relation with a number of oil companies and Doctor Bain was going to the Pacific Coast to take up this matter with the oil companies out there. [559—476]

Speaking of what oil companies, or class of oil companies, he was going to take it up with, Dr. Bain mentioned the Standard Oil Company, Associated Oil Company, the General Petroleum Company, and witness thought one or two others, but Doctor Bain did not mention Pan American Company or Mr. Doheny. With regard to class of these companies, or the reason for their selection, Doctor Bain said, "This job is so large and so complicated and has the elements of national defense so involved in it that it is not the kind of thing

(Testimony of Gano Dunn.)

that we can advertise by public bidding and call in all companies, great and small. Also, it is a job so large and important that only the companies that have a good organization and a considerable business are competent to handle it and to deal with it, and therefore I expect to take it up only with those companies who have a good standing and are large enough and well enough organized to carry the project through."

Witness next saw Doctor Bain shortly after he returned, after the middle or in the latter part of January, 1922. Prior to seeing Doctor Bain witness had received a letter from him from San Francisco, dated January 11, 1922. He did not send any written reply, but went to Dr. Bain's office and talked to his secretary and possibly to Mr. Ambrose about it, but there was no use in replying to it because Doctor Bain would be en route.

Prior to the time witness saw Doctor Bain in January, 1922, after he returned to Washington, witness had not seen Mr. Cotter or any other representative of the Pan American Company.

As to the meeting with Doctor Bain in January, Doctor Bain came back full of information and with a number of ideas on the oil exchange future. He told witness that he had had very satisfactory conferences on the Pacific Coast; that several of the oil companies had felt that the law under which the exchange was to be made was unsound or illegal, or something to that effect, but that there were several of the companies who were interested

(Testimony of Gano Dunn.)

in the work and whom he thought would put in proposals or bids when the time came. He confirmed what he said in his letter about having brought the matter of witness' proposed form of arrangement to the attention of Mr. Doheny and the Doheny officials, or the Pan American officials, out on the Pacific Coast, [560—477] and said they had expressed the view that cooperation between an oil company and an engineering company was essential to the success of this job because the oil companies generally did not have the engineering organization to handle so large and variagated a project as this in engineering and, correspondingly, the engineering companies did not have the skill and knowledge to deal with oil in the large quantities that were involved in this.

The Judge Advocate-General's opinion was furnished witness the day after or the same day that he had his last conference with Doctor Bain before the latter went to the Coast. One of the questions witness asked him was, "Is this exchange all right, is it warranted?" Because witness made the inquiry Doctor Bain said, "Yes, we have had an opinion from the Judge Advocate-General and from the legal officers of the Department of the Interior, and it is all right." Then Doctor Bain confirmed that by giving witness the opinion of the Judge Advocate-General in writing, which he got the next day—that is, on or about December 29, 1921.

Witness had a talk with Doctor Bain about getting the White Company's own attorney's opinion on the

(Testimony of Gano Dunn.)

subject. At that conference on December 28 when witness made his tentative proposal, or possibly at the previous conference, when he had inquired as to what authority there was for doing this work in this way, Doctor Bain told him of the Judge Advocate-General's opinion, and witness told Doctor Bain he would also get the opinion of the White Company's own counsel. Witness did not do this, however. When he found the directors on the Executive Committee were opposed to doing the job and taking pay in oil that meant that they would not entertain the liability of handling a large amount of oil, and therefore the question as to whether it was legal for them to be paid in oil became subordinate. It did not affect the White Company at all from that time on only to the extent that if the White Company had taken the kind of contract that witness suggested in the interview of December 28, there would have been current between them and the Government only such liabilities as might be required as working capital, amounting to perhaps \$50,000 or \$100,000, and that was too small an amount to give concern at that time. [561—478]

At the conversation of January, 1922, Doctor Bain introduced Mr. Cotter to the witness. In response to Doctor Bain's letter of January 11th from San Francisco, witness had called up the offices of the Pan American Company in New York to find when Mr. Doheny was coming east. He did not tell them the object of his inquiry

(Testimony of Gano Dunn.)

and did not get in touch with him as a result of that; but in one of his conversations with Doctor Bain on his return, he said: "Mr. Cotter is in my office now," and witness said: "Introduce him to me over the telephone," which Doctor Bain did, and at that time an appointment was made whereby witness went down to Washington and in Doctor Bain's office met Mr. Cotter. He had met him on one occasion previously, which he remembered when he saw Mr. Cotter's face. It was when Mr. Cotter was Secretary to Secretary Lane and witness was on the Inter-Racial Council.

Witness often tried to find out where Mr. Cotter's office was, but did not know. Mr. Cotter was so much in New York and so much in Washington, witness did not know which was Mr. Cotter's headquarters at that time. Mr. Cotter and the Pan American Company have offices at the same places, 120 Broadway, New York, and at Washington, in the Woodward Building. Witness has been in those places. He knows that Mr. Cotter lives on Illinois or Columbia Avenue in Washington. When witness met Mr. Cotter, witness asked him if Mr. Cotter's company would consider an arrangement involving a parallel contract with the White Company, agreeing to take off the White Company's hands any oil received in payment for construction work. He asked Mr. Cotter if he would accept a put from the White Company on his Company for that amount of oil. Mr. Cotter said they would consider it. There was some question in both

(Testimony of Gano Dunn.)

of their minds whether that was a relation which witness would seek with any of the other oil companies, or with all of the other oil companies, and, correspondingly, whether Mr. Cotter would seek an engineering relation with the other engineering firms that were interested in this matter. That question was not promptly answered but was discussed between them. It was a delicate question because if each of them was to have relations with all the others, then their relations could not be so intimate as to their hopes and fears and what the costs [562—479] were as involved in their bids and things of that kind. Mr. Cotter saw that and told witness that he would put it up to the officers of his company, and finally, after some time on the part of both of them, Mr. Cotter came back with an oral agreement that the Pan American Company and J. G. White Engineering Corporation would work together in this matter, and consequently the White Company no longer contemplated relations with other oil companies and the Pan American Company no longer contemplated arrangements with other engineering companies.

Prior to February 16, 1922, when witness first met Mr. Doheny, witness had received a communication from Doctor Bain in the way of an invitation for proposals. After the receipt of that communication there was a conference at the Pan American office at which there were present the witness, together with Messrs. Chilson and Williams, Vice-presidents of the White Engineering Company,

(Testimony of Gano Dunn.)

Mr. Danziger, Vice-president of the Pan American Company, Mr. Cotter, then another Vice-president of the Pan American Company, Mr. Doheny, probably Doctor Norman Bridge and Mr. Wylie of the Pan American Company, and one or two others. This conference was held in Mr. Doheny's office, 120 Broadway, New York. Witness stated to the persons at the conference that the J. G. White Engineering Corporation had received the invitations from the Department of the Interior, that conformably to witness' discussion with Mr. Cotter, he wanted to discuss with them, now that the formal invitations were out, any further details of the joint or associated relation which Mr. Cotter and witness had personally worked up, and witness had brought other officers of his company along to help in the discussion and also to receive full knowledge from the beginning of what the officers of the Pan American Company would say and also for the purpose of mutually getting acquainted with people with whom it looked as if witness' company was going to have important business dealings.

With regard to the relationship between the two companies if an agreement was reached, witness restated to them what he had stated to Mr. Cotter, that the White Company never took lump-sum bids; that they always entered into an agency relation, or the relation of professional engineer to client, and that witness wanted that clearly understood by them; that Mr. Cotter and witness [563—480] had discussed a relation with the Pan American

(Testimony of Gano Dunn.)

Company in which the White Company, either directly to the Government or through the Pan American Company, was to put in a cost-plus bid, and the Pan American Company was to put in a bid of some kind on the exchange of oil, and that the White Company had agreed to stand or fall with them and they with the White Company. That was the substance of that conversation at that time. [564—481]

Mr. Doheny at that conference said that the costs that the White Company was tentatively reporting on the construction were very much higher than he had expected from estimates made to him prior to that time; and then witness explained to him that the reason for the largely increased costs was that the tanks were not standard commercial tanks, that they were heavier and thicker, that their rivets were closer together, that they had different kinds of foundations and had steel instead of wooden roofs, and there were many other features that made the costs greater. Mr. Doheny said that they would make the arrangement which had been discussed between witness and Mr. Cotter and said also that he had told the Government that he would make or entertain a proposal of this kind and he was going to do it.

Subsequent to this time witness received a telegram from Secretary Finney asking that action be deferred upon the invitation or proposal and thereafter a letter dated or sent out on February 17, 1922, was received by witness on the 18th of

(Testimony of Gano Dunn.)

February and was also received by the Pan American and other addresses. After receiving that letter witness first got a telephonic communication from Mr. Cotter to see whether he had received similarly from the Department of the Interior a communication and found that he had. Then witness said, "This is a sudden and complete reversal of the plans that have been proposed. The specifications that are out are such that lump-sum bids which Secretary Finney's letter to which you refer now said were the only kind of bids that would be considered—cannot be put in without such enormous contingencies, without such an enormously high price being quoted by lump-sum contractors, that it would be unfair to the Government, and that witness felt it necessary, in the interest of his own company and in the interest of the Government and whole job, and of the Navy that wanted to get the base constructed, to go down there and make those representations to them"—which witness did. Witness went down to Washington and saw Secretary Finney and Dr. Bain and thinks he saw Dr. Ambrose and Admiral Robison, but is not sure as to Admiral Robison on that particular visit. Witness had never known Admiral Robison before, [565—482] but met him at his office within a few days of that time. Witness saw Admiral Gregory of the Navy Department at his office. When witness saw Secretary Finney, the latter told witness that the objection came from the Navy, and it was as a result of that that the witness

(Testimony of Gano Dunn.)

went over to see the Navy. He learned that the objection originated with Admiral Gregory, who was then the new chief of the Bureau of Yards and Docks and witness saw him to argue with him about the unfavorable effect the limitation of the bidding to lump-sum bids would have not only upon the prices that would be quoted to the Government, but upon the rapidity of construction which at that time was an important feature. Witness told Admiral Gregory that he thought it would make it a million dollars higher than it otherwise would be, or to that effect, and told him why. He thought his specifications were more complete than they really were. Witness had had the benefit of the study of his specifications by witness in his own organization and brought to the Admiral's attention a number of matters in which the specifications were silent, thereby leaving it uncertain as to where the responsibility for execution was and in the event of uncertainty in bidding to the Government a subcontractor or a contractor always decides that in his own favor and adds it to the price. Admiral Gregory said there were a number of things witness had brought to his attention that he had not recognized before. He still felt, however that he was right, in the main, in objecting to cost-plus bids. The Admiral told witness the objections that he saw from his experience based upon a contractual cost-plus basis of contracting and witness had to agree with him in the objections he stated. Subsequent to that time, Admiral Greg-

(Testimony of Gano Dunn.)

ory sent witness to his own engineering organization to tell them what gaps and omissions witness had found in the specifications and called into his office Commander Sherman, the project manager in the Bureau of Yards and Docks at that time in charge of the work on designs for Pearl Harbor. Commander Sherman took witness out to the engineering offices and introduced him to Mr. McGuire in his office, later to Mr. McKay, later to Captain Barkenhaus, who acted as Acting Chief of the Bureau of Yards and Docks when Barkenhaus was away; also to Mr. Beese and one or two other men connected with the Bureau of Yards and Docks of the Navy, who witness knows and remembers, but whose [566—483] names he could not recall. These in turn introduced witness to some draftsmen at the boards where they were at work on these plans. As a result of all that they began to amplify the plans and specifications a good deal and fill up deficiencies which witness had pointed out.

Witness saw Secretary Finney, Dr. Bain and once or twice Mr. Ambrose in the Interior Department about these specifications before the March 7, 1922, invitations for proposals were sent out. Prior to the sending out of the March 7, 1922, proposals, witness attended discussions with Admiral Gregory, Dr. Bain, Mr. Finney and to a slight extent, Mr. Ambrose regarding alternate proposals to be invited.

Witness said to them, "If you limit your invita-

(Testimony of Gano Dunn.)

tions to only one narrow class of bidding you limit the competition and you also limit the opportunity of the Government getting the suggestions of others in respect to how best to carry out this work." Witness represented particularly to Dr. Bain the universal custom in engineering practice of putting in alternative bids even when they were not invited. He represented to Dr. Bain that the conditions differed with different bidders and that one bidder would find it easier to do a certain thing than another bidder, and told him that he ought to make the basis of the bidding as broad as possible so as to give the Government the advantage of the widest field and the greatest amount of competition.

Regarding the necessity of getting information in order to formulate a safe lump-sum bid from Hawaii, witness said to him when he had in mind calling for bids under the new specifications promptly—that that would defeat the object of what witness had in mind in regard to the proposed invitation, because it was necessary for bidders to go to the Sandwich Islands to study the sites and learn the local conditions before they could make up their minds as to the hazards of the job and as to the kind of labor it was and as to the facilities that would be available for carrying out the work. Dr. Bain saw this point and finally, when the invitations came out, witness observed that he had shoved ahead the date on which the bids should be opened to April 15, giving time for visits to the

(Testimony of Gano Dunn.)

Sandwich Islands on the part of prospective contractors. [567—484]

No suggestions had been made to witness by any of the officials of the Pan American Company before witness talked with Dr. Bain and Admiral Gregory on the matters witness had told about regarding alternate bids and the necessity therefor. They left that to witness because that was the engineering end. The basis upon which crude oil was to be taken and fuel oil to be given, and construction also to be given, was continually referred to throughout our conferences from the end of January on through until the contract was signed by all of those witness had mentioned except Admiral Gregory. They all had the matter in mind. Witness was not very clear as to just what they were driving at, and never concurred in their views as to the ratio of exchange. He felt it would not work, but did not go into details with them. He observed when the invitations came out later that they had called, among other alternatives, for the expression of bids in terms of a ratio of exchange. Prior to the time when bids were opened, witness was not present in Washington where there was any endeavor made to work out a formula for this ratio of exchange, but Mr. Cotter brought the results of such an endeavor to witness and asked whether witness thought it right.

Witness did not meet Mr. McLaughlin, the representative of the Associated Oil Company prior to the time bids were opened. Prior to April 15,

(Testimony of Gano Dunn.)

the day the bids were opened, witness saw Mr. Doheny once to the best of witness' recollection, in another conference like the one already described, the subject of which was making clear to him and his associate officers that there had been a complete change in the basis of proposed relation between the J. G. White Engineering Corporation and his company on which the White Company was expecting to put in a proposition. Previously it had been a relation in which the White Company was to put in a cost-plus bid either to the Government with a parallel contract with him or to him and he was to put in some sort of a similar bid to the Government, but now when the Government had called for lump-sum bids the White Company was not to put in the lump-sum bid used. It was arranged at that conference that while the Pan American Company would put in a lump-sum bid to the Government they would allow the White Company to bid to them on a cost-plus basis and take the chance of our over-running our estimate. On that basis the J. G. White Company would take no chance [568—485] of loss in the event the cost was greater than witness had estimated, but that chance would be taken by the Pan American alone. Witness wanted to make it clear to Mr. Doheny and his officers that the risk was theirs and not that of the White Company. The basis upon which witness then proposed to enter into relationship with the Pan American was that the J. G. White Engineering Corporation was to be reimbursed by the Pan

(Testimony of Gano Dunn.)

American the cost of the construction work plus a fixed fee to the J. G. White Engineering Corporation. The fixed fee as finally agreed upon was in the neighborhood of \$172,000; approximately five per cent of the then estimated cost. The last conference prior to the opening of the bids was held in the Pan American office in New York to the best of witness' recollection between April 1 and April 8, 1922.

The witness drew the form of proposal to be prepared by the Pan American Company. He spent two weeks drafting the proposal and it was only two or three days before the proposal was put in when Mr. Cotter came over to witness' office and told him that he wanted to put in also an alternate proposal and asked witness whether such an alternate proposal would be honored as a proper proposal to put in. At that time witness had informed Mr. Cotter of the basis for figuring a lump sum for the construction work. In that basis that had been agreed upon with Mr. Cotter at that time there was no profit figured for the Pan American Company. What the White Company did as to basis A was to present an estimated cost to the Pan American, and then it was for them to say how much profit they wanted to load on to that cost before using that cost in their bid.

It was at that time that Mr. Cotter saw the witness about putting in an alternate proposal—the percentage of profit to be put into the proposal by the Pan American had been discussed between him

(Testimony of Gano Dunn.)

and the witness. It was in the neighborhood of ten per cent on top of the estimated cost.

The alternate proposal that Mr. Cotter discussed with the witness was that he said he wanted to throw off all that profit between \$300,000 and \$400,000 and then he said, "Also I want to promise to give to the Government the benefit, in addition to throwing off that profit, of any savings [569—486] you make if you contract the Pearl Harbor project for less than your estimated cost." These were the things that stood out in witness' mind and impressed witness and gave him most concern. Mr. Cotter added that at that same time that in consideration of that he wanted the Government, if the proposal was accepted, to grant to the Pan American Company what he called a preferential right to lease certain lands. Witness did not know what a preferential right was and was concerned lest it be a vague and indefinite thing which would invalidate the bid because of having an indefinite value, and when witness learned from Mr. Cotter that it was not a preference in price but merely a preference in order of consideration, or rank, or time, in other words, that it was a privilege that could not be evaluated in dollars, then witness said "All right, I will incorporate those three provisions into the paragraph or two of the proposal I was then working on for two weeks and had already prepared and make it into an alternative proposal." Witness also advised Mr. Cotter that alternative proposals

(Testimony of Gano Dunn.)

had been invited and that such alternative proposals would be regular and subject to consideration.

At the time the final draft of proposal A and proposal B was made, witness had a discussion with Mr. Cotter as to witness' form versus the form drawn by him that was taken up with Mr. Danziger, vice-president of the Pan American Company in that Company's office with the result Mr. Danziger preferred witness' form of proposal and signed it.

The term "proposal sum" and the other terms in that proposal, "proposal sum, basic crude, particular crude, reference price" were witness'. Witness got up the basic formula that is worked out for the exchange of crude and fuel oil in the proposal under contract.

Prior to the negotiation of this matter, witness had had a great deal of experience in Governmental contracts dealing with Government departments at Washington. It not only was customary, but it was necessary in a complicated job that the prospective bidders or persons interested in transaction should visit the departments and go over with the officials of the departments, the terms of the proposal and specifications prior to the opening of bids. The specifications and drawings never are able to contain all the information the [570—487] Government wants to give the bidders and the bidders are welcome to the Government departments to get further information of any kind they can, and it is customary for bidders to go and see the officers and learn all they can about further details of bid-

(Testimony of Gano Dunn.)

ding and what is the real object of the invitation.

Compared with the witness' experience in this White Engineering Corporation in connection with former Government contracts, the witness did not do anything or carry on anything in the least unusual as compared with what witness did on other contracts. Witness was present in Washington at the time bids were opened and his recollection is that there were more persons present than the record shows. Subsequent to the opening of the bids they were left on Mr. Finney's desk when witness left Mr. Finney's office. None of the persons present or anybody protested or objected or raised any question about the consideration of the Pan American proposal B when it was read.

After the bids were opened witness remained a short time in the office in conversation with Secretary Finney and others and then went back to New York. He remembers what was said and among other things, Mr. Cotter, who was present told Secretary Finney that he would prefer to have the Government accept proposal A. He felt that it would be better for his company. Both proposals were lowest bidders and had been found to be such upon the opening. Both proposals were read and were observed to be the lowest proposals and Mr. Cotter said in witness' presence to Secretary Finney, that he preferred the Government would accept proposal A. Witness endorsed this preference because he too preferred proposal A. [571—488]

Just before the bids were opened, from the infor-

(Testimony of Gano Dunn.)

mation that witness had, he expected there would be a considerable number of competitors—that the Foundation Company would bid; that Ford, Bacon & Davis would bid; that the Pittsburgh Des Moines Steel Company would bid; that the Associated Oil Company would bid; that the Standard Oil Company would bid and, of course, the Pan American and the J. G. White Corporation. The witness was very familiar with the Foundation Company—one of the witness' competitors—and also with Ford, Bacon & Davis, likewise a competitor.

On that afternoon witness returned to New York and Mr. Cotter remained in Washington.

On April 17, 1922, witness wrote two short letters from New York, one to Doctor Bain and one to Mr. Ambrose, saying he would be down next day, and in the letter to Ambrose referred to telephone communication between Mr. Ambrose and Mr. Cotter. The witness either called up Cotter, or *vice versa*, and learned of Ambrose's telephone communication to Cotter. The substance of that telephone communication was, "Come down right away," and they went. Witness thinks Mr. Cotter was in Washington. He telephoned to witness and said the word from Mr. Ambrose was to come down right away. Witness got there on the 18th. From Saturday, April 15, 1922, when witness left Secretary Finney's office, until the 18th, witness did not see Doctor Bain or Mr. Ambrose. Neither the witness, nor anybody in his presence, asked Mr. Ambrose or Doctor Bain, or any Government official, anything about what

(Testimony of Gano Dunn.)

their report was going to be or make any suggestions to them about their report on the bids.

On arriving at Washington on the 18th, witness saw Bain and Ambrose—he rather thinks Ambrose first—and also Secretary Finney. Mr. Cotter and the witness were told by all three of them, Bain, Ambrose and Finney, at different times, that they were the lowest bidders. Witness thinks that Mr. Finney said to Mr. Cotter that the Pan American Company was entitled to the award, and there were a number of things on which he wanted information in regard to details of the Pan American proposal and other things like that. At that time, or the following day, Mr. Finney said in substance that telegrams had been sent to Secretary Fall with certain recommendations and that replies [572—489] had been received. He said that the recommendations were that the Pan American Company bid proposal B should be accepted and that the replies approved that recommendation.

Witness saw Admiral Robison on that visit to Washington on April 18th, and had a talk with him at the Navy Department. The Admiral said, "There is a feature as to Article 12 which may cause considerable confusion unless it is made clear at the beginning." That feature referred to the part of Article 12 which said that if the contractor succeeded in effecting the construction and erection of the storage facilities therein called for at a lesser cost than three million and some-odd thousand barrels of crude oil at the reference price he

(Testimony of Gano Dunn.)

would give the Government the benefit of the saving by crediting it, in barrels of basic crude oil, against the proposal sum. Admiral Robison said that it would be better to save the large expense which he mentioned as being made, if witness recollects correctly, in the neighborhood of \$100,000 involved in the custom of accounting for certain types of Navy contracts if the accounting could be left in the hands of the J. G. White Engineering Corporation as a commercial accounting—an ordinary commercial job. To do that, however, required a special mention in the contract, otherwise the accounting would naturally be made as a certain type of Government contract. So witness suggested the introduction of the phrase in connection with the sentence, "He will give the Government the benefit of this saving"—Admiral Robison introduced the phrase—"as determined by agreement between the contractor and the Secretary of the Interior," meaning that through that phrase auditors could be put upon the books of the J. G. White Engineering Corporation and the Government inspectors could accept the books of the J. G. White Engineering Corporation as *prima facie* evidence of the account, the same as any private concern would do.

Prior to the time the contract was signed and while it was in process of drafting, witness was present at several conferences between Mr. Cotter and others in Secretary Finney's office with regard to the making of Secretary Denby a party representing the Government in that contract. The first

(Testimony of Gano Dunn.)

conference was on April 15th, right after the opening of the bids. There was a [573—490] considerable conference around April 18th, at which Mr. Finney, Mr. Cotter, the witness and, part of the time, Doctor Bain, were present. Mr. Cotter, in addition to saying what the witness has already testified to about preferring that the Government accept proposal A, said that he felt that when the contract was drafted it ought to have, in addition to the signature of the Secretary of the Interior, the signature of the Secretary of the Navy. Secretary Finney tried to dissuade him from this saying, "Joe, I don't think that is necessary." Mr. Cotter hesitated and said, "Well, I think it ought to be." At the last of the conference on that subject Mr. Cotter was very firm and Secretary Finney somewhat impatient. Mr. Cotter finally said, "Well, Judge, I feel so strongly about this that unless the contract is signed by the Secretary of the Navy as well as by the Secretary of the Interior, I do not feel that I can take the responsibility of recommending it to my company." Whereupon witness left the office and was uncertain what would happen.

Witness overheard, but was not very much interested in, several conversations on the part of Mr. Cotter when the Government and its representatives all seemed inclined to accept proposal B instead of proposal A, in which he said he felt that he was entitled to something definite, or some definite assurance that there would be something he would

(Testimony of Gano Dunn.)

get under the preferential right clause. Very often Mr. Cotter said he preferred they would accept proposal A; that he had thrown off the profit on proposal B and offered to give the Government the savings; that there was nothing in the contract for the Pan American Company except the occupation of a couple of tankers, and he felt that his company officials would criticise him for not having made a sufficiently advantageous contract. He told that to Secretary Finney, to Mr. Ambrose and to the witness. Witness does not recall any such conversation on Mr. Cotter's part with Admiral Robison or Dr. Bain on that feature, but remembers that in general Mr. Cotter said to Admiral Robison that he preferred the Government to accept proposal A. Witness remembers that Secretary Finney replied to Mr. Cotter orally on that subject, saying that proposal B had been recommended by the officials of the Bureau of Mines as the most advantageous proposal to the Government, and, therefore, he wanted to accept that proposal, [574—491] and that he, Secretary Finney, concurred in that view.

While the contract was in process of drafting, the witness assisted in the drafting, furnishing data. In Article 12 of the contract it says that if the contractor succeeds in effecting the construction and erection of the storage facilities herein called for, etc., etc., at a lessor sum than blank number of barrels of basic crude oil, etc.,—that paragraph was based on the proposal—the proposal said

(Testimony of Gano Dunn.)

that if the contractor succeeds in effecting, etc., etc., at a lessor cost than its estimate, it would give the Government the benefit of the saving. Question then was, "What was that estimate?" Witness brought J. G. White Corporation's estimate down from New York and showed it to those drafting the contract and gave them the figures that now appear in the contract, and that incorporation was made into the contract. It is in oil in the contract and the witness gave them the figure in dollars, and it was changed into oil there. The figures given them in dollars was \$3,516,000 odd dollars.

Under date of April 28, 1922, after the contract was signed, witness received a communication from Doctor Bain. It is the one that transmits the Gregory procedure. Defendants' Exhibit "C4" consists of a letter from Bain to witness transmitting memorandum prepared in the Bureau of Yards and Docks of the Navy, which is Exhibit "D4" below.

The witness conferred during the three, or four, or five days after he received the plan of procedure on April 29th, with officials of the Government with regard to revising that plan of procedure, and there was drafted a proposed form of agreement with regard to the procedure, being on a Department of the Interior letterhead, dated May 3, 1922. Its preparation was a joint matter, involving three or four of the parties interested, the witness having a good deal to do with it. Mr. McClellan, the counsel of the Hawaiian Dredging Company, had a part

(Testimony of Gano Dunn.)

in it; Mr. Williams, vice-president in charge of construction in the White Company, and Mr. Finney and Mr. Ambrose. Witness knows that it was never executed by all of the parties for whose execution blanks are left at the bottom thereof. It was executed by Mr. Danziger for the Pan American Company. The witness never heard of its being [575—492] executed by anyone else.

Memorandum of procedure, dated May 3d, 1922, was then offered and admitted in evidence as Defendants' Exhibit "D4" and is as follows:

DEFENDANTS' EXHIBIT "D4."

"May 3rd, 1922.

Memorandum of Procedure for approval of the Secretary of the Navy, the Acting Secretary of the Interior and the Pan American Petroleum & Transport Company, with respect to Sections 215, 216 and 230 of the contract dated April 25, 1922, between the Pan American Petroleum and Transport Company and the Government.

1. Contract consists of two principal parts. The first is the exchange of crude oil for fuel oil, the fuel oil to be delivered in tankers at Pearl Harbor. The second part is the construction of oil storage and the receiving of oil in tanks at Pearl Harbor.

2. The Department of the Interior shall retain direct control of the oil business involved in this

contract, in other words, of the first part of the contract mentioned above.

3. Admiral L. E. Gregory, the new Chief of the Bureau of Yards and Docks, is individually made the personal representative of the Secretary of the Interior in handling the second part of the contract as noted above. This involves first, all technical matters in connection with the plans and specifications for storage, and which in its general phases can be most expeditiously handled in Washington. Second, the supervision of construction work in the field at Pearl Harbor, and third, the receiving of the oil at Pearl Harbor from the tankers and placing same in tank storage as it becomes available under this contract until such time as the completed plant shall be turned over to the Government.

4. The Secretary of the Interior expressly reserves at all times the right to recall the foregoing personal representation, and, in consultation with the contractor, to designate a successor from the Navy Department as his personal representative. This will in no way involve the functions at present exercised by the Chief of the Bureau of Engineering in dealing with the Secretary of the Interior in regard to all matters in general, since the only function of the personal representative of the Secretary of the Interior, would be the technical work of constructing the tanks, the receiving and storing of the oil during construction and reporting to the Secretary of the Interior the amounts received.

5. Admiral Gregory, representing the Secretary of the Interior, will then designate the Commandant at Pearl Harbor as representing the Bureau in the field. The District Public Works Officer will be designated as the Officer-in-Charge of the work under paragraph 215 of contract specifications. Admiral Gregory will designate an officer to have direct charge of the work on the ground and to devote his time exclusively to that work; he to receive orders from the Secretary of the Navy to report to the Commandant of the Fourteenth Naval District [576—493] for duty under the District Public Works Officer solely in connection with this contract.

6. The contractor and his designated agents having the right to appeal direct to the Secretary of the Interior and to his personal representative, notice of any appeals on the part of the contractor from the decision of the Officer-in-Charge of the work and the reasons therefor shall be forwarded promptly being routed through the Commandant and the Chief of the Bureau of Yards and Docks on their way to the Secretary of the Interior.

7. On account of the importance of this contract and of the fact that it contains a bonus and penalty clause as to date of completion of the work, and of the importance of the Government causing no delay, it is stipulated that the inspection force to be provided by the Navy Department shall report for exclusive service on this contract, unless

(Testimony of Gano Dunn.)

otherwise approved by the Secretary of the Interior or his personal representative.

8. The authority of the personal representative of the Secretary of the Interior shall include the authority of the Secretary of the Interior to appoint boards of government representatives in connection with changes in construction work as provided by paragraph No. 230 of the specifications provided that any changes in contract be submitted to the Secretary of the Interior for approval.

Approved:

PAN AMERICAN PETROLEUM &
TRANSPORT COMPANY.

(Signed) J. M. DANZIGER,
Vice-President.

Approved:

_____,
Acting Secretary of the Interior.

Approved:

_____,
Acting Secretary of the Navy."

Thereafter the witness received a copy of a letter signed by Mr. Finney and approved by Edwin Denby, Secretary of the Navy, dated May 5, 1922, which is already in evidence, Exhibit 129, outlining procedure. The witness did not take up with Mr. Cotter personally this question of procedure because he was traveling on a train, but telegraphed him the substance of the discussions in order to get his approval, because in his absence the witness was acting to represent the Pan American Com-

(Testimony of Gano Dunn.)

pany. This question of what the procedure should be was handled, so far as the contractor was concerned, by witness with the Government. No other official of the Pan American Company, except Mr. Danziger when he signed his name to the May 3d form, handled it. [577—494]

Before the procedure was determined upon, witness' company entered upon the work of Pearl Harbor under the first contract, but entered it with very great vigor after that date. The first project has been completed. There were extras, increases and decreases by reason of changes in the work, all in accordance with the provisions in the contract for such, but witness' company and the Pan American Company saved the Government \$466,000 under the estimated cost. That was arrived at by taking the estimated cost and whenever the Government ordered anything that was not part of the original project, and, with their concurrence, all as provided in Section 230 of the specifications, the White Company made an estimate of what that additional item would cost. Then, with the Government's approval and permission, that extra was added to the estimate, and when the extra was carried out the cost thereof was added to the cost. The difference between the initial estimate, augmented by such additions and the final cost augmented by such additional costs, was \$466,000. In arriving at that figure the witness did not take into consideration at all the \$150,000 represented

(Testimony of Gano Dunn.)

by the difference between \$1.00 and 90¢ for the fuel oil. It was solely construction.

Admiral Gregory fixes the date of that contract as of December 15, 1923. It was accepted later, but as of that date.

There is also a disputed figure of \$150,000, which the witness believes that Admiral Gregory's testimony erroneously considers to have a bearing upon those savings. No matter how that is decided, it would go on one side of the ledger and then on the other side. If it is decided adversely to the job, the subcontractors have to stand it. They are under contract to do that, so it does not affect the savings. The savings are not affected by favorable or adverse decisions on those items under dispute. The main item of that is with respect to the question of who was responsible, the designer or the subcontractor, in connection with some concrete piles that had to be changed—about half of it.

Witness first learned from Admiral Robison in the latter part of November, 1922, of the contemplated extension of the Pearl Harbor fuel plant. [578—495] In substance he said, "Dunn, there is going to be a large extension of the Pearl Harbor storage and I will tell you more about it in detail later." He said, "It is very confidential."

Mr. Cotter first talked with witness about the extended project in the early part of December and told him there was to be an extension of the Pearl Harbor storage and that he would tell him the details at a later time.

Prior to the time the April 25, 1922, contract was

(Testimony of Gano Dunn.)

signed, the witness once—in the latter part of March—saw Secretary Fall. Doctor Bain took the witness up and introduced him. Mr. Safford was also present and one or two others came in and went out while the witness was there. The conference was solely a social one and a pleasant visit. Witness had a letter of recommendation from Judge W. Hawkins of El Paso, Texas—whose wife is his wife's sister—to Secretary Fall. Judge Hawkins is an attorney at El Paso and thirty years ago he was Secretary Fall's law partner. A letter of recommendation, at the witness' request, was sent by Mr. Hawkins directly to Secretary Fall, and then Mr. Hawkins told the witness he had sent it, and the witness asked Doctor Bain to take him up and introduce him to the Secretary after he received the latter, which he did, and the conversation was largely social. They did not deal with the business part of this project in any way except as mentioning that the witness was a prospective bidder for the work, etc., but no determinations were made or anything of that kind. When the witness told Secretary Fall he was a prospective bidder for the work, he said he was very glad to know it because it would insure that the work would be well done. He said it was in the hands of Doctor Bain and in substance that he wanted it done as cheaply as it could be done.

After the December 11, 1922, contract between the Pan American and the Government was made, a new arrangement, similar to the old, was made be-

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(Testimony of Gano Dunn.)

tween the J. G. White Company and the Pan American Company. That work the witness estimates to be 95% finished. That means the last part of the entire project. If the entire project is considered taken as a whole, it would make it about 98% finished. The witness produced certain progress charts. [579—496]

With regard to subcontracts for the work under the first project, some of these contracts were competitively let and others were not. About 98% were let on a lump-sum basis. Prior to the time contract was received by the Pan American Company, on April 25, 1922, witness had received from Doctor Bain a list of names of suggested concerns for subcontracting, which has already been put in evidence.

Under the contract of December 11, 1922, all subcontracts were competitively let. In the second contract every bid was submitted to the Bureau of Yards and Docks. No contract was awarded except by their instructions and no bidder was invited except with their approval, and the decisions on the letting of the contracts and all procedure in connection with it, were made down in their office in Washington, when we, at the time of opening the bids, brought all of the bids down there in connection with each particular item that was let. No estimated cost was mentioned in the contract of December 11, 1922, for construction work because the project had not yet been defined. It was not defined until it was nearly finished, but when we

(Testimony of Gano Dunn.)

got along toward the middle of the project, it was roughly figured about 4,000,000. With the project in its present nearly completed condition, the estimated cost of the construction part of it is in the neighborhood of \$4,000,000.

It is the custom among engineering concerns such as the J. G. White Engineering Corporation, while doing construction work, to take progress photographs from time to time. It is one of the essential features of service to clients. No progress photographs were taken of the Pearl Harbor work as they were not allowed on account of the secrecy of the work. It was first forbidden by the officers in the Bureau at Washington, and then by the officers in charge of the station at Pearl Harbor.

The witness saw a plat of the Pearl Harbor Station placed upon the blackboard while Admiral Gregory was on the witness-stand, and had seen it, or its prototype, in the Navy Department. Its condition when the witness saw it was with a large part of its features deleted in the printing by having pasters put over it so that the plan was hardly useful so much had been taken out. The witness has received photographs in connection with [580—497] these contracts from the Navy Department which came with large parts of the printing cut out, or printed out in large, great spots, where the Government did not want to show certain features of the typography or the other parts of this project. Photographs came with holes cut right out of them and in a mutilated condition, and

(Testimony of Gano Dunn.)

it has been so as regards the Pearl Harbor photography all through from the very beginning. Photographs received under Contract 4800 were almost invariably received with pieces cut out of the photographs. [581—498]

Cross-examination.

On cross-examination by Mr. Roberts, the witness testified as follows:

He never had any conference with Admiral Robison prior to the submission of the bids relative to an alternative bid by the Pan American Company. The Admiral never conveyed to him any desire or request for such a bid, and the witness never told him that any was proposed by the Pan American Company. Witness did not tell Doctor Bain an alternative proposal was going to be submitted by the Pan American Company before it was submitted. Doctor Bain absolutely did not suggest that he or Secretary Fall desired an alternative which would mean that the work would be done at cost in consideration of certain preferential rights or other things to be granted by the Government. The witness did not discuss any alternatives with Doctor Bain, but did discuss the principle of alternative bidding in general to make the latitude wide. Witness did not know what they might drag, but did not have lessee in mind at that time. Witness did not have any discussion with Mr. Ambrose about submission of an alternative bid by the Pan American Company bid with preferential rights in it, or at cost. Neither Mr. Ambrose, nor

(Testimony of Gano Dunn.)

Admiral Gregory, nor Secretary Fall, told the witness before the bidding of any desire on the part of the Departments, either of the Interior or the Navy, for any such bid.

There was then produced a letter dated May 12, 1922, written by the witness to Admiral Gregory, and it was marked U. S. Exhibit 256 for identification.

The witness had a discussion with Mr. Cotter about the submission of an alternative bid at cost in consideration of the Government making certain grants to the Pan American Company. Mr. Cotter did not say that that had been requested of him or his company by any officer of the Government.

Referring to the paragraph in the letter of May 12 to Admiral Gregory, he says, "One of the reasons why proposed B was considered most advantageous to the Government was that in response to a wish expressed by Secretary Fall a distinctive feature was introduced in addition to the quotation of a flat lump sum." When the witness saw Secretary Fall he expressed the wish that the work be carried out as economically as possible. He said that to a number of [582—499] others in the Department who told witness—the wish to which the witness referred to in that letter. The witness is not certain whether it came to him from Secretary Fall through Doctor Bain through Mr. Cotter, or whether it came from Secretary Fall from Mr. Cotter to witness, but it was the general wish that the work be carried out as economically and cheaply

(Testimony of Gano Dunn.)

as possible; and when Mr. Cotter instructed the witness to draw that paragraph, it was to conform as much as possible to that wish, to avoid the pyramiding of contractor's profits, which had been talked about a good deal in the Department. Witness had not been informed that at the outset of the discussion between Pan American Company and Secretary Fall of this proposed project—October or November, 1921,—the Pan American Company had said to Secretary Fall or to some officer in the Government that they would bid at cost and without profit.

The letter of May 12, 1922, tells the whole story as to requests that the contractors be credited with certain savings by reason of having gotten firm subcontracts at less figures than the original estimates. They granted both requests in the letter.

Mr. Cotter said there was very little in it for their company; that with the profit thrown off of the construction and with any savings that might be made turned over to the Government in addition, the only thing left for them was the keeping busy of certain tankers which might otherwise be idle, and that was the real advantage to them.

The witness wrote the letter of April 3d to Mr. Cotter. "Bacon & Eggs" referred to in that letter means Ford, Bacon & Davis.

The letter of April 3, 1922, by the witness to Mr. Jos. J. Cotter, was then offered and accepted in evidence and marked U. S. Exhibit 257, and is as follows: [583—500]

PLAINTIFF'S EXHIBIT No. 257.

"THE J. G. WHITE ENGINEERING CORPORATION.

April 3, 1922.

CONFIDENTIAL.

Joseph J. Cotter, Esquire,

Mexican Petroleum Company,

Woodward Bldg., Washington, D. S.

Dear Mr. Cotter:

Mr. Dillingham has received a telegram from his San Francisco office to the effect that Bacon & Eggs are considering reentering the situation as bidders.

This Mr. Dillingham takes to mean a possible connection with the Associated. I remember that Bacon & Eggs formerly advised the Department that they would bid only on a cost plus basis. I doubt if a cost plus bid, separated from an oil bid, would have much consideration.

The Pittsburgh & Des Moines people had a long talk with Mr. D. last week, who pointed out certain features in the general proposal which considerably discouraged them. There is no reason why both Pittsburgh & Des Moines and Bacon & Eggs should not each put in a separate bid direct to the Government, payable in oil, in conjunction with a side contract by which the Associated would accept their oil.

We have just pressed the Pittsburgh & Des Moines people for their bid on the tanks, which has been several times promised and was overdue on April 1st. They now tell us they were unable to

bid on the tanks, confessing that they are considering competing with us by a bid on the whole contract. Their New York people are endeavoring to dissuade their Washington people from doing the latter and the question will be decided by their President Jackson, who arrived in Pittsburgh yesterday from Honolulu. They mumble something about wanting to work with us, and I give you the above for what it is worth, as it flies by.

I just missed you as you were taking the train today. Shall come down Wednesday night as planned.

Very truly yours,

RMS.

GANO DUNN,

[584—501]

President."

A letter of March 1, 1922, to H. Foster Bain, signed by the witness, was then offered and received in evidence, marked Exhibit 258, and is as follows:

PLAINTIFF'S EXHIBIT No. 258.

"Dear Mr. Bain:

I have had a further telephone from Mr. Cotter and find that Mr. Dillingham is in New York ill at the Harvard Club, where I have had a long telephone conversation with him, and I have arranged to see him tomorrow morning again.

He is to long distance telephone his representative at San Francisco tonight to give our Vice President now on the Pacific Coast complete information and prices, and I will keep you further ad-

vised after conference with Mr. Dillingham tomorrow morning.

Very truly yours,

GANO DUNN,

President."

Thereupon the witness Gano Dunn was excused.
[585—502]

Thereupon there was read in evidence the substance of Defendants' Exhibit "B4" which had been identified and offered when the witness Dunn was testifying. Said exhibit consisted of a series of progress charts showing the progress of work done on the second Pearl Harbor project as of dates indicated on the charts, and it was agreed that the same show, in substance, that the fuel oil tank foundations were entirely completed on March 16, 1924; that the fuel oil embankment, concrete, was entirely completed on August 2, 1924; that the grading of the Pearl Harbor tank area was completed on May 1, 1924, and the tank embankments completed August 2, 1924; the term "completed" as used herein means entirely completed so far as a part of the construction work mentioned is concerned; that this schedule of tank erection provided for one 80,000 barrel tank, one 50,000 barrel tank and seventeen 150,000 barrel tanks, and that all of these tanks were completed on August 18, 1924; that the lubricating plant was completed on September 2, 1924; the Ford Island dredging was completed on February 29, 1924; the Barracks Building (referred to in testimony of witness Admiral Gregory) was completed on March 31, 1924; Ford Island tank

foundations, pump-house, trenches and grading were ninety per cent completed as of August 31, 1924; all piping was completed August 31, 1924; the electrical work was ninety per cent completed, fencing around the plant sixty per cent completed, and the Ford Island wharf eighty per cent completed as of August 31, 1924; gasoline tank erection is under way.

Thereupon there was re-exhibited to the Court Plaintiff's Exhibit No. 131 as introduced during the testimony of Admiral Gregory and introduced in evidence as Defendants' Exhibit "F4," identified by witness Dunn, being the same chart as Exhibit 131 with the Navy's deletions therefrom indicated in white; said Exhibit "F4" is appended to this statement next to Plaintiff's Exhibit No. 131 also so appended.

It was stipulated by counsel for the parties that the testimony of Dr. H. Foster Bain, Director of the Bureau of Mines, given before the Sub-Committee of the Appropriation Committee of the House of Representatives on December 4, 1921, at which time that Committee had under consideration the appropriation [586—503] bill for the Interior Department for the fiscal year beginning July 1, 1922, and ending June 30, 1923, was officially reported and published in a House document, that the witness Bain when testifying in this case identified the same and that so much of the official transcript of the said testimony under the heading of "Depletion of oil supply under Government lands through operation of wells on adjoining private

lands" consists of questions propounded by members of the Committee and answers made thereto by Dr. Bain, and may be offered and received in evidence and the same was accordingly read to the Court as follows:

"Mr. FRENCH.—Before you get to that, with respect to the oil leases to which you have referred, the Government has an important interest in that through its royalties, has it not?

Dr. BAIN.—Absolutely.

Mr. FRENCH.—To what extent is the work behind at this time? You were, of course, away behind because of litigation.

Dr. BAIN.—Yes, sir. It is not now so terribly behind. I think we will get those computations ready without any extra force in the course of a year or two. I will tell you what we have done. When the permit is given it is required that the man shall start work within six months, and drill the first year a certain number of feet before he can get a lease. We have not tried to watch this work. We do not know whether they are doing it properly or not. We consider it more important just now to compute the back royalties due and to supervise the drilling in known pools. We cannot take care of any more pools without more men and money. The work should be extended promptly as the wells come in to check the share of the oil coming to the Government.

Mr. FRENCH.—And avoid waste, either to the Government or to the lessees through delaying inspection of that work.

Dr. BAIN.—That is the very danger of it. I think before it gets to that we would find out about it and send somebody to look after it. There is always the danger of the first man that gets into the field using careless methods that injure the field.

Mr. CARTER.—Right in that connection I make this statement. Perhaps the director knows more about it than I do. In about 1913 certain public lands were segregated for insuring a supply of oil to the Navy. It developed that the Standard Oil had drilled certain tracts adjoining the Government lands, and these wells withdrew oil from the Government reserves. Along in the last year, not before then, that Government land, or a part of it, the withdrawn lands, had been leased. Prior to that time the Navy Department would not permit the leasing of it. Prior to that time and up until after development started on the withdrawn lands they were having a most prodigious production in all those wells of the Standard Oil Co., and now since those other developments have been permitted on Government lands [587—504] it has been found that the largest wells they find there are on one particular tract adjacent to this, and produce only about 300 barrels, whereas the other wells produced as high as 6000 barrels. There can be but one conclusion.

Mr. CRAMTON.—It is the same Standard Oil?

Mr. CARTER.—These wells of the Standard Oil produced something like 6000 barrels?

Mr. CRAMTON.—Yes, sir.

Mr. CARTER.—The one on the Government land adjoining produces only 300. There can be but one conclusion, that the Government sat there and permitted the Standard Oil to draw this oil off when it should have offset the Standard Oil wells.

Mr. FRENCH.—That is the point I had in mind, that the work for the Government must be kept up to date; and it seems to me there is a responsibility upon this Committee as well as upon the Bureau of Mines to see to it that you are able to function properly under the law.

Dr. BAIN.—The point is very well taken.

Mr. CRAMTON.—One other matter, since we have mentioned this naval reserve matter. I would be glad for just a moment to go into that. The naval reserve in California covers an important part of that rich field in California.

Mr. CARTER.—That was the field that I referred to.

Mr. CRAMTON.—There are some wells in operation there from which the Government is now drawing its royalties, and those royalties are payable in kind, I think, in all cases.

Dr. BAIN.—At the option of the Government.

Mr. CRAMTON.—Optional with the Government to be in kind or cash.

Dr. BAIN.—Or in cash.

Mr. CRAMTON.—Or in cash. Recently action has been taken by the Secretary of the Interior with reference to that field, has it not?

Dr. BAIN.—Yes, sir.

Mr. CRAMTON.—What is the nature of that action?

Dr. BAIN.—There are two. In the first place, the thing Mr. Carter has brought out. The Secretary of the Navy has decided that he wants all of one of these reserves which is badly cut up by private lands drilled in order to get this oil out and above ground, to get it to a safe place rather than to be left there to be drained off through adjacent leases. So a much more extensive drilling is to be planned than at the time we went over our estimates. The other thing is this, that they ask us to exchange that crude oil in the field for fuel oil at the Coast, and we have made some exchanges. [588—505]

Mr. CRAMTON.—Who asked that?

Dr. BAIN.—The Navy. So we made that exchange covering the months of November and December.

Mr. CRAMTON.—Yes. Who decides how that royalty shall be paid?

Dr. BAIN.—The Navy, in this case, because we are acting for them.

Mr. CRAMTON.—Can you make any estimate? You have already said you will put in that other data as to how much oil is likely to be available for the Navy under this royalty plan for the fiscal year 1923 if the policy of exchange of their crude oil in kind for fuel oil is carried out.

Dr. BAIN.—It will be somewhere between 1,000,000 barrels and one and one-quarter million barrels.

Mr. CRAMTON.—What is the market value of that oil?

Dr. BAIN.—I cannot tell you what it will be by that time.

Mr. CRAMTON.—At the present time?

Dr. BAIN.—Approximately \$1.50 per barrel. It depends also on where it is delivered.

Mr. CRAMTON.—What are the possibilities of the Navy storing any large amount of fuel oil or of crude oil for any long period of time?

Dr. BAIN.—That is the plan they have in view.

Mr. CRAMTON.—What is the particular capacity now in storage?

Dr. BAIN.—They have no adequate capacity at all, but the plan under contemplation is to exchange some of that oil for storage so as to store it above ground instead of below ground.

Mr. CRAMTON.—What can you say about the feasibility of storage of oil for any extended period of time?

Dr. BAIN.—For fuel oil it is quite feasible.

Mr. CRAMTON.—How expensive a proposition is it?

Dr. BAIN.—It depends on the character of the storage. In a general way it is perhaps two cents per barrel per month.

Mr. CARTER.—Is that steel storage?

Dr. BAIN.—Yes.

Mr. CARTER.—What particular advantage would there be for the Navy or for the Government, which the Navy represents, to take their royalty in kind, provide the cost of storage and expense of storage, and hold it for an extended period, rather than to sell, taking royalties in cash, and

having the cash for use at a time when the Government greatly needs it; and when they need the oil, buy their oil? [589—506]

Dr. BAIN.—It is the insurance of having a supply.

Mr. CARTER.—Of having a supply?

Dr. BAIN.—A reasonable supply for any naval emergency.

Mr. CRAMTON.—What is termed a reasonable supply? What is contemplated by that? For how long a period would such an emergency last?

Dr. BAIN.—That is a matter for naval officers to determine. On those things we simply show them how to do what they want to do. What constitutes a reasonable supply is, of course, the ratio to the amount of use expected.

Mr. CRAMTON.—I am asking a little more with reference to the advisability of storage.

Dr. BAIN.—That is entirely feasible.

Mr. CRAMTON.—The Navy has a big investment there in these oil reserves and will receive millions of dollars out of their royalties. Why, then, should not the receipts from those wells bear the expenses of the Government with reference to them, and as a part of that expense, the service rendered by your Bureau?

Dr. BAIN.—If you consider this a proper expenditure, why not take it from the fuel appropriation of the Navy?

Mr. CRAMTON.—The Navy Committee will take up the matter of the fuel appropriation. A portion of the oil may be sold, other portions put in stor-

age, and you are only acting in accordance with their requests to you?

Dr. BAIN.—That is all.

Mr. CRAMTON.—The Secretary of the Interior does not contemplate for you to do anything except when the Navy asks it.

Dr. BAIN.—The Navy gives us a general policy and we follow it out."

Thereupon there was offered and received in evidence in connection with the correspondence beginning with Plaintiff's Exhibit No. 13 and ending with Plaintiff's Exhibit No. 14, a memorandum dated Bureau of Supplies and Accounts, Washington, July 29, 1921, to the Secretary of the Navy from Rear Admiral David Potter, Chief of the Bureau of Supplies and Accounts, which is Defendants' Exhibit "G4" and reads as follows: [590—507]

DEFENDANTS' EXHIBIT "G4."

"MEMORANDUM FOR THE SECRETARY OF THE NAVY.

Subject: Exchange of royalty oil obtained from wells on Naval Reserves.

With reference to the letter of the Secretary of the Interior, dated 23 July, 1921, I strongly recommend that the plan suggested by the Secretary be accepted. It will be of great benefit to the Navy to have the royalty crude oil from wells on the Naval Reserves (both those already in operation and those to be drilled by the Pan American Petroleum Company and the United Midway Oil Company) ex-

changed for fuel oil at tidewater to be stored if practicable without expense to the Government, and if possible for tanks in which such fuel oil can be stored. As the Navy has no appropriation to pay for the cost of construction of tank storage, the acquisition of tanks by exchange for crude oil from Naval Reserve wells will be most acceptable.

While these tanks could be readily utilized at any point at tidewater, their usefulness to the Navy would be increased if they could be located at any one of the following points:

San Diego	San Francisco Bay
San Pedro	Puget Sound

Honolulu or Pearl Harbor, Hawaii.

In view of the greatly reduced amount available under the appropriation "Fuel and Transportation" for the present fiscal year, it would be of special benefit to the Navy to obtain royalty fuel oil at this time as such oil would not involve a charge against this appropriation.

I recommend that the Secretary of the Interior be requested to undertake to consummate the arrangement, as suggested in his letter.

DAVID POTTER."

Thereupon there was read in evidence (and marked Defendants' Exhibit "H4") the following stipulation dated October 10, 1924 and signed by the parties to this cause of action by their respective solicitors:

DEFENDANTS' EXHIBIT "H4."

"It is hereby stipulated by and between the plaintiff and the defendants, by their respective solicitors of record, that the following statement may be read in evidence during the trial of the above-entitled cause and be received with the same force and effect as if the facts therein contained were testified to at the said trial under oath by Theodore Roosevelt as a witness called by either plaintiff or defendants herein:

Testimony of Theodore Roosevelt.

My name is Theodore Roosevelt. I am a citizen of the United States and of the State of New York and a resident of Oyster Bay at the latter place; I am 37 years of age; I was on or about March 5, 1921, appointed Assistant Secretary of the Navy of the United States and served continuously from that date in that office until September, 1924, when, following my nomination for the office of Governor of New York by the Republican Convention in that State, I tendered my resignation to the President of the United States and the same was accepted by him. [591—508]

My first information regarding the consideration of the subject which eventually resulted in the Executive Order signed by President Harding dated May 31, 1921, was, as I recall it, in the Spring of 1921, one day after a Cabinet meeting. The Secretary of the Navy, Mr. Edwin Denby, returning to

(Testimony of Theodore Roosevelt.)

the Navy Department, told me that this subject had come up for discussion at a Cabinet meeting. I cannot fix the date accurately but I should say that that was some time in April, 1921. Prior to the issuance of the Executive Order the matter was discussed in general between Secretary Denby and myself. Up to that time I had not given any very definite attention to the subject of the Naval Reserves, though I had discussed the general subject of the Naval Reserves with Admiral Griffin and certain other officers in the Department who were charged with looking out for that matter. Some time in the Spring of 1921, the exact date I do not recall, Secretary Denby sent me a copy of a proposed Executive Order transferring naval oil reserves to the Department of the Interior. He sent at the same time a copy to the Bureau of Engineering. After getting my copy of the order I asked Admiral Griffin, who was then chief of that Bureau, and who had the handling of the oil reserves in his charge, to talk it over with me. I knew very little about the matter, but Griffin felt very strongly that this transfer would be a mistake. After thinking the matter over I decided that he was probably right. I went to Secretary Denby and urged that the land be not transferred to the Interior Department. He informed me that my protest in the matter was made too late, because the transfer had been agreed to by the President, Secretary Fall and Secretary Denby. I then went back and discussed the matter further with Griffin and I believe with Commanders Stuart

(Testimony of Theodore Roosevelt.)

and Shafroth. It occurred to me that if we could get an amendment to the original draft of the order making it necessary for the Interior Department to gain consent of the Navy Department before any leasing or drilling was undertaken, we could safeguard the interests of the Navy. I discussed this subject with Admiral Griffin, and I believe with Stuart and Shafroth, and we came to the general idea, or arrived at the general thought, that the original Executive Order as contemplated did not give the Navy any actual physical control over the oil in the reserves if signed. It was largely a theoretical point, because, of course, the President would be in control of both departments anyhow, and therefore could impose his best judgment as to the disposition on either or both departments as to the handling of the oil. However, after we talked it over, there was a suggested modification of the first order; the modification is contained in the phrase in the Executive Order beginning 'but no general policy as to drilling or reserving lands located in a naval reserve shall be changed or adopted except upon consultation and in co-operation with the Secretary or Acting Secretary of the Navy.' That clause, or substantially that clause, I took up with Secretary Denby myself, explaining as my reason for taking it up that though we were working in perfect harmony with the Interior Department at the moment, things might change; civilian administration in both departments is not of a permanent nature, and there might arise at some time in the

(Testimony of Theodore Roosevelt.)

future a condition in which the then Secretary of the Navy and the then Secretary of the Interior might not be on such a good working arrangement, and that it would be safer from the Navy's standpoint to have in the order this particular clause. Secretary Denby agreed, and said that he thought it was a better proposition [592—509] from the Navy's standpoint, and directed me to take the order to Secretary Fall with this suggested amendment in it. Secretary Denby told me that if I could get Secretary Fall to agree to this amendment it would be all right with him. I then took the order up to Secretary Fall, and Secretary Fall immediately agreed to this new paragraph. There may have been some slight modifications made in this paragraph, some 'ifs' and 'ands' in this discussion, I do not remember as to that. After Secretary Fall had agreed to it, my memory is that we had the order rewritten, typed off again. I then took the Executive Order in that form to the White House. I advised President Harding, personally, that the order as then presented to him with the modification which I had obtained was agreeable to both Secretary Denby and Secretary Fall. He thereupon signed the order. My recollection is clear in this matter, namely, that I went to the White House directly from Secretary Fall's office in the Department of the Interior. I do not recall having heard at that time of the various letters of transmittal.

When the draft of the order was originally presented to me I was not personally in favor of mak-

(Testimony of Theodore Roosevelt.)

ing the transfer but I became convinced afterwards that it was the correct thing to do. I became convinced, after going over the people, and machinery necessary to look out for oil work, that the Navy Department was not provided with sufficient practical machinery to take care of the development which circumstances had made necessary and that, therefore, the Secretary of the Navy's decision was correct in the matter. After obtaining the modification in or amendment to the draft of the Executive Order, as I have already explained, I felt satisfied that the interests of the Government could be guarded, because I was confident that no leases could be signed without the supervision of the Secretary of the Navy and the naval officers charged with the responsibility for the reserves; after this amendment had been obtained I felt that the transfer would be all right, for, as I have already said, after investigating the matter, the organization and the equipment of the Interior Department for handling oil matters were shown to be very much superior to those of the Navy Department.

I did not take any part in the actual negotiating of the contract dated April 25, 1922, or the contract dated December 11, 1922, or the lease dated December 11, 1922, between plaintiff and the Pan American Petroleum Company. As regards the contracts, I concurred in the policy of exchanging oil in the reserves for oil in storage at the points where it would be available for use by the Navy in any emergency which might confront the country,

(Testimony of Theodore Roosevelt.)

because I was informed that the oil was being drained from the reserves and I accepted this statement at its face value and said that I thought that those in charge were correct in the plan they had adopted in arranging to have the oil taken out and conserved for Government use in tanks above the ground. I knew of the war plans of the Navy which called for the storage facilities, part of which are provided for in the contracts dated April 25, 1922 and December 11, 1922, between the plaintiff and the defendant Pan American Petroleum & Transport Company, and I approved of the policy of providing for an exchange of crude oil in the reserves for oil and other petroleum products in usable form and the storage and incidental facilities provided for at Pearl Harbor, under the plans and specifications which formed a part of the two contracts hereinbefore mentioned. [593—510] This approval was based, as I have said already upon the assurance given me by those in charge, that the oil was being drained from the reserves and could not be retained in the ground.

Such communications as concerned these contracts which came up during Secretary Denby's absence, while I was Acting Secretary of the Navy, were signed by me. I was informed with respect to the subject matter at the time I signed the same and acted knowingly in the premises. I do not recall signing any letters directing that information regarding the fuel oil storage facilities to be provided at Pearl Harbor, Hawaii, be kept confidential,

(Testimony of Theodore Roosevelt.)

but if any such letter was presented to me and I signed it it was because all our naval authorities regarded the information concerning our oil storage as confidential and as a matter that should be, in the interests of the Government, kept secret. There was no reason other than this in so far as I know, for any official or officer of the Navy Department desiring to keep secret the facts relating to the Pearl Harbor fuel projects which are involved in this suit.

In so far as the actual leasing of naval reserve land is concerned, I had no part in the negotiating or making of any of those leases. That was not in my particular bailiwick in the Navy Department. The Navy Department is a very big Department and its various functions were allocated to various people. I was doing other work. It fell to me to take the part I have already told about in connection with the particular proviso in the Executive Order which the President signed. It did not fall to me but to others in the Navy to handle whatever was handled in connection with the leases." [594-511]

Testimony of John Keeler Robison, for Defendants.

JOHN KEELER ROBISON, called as a witness on behalf of the defendants, testified that he is an officer of the United States Navy, with the rank of Rear Admiral; he entered the Naval Academy in 1887, and was commissioned in 1893, and his Naval

(Testimony of John Keeler Robison.)

service dates from the time of his entrance as a midshipman in the Academy; in 1893, immediately after being commissioned as an assistant engineer in the Navy, he had duty for a few months in the Bureau of Steam Engineering, as it was then called; briefly and generally, he has had about all the classes of duty as an officer of the Navy that comes to a man that works at it for 35 years, both sea duty and shore duty; he has been at sea for something over 18 years, in all of the Seven Seas, and has been on shore duty practically everywhere, having had the usual run of duty that comes to an officer as he passes from youth to long service; as regards his periods of duty in the Bureau of Engineering, in 1894 and '05 he was in that Bureau for a few months, and in 1898-99 was there for a little over a year; in 1909 he commenced a tour of duty in that Bureau which lasted two and one-half years; he had been there three or four times for other short periods, and performed practically all of the subordinate duties within that Bureau; between 1911 and up till 1920, he was on duty in Washington, only temporarily for a day or two at a time, and was not, between the last mentioned years, regularly attached to any duty in that city.

Early in 1920 the witness was assigned to duty in the Division of Operations, in the office of Chief of Operations, at Washington, and for about a month, commencing the middle of March, 1921, he was attached to the Secretary of Navy as his personal aide, during a trip of inspection of the

(Testimony of John Keeler Robison.)

fleet, and of certain shore stations, and foreign activities of the Naval [595-512] Service; from and after October 1, 1921, the witness has been Engineer in Chief of the Navy, Chief of the Bureau of Engineering in the Navy Department, which office has the rank of Rear Admiral attached to it, he still holds that position; there are certain offices in the Navy Department that are part of the civil establishment of the Executive Department of the Navy; they are called chiefs of operation in the Navy Department, and have attached to them the rank of Rear Admiral; the heads of these Bureaus have, under the law, authority to issue orders in the name of the Secretary of the Navy, and there is no restriction except such particular restrictions as are set forth in the law creating the various Bureaus, as to the rank, in his own right, of the officer who may be detailed, by the President, with the advice and consent of the Senate, to the office of chief of a Bureau so that a commander or a captain in the Navy, who is appointed by the President and confirmed by the Senate to be Chief of the Bureau of Engineers so long as he is in that office, has the rank of Rear Admiral, which rank is attached to the office, and when his tour of duty in that office ends, he goes back to sea in his own rank; the witness held the rank of Rear Admiral in virtue of his occupancy of the office of Chief of the Bureau of Engineers, from October 1, 1921, until June 5, 1924, since which date he has been a Rear Admiral in his own right, by appointment of the President.

(Testimony of John Keeler Robison.)

His present commission as Rear Admiral bears date June 5, 1924, and his appointment to that rank was made by President Coolidge. He is at this time performing the duties of Chief of the Bureau of Engineering.

Admiral Robison knows Edward L. Doheny, Sr., and Edward L. Doheny, Jr.; he became acquainted with the latter in April, 1917, aboard the U. S. S. "Huntington," at Mare Island, California; he was a Captain of that ship, and Doheny, Jr., was [596—513] a young lieutenant of the California Naval Reserve, and Robison swore him into the service as an officer of the United States Navy; Doheny, Jr., remained under the witness' command thereafter for several months during which time the ship had been over to France, or nearly to France, escorting troops; they left Mare Island for a trial trip, and were for a time at Pensacola, Florida; when Doheny, Jr., became an officer on Admiral Robison's ship, the latter did not know, and had never heard of, Doheny, Sr., and he was first introduced to the latter when the father came aboard ship to see his son at San Francisco, and later when Mr. Doheny visited his son aboard the "Huntington" while she was laying off Pensacola, at which time witness thinks he saw Doheny, Sr., once or twice, but he can only remember one of the visits when they had a conversation in which the Naval Oil Reserves were mentioned; at that time witness was Captain of the "Huntington"; Mr. Doheny had come over to see his son, and lunched with the witness,

(Testimony of John Keeler Robison.)

the son being busy, and unable to see his father until the work then in hand was completed; during the course of the luncheon, oil was the subject of conversation as it always is with Mr. Doheny, witness has found, and Admiral Robison mentioned that the Navy had some oil reserves of its own, and was therefore somewhat interested in that subject; witness had been in Washington when the oil reserves were originally contemplated and created, and had advised their being created, and he had no knowledge of what had been done, in detail, between the periods of 1909 and 1910, and this period of 1917; he thought the reserves were being handled well, and said to Mr. Doheny that he thought so, and in substance Mr. Doheny said: "Yes; your Naval oil reserves are something that I know a good deal about." Witness remarked, "They are going along all right, aren't they?" Mr. Doheny replied, "They are going along all [597—514] right if you want to lose them. One of them is no good now and the other won't be much good long"; Admiral Robison expressed astonishment, and Mr. Doheny told him that outside parties, owning lands, either geographically within the outside limits of the reserve or bordering the outside limits thereof, were, through wells that they owned, getting the oil out of the ground, and that we would not have any left before long; that is the whole of the conversation regarding the California Naval Reserves that this witness had with Mr. Doheny at that time.

After the War, the acquaintanceship of the wit-

(Testimony of John Keeler Robison.)

ness and Mr. Doheny, Sr., and Doheny, Jr., ripened into a friendship, and they are friends right now.

Prior to his appointment as Chief of the Bureau of Engineering, on October 1, 1921, Admiral Robison did not, orally or in writing, communicate with either Doheny, Jr., or Sr., and ask their assistance in obtaining his promotion; he does not think either of them knew anything about it until it was an accomplished fact; he thinks he gave to Doheny, Sr., information by letter, which he wrote, dated October 6, 1921 (Exhibit No. 23); he has no knowledge of any communication with either of the Dohenys on this subject before that time; before being appointed Chief of the Bureau of Engineering, and while Mr. Denby was Secretary of the Navy, from March to October, 1921, Admiral Robison did not have any connection with the oil reserves; he had nothing whatever to do with the executive order of May 31, 1921, or the steps leading up to its promulgation; the witness first became a member of the Secretary of the Navy's council October 1, 1921, and after becoming Chief of the Bureau of Engineering, on that day, his first official duties in connection with the naval petroleum reserves began on October 8, 1921, by orders received by him directly from the Secretary of the Navy, Mr. Denby; Secretary Denby sent for [598—515] the witness on that date, and called attention to some letter which he objected to, which had been placed in his correspondence for signature, and asked why witness had allowed such a letter to be treated that

(Testimony of John Keeler Robison.)

way; witness responded that he did not know anything about the letter, which was about some oil matter; that such matters were handled for him directly by his own immediate subordinate, Commander Stuart; that witness knew from Stuart what happened after it had taken place, and that he knew nothing about this letter; Secretary Denby then said, "This is a case of an unauthorized bureau then?" To which Admiral Robison replied that, on the contrary, it was a case of an office that was established by the Secretary of the Navy himself, for his own information in connection with oil matters, the Fuel Oil Office, so called; "Well," said the Secretary, "I want you to handle that matter hereafter, yourself, and I don't want Stuart to do it, except under you."

Subsequently, about October 18, 1921, these orders were reduced to writing. Commander Stuart at that time was on duty in Washington, and had office space in the Bureau of Engineering, next door to the office of the witness; Stuart was a line officer, who was restricted to the performance of engineering duties, and at that time was on duty, but was not directly under the Chief of the Bureau of Engineering, prior to the conversation between the witness and the Secretary of the Navy above narrated; on October 24, 1921, Stuart was detached from duty in the Office of Secretary, and thereafter his duties were as witness' subordinate (Exhibit "D"); on April 5, 1922, Stuart was detached from duty in Washington, and ordered to duty at

(Testimony of John Keeler Robison.)

Charleston, South Carolina, upon the recommendation of the witness; this was a very important duty, and one that Stuart desired; prior to the time that Stuart was detached on April 5, 1922, from Washington duty, [599—516] no one outside of the Navy Department made any request of witness to have Stuart detached from duty in Washington, and sent elsewhere.

When witness took up the duties assigned by the Secretary of the Navy in connection with the Naval Petroleum Reserves, in 1921, he familiarized himself with the then status of the reserves by using Stuart's card index, and getting hold, from the files of the Department, of all the information he could, bearing upon the existing conditions in the reserve; in examining these files, witness saw letter from the Secretary of the Interior, dated July 23, 1921 (Exhibit 13), and also found in the files memorandum from Admiral David Potter, Chief of the Bureau of Supplies and Accounts, dated July 29, 1921, in connection with this Exhibit 13; witness also read at that time communication of July 29, 1921, from the Secretary of the Navy to the Secretary of the Interior, Exhibit 14; he also found the Mark L. Requa report, of 1916, which was brought to his attention by Commander Stuart, and he read it; he also examined maps in the Bureau of the Naval Reserves; No. 2 was the outstanding one; the department had reports from Landis, in California, that indicated to witness that conditions needed some correction, and witness is free to say,

(Testimony of John Keeler Robison.)

in spite of public criticism, that he could not foresee at the time, and that he does not see just now, that he did give the conversation that he had with Mr. Doheny, four years previously, no inconsiderable weight; he means the conversation he has testified to as having taken place on the Huntington, and because he uses that method himself, as an engineer, obtaining all the information he can on subjects from experts thereon, he recalled that conversation; with the records of the Department before him, and with Commander Stuart's help, witness went over the conditions that then existed in the reserves with relation to what [600—517] steps would have to be taken, if any, regarding that; he found that reserves were suffering, or the Navy was suffering worse than the reserves were; these naval reserves are Government property, in the broad sense, and the Government got something back from them in a broad sense, because the treasury was receiving some of the usufruct, had got a little from the royalties in the form of cash; but the reserves are really naval property, and the Navy was getting nothing; that is one thing witness found, and that he did not like, and determined to correct if he could; another thing he found was that Reserve No. 2, every alternate section thereof, was in the possession of private owners, and was, in 1921, being developed; there was not but one thing to be done with No. 2 Reserve, and Stuart agreed to that, and that was to develop it. if the Government could get any-

(Testimony of John Keeler Robison.)

thing out of it at all. Obviously, there was something to be done in the case of No. 2 Reserve. In the case of No. 1 Reserve, as shown by the chart (witness referred to Exhibit "XXX"), there was a condition up in the northeast corner which looked bad to witness; he does not know what oil is like under the ground, but it looked to him as if the equivalent of a pool was being tapped by the Standard Oil Company of California, and that the Navy was getting nothing out of it; he figured "we would get it if we could"; he went over to the Interior Department and talked with Director Bain, and his chief petroleum technologist, Mr. Ambrose, and advised with Secretary Fall, who sent him to these others; he does not remember if before going to the Interior Department he was informed at that time in the Navy Department of any estimate as regards the amount of oil that had been drained out of No. 1, but he knows there was a lot of it that had been lost, and that the Navy knew had been lost, but did not know how much; as to what estimates came to him in the discharge [600a—518] of his duties as regards the quantity of oil that had been drained out of Reserve No. 1, witness obtained estimates from the Bureau of Mines, and in the Navy Department; in the Navy Department, Stuart agreed there had been lost a lot, but he did not know how much; in the Bureau of Mines, they told witness there had been lost close to a million dollars' worth of oil out of each of the Standard Oil

(Testimony of John Keeler Robison.)

wells; he does not know whether there is any truth in that or not, but that is what he got; \$800,000 a well, he thinks, was the figure they gave him as a minimum loss to the Government, there being over 22 wells in there in Section 36.

Upon taking the duties thus assigned to him by the Secretary of the Navy, in October, 1921, Admiral Robison read the executive order of May 31, 1921, and saw the Secretary of the Interior on the subject; as to whether he talked to Secretary Denby after he had examined the files of the Department, and before seeing Secretary Fall, the witness "talked to Secretary Denby right along"; he told Secretary Fall that he was sent there by the Secretary as his representative, and that he handled all oil matters in the Navy Department; Secretary Fall said he was glad to see witness, and introduced him to Dr. Bain and Mr. Ambrose and Mr. Safford, and Judge Finney, the latter being a re-introduction, as he had met Judge Finney about 30 years ago, when he was in the Land Office.

Admiral Robison saw Secretary Fall a good many times in the month of October, 1921; during his first conversation, about which he has been testifying, on October 9, after advising the Secretary of his mission to the Interior Department, witness told him that he did not like much the idea of Naval property being dissipated without profit to the Navy, and that he did not know how to stop it; Secretary Fall called attention to the fact

(Testimony of John Keeler Robison.)

that he had made a suggestion in the July letter [601—519] (Exhibit 13) which witness had not at that moment read, and the latter thereupon stated he would look into the matter, but in the meantime it seemed to him that there was some way, that there certainly must be some way, "in which we could take care of our own. He said he would help us"; Secretary Fall did not tell him of the trip which the Secretary had made out West prior to October, 1921. From and after October 9, Admiral Robison was busy, going over a considerable mass of records in the Navy on this subject; as these came to hand, he read them and grasped the reports that he received from Commander Stuart; he went over to the Interior Department and talked with Dr. Bain and Mr. Ambrose, and, upon occasions, with the Secretary himself; then there were gradually evolved a plan set forth in detail in the letter from the Secretary of the Navy to the Secretary of the Interior, dated October 25, 1921 (Exhibit 24); as to whose composition that letter is, that letter is the product of Secretary Denby and Admiral Robison; the witness wrote it first, and Secretary Denby and the witness went over the rough draft, and then Admiral Robison wrote it in the smooth form that Secretary Denby agreed to, and that is the way it was sent; prior to the time the letter of October 25 was drafted, and while he was having conferences with Fall, Bain and Ambrose, the witness saw Secretary Denby on the subject every

(Testimony of John Keeler Robison.)

time he saw Secretary Fall; either before, or perhaps before, and always afterwards; witness made himself genuinely a personal representative of the Secretary of the Navy, and he had to inform himself of Mr. Denby's ideas, and plans, in order to accomplish that; he always made known to the Secretary of the Navy the subject of any conference; the details were reported to the Secretary, and sometimes the plans, the projected conference, was discussed before it took place; so that it may be said that Secretary Denby was informed by the [602—520] witness of the information concerning these reserves, and their conditions, just as he gathered it, whether from the Navy Department files, or from Interior Department conferences; he was given the information concerning the condition of these reserves by the witness just as fast as the witness got them.

Thereupon, there was handed to Admiral Robison Exhibit 24, and he testified that Secretary Denby gave to that letter, he thinks, the name of "Policy Letter," and that is the term used thereafter by Admiral Robison and Secretary Denby in referring to it in their conversations about it; prior to the writing of the October 25, 1921, letter, those in the Interior Department with whom he discussed the points therein set forth were primarily Dr. Bain and Mr. Ambrose; witness is unable in his recollection to distinguish between these two gentlemen; he was with them both and talked these points over with one or the other or both of them; he did not

(Testimony of John Keeler Robison.)

know either of them before this time; he got information from each of them, and he does not now know which one of them made to him one statement and which made to him some other, but they were agreed in their recommendations, and in their reports; taking up the policy letter and stating in respect thereto, and answering as to what he learned prior to this writing, and what he told Secretary Denby, the witness testified, "In paragraph 1 of that letter," in which appears, "that arrangements will be made by the Interior Department to have Naval Petroleum Reserves Nos. 1 and 2 drilled with offset wells in every case where adjacent property is drilled," that was the definite establishment of a policy of offset drilling for the protection of our reserves. That came about as a result of our belief—and by 'our' I mean Secretary Denby and myself—that it was necessary. That belief was founded upon information received from the sources I have mentioned." [603—521]

Bain and Ambrose were the last sources; the first sources were the reports from Landis in the field; other sources were the confirmatory opinion of Stuart in the matter; another source was this report of Mark L. Requa; there was no contradictory evidence, and there was a mass of evidence in favor of the necessity of drilling.

(Counsel for the plaintiff moved to strike the statement that "there was no contradictory evidence and there was a mass of evidence in favor of the necessity of drilling"; and the Court advised

(Testimony of John Keeler Robison.)

the witness to state what the sources were instead of the general characterizations, so that the Court could decide just what information witness is referring to.)

Taking up the second point in the policy letter, reading "That the amount of drilling with consequent exhaustion of the Reserves shall be kept as low as practicable without risking the depletion of the reserves by other parties," witness does not know that he discussed that with Bain, Ambrose and all of them, but he discussed that with Secretary Denby, and with Secretary Fall, without question, and it was agreed to by them.

The point in the October 25 letter with regard to getting fuel oil for crude oil was suggested to witness by Admiral Potter's recommendation to the Secretary of the Navy, and Secretary Fall's letter of July (Exhibit 13); also the Navy cannot use crude oil for fuel on ships of the United States Navy; it has to be used in some exchange form in order to have it for any use in the Navy, and witness brought that up from that point of view himself; it is necessary for crude oil to go through some refining process, in which the lighter gasoline products must be taken off in order to make it into fuel oil, safe to handle, to the vessels, and that point was discussed preliminarily to writing the October 25 letter; prior to the writing of the letter, the statement that the [604—522] exchange was to be effected "on as favorable terms as it was possible to obtain," that was not talked over with anybody except Secre-

(Testimony of John Keeler Robison.)

tary Denby, because that was put in there without talking to the Interior Department, for the Navy's own protection; as regards the contents of paragraph 4 of this letter, that was the suggestion of Admiral Robison; he discussed with Mr. Denby the urgent need of a considerable fuel oil supply in Pearl Harbor, his talk on that subject with Mr. Denby being in March, 1921, while witness was the Secretary's special aide on the trip to which he has referred; he had been working for over a year on the needs of Pearl Harbor; this same subject was discussed with Secretary Denby in October, 1921; as regards what plan the Navy Department had to use fuel oil which was obtained in exchange for crude oil from the reserves, there were several plans; at that time the current appropriation for the Navy, for the sustenance of the Navy during the fiscal year, and for the purchase of fuel and its transportation, was too small to accomplish the operating plans of the department, and a deficiency in that appropriation was imminent; it was desired—the memorandum from Admiral Potter (Exhibit "G-4") states that desire—to use the royalty oil for the purpose of accomplishing the current needs of the Navy, without charge to the current annual appropriation, thus enabling the department to accomplish its plans without incurring a deficit; that subject was discussed at meetings of the Navy Council, and at the time of the writing of the letter of October 25, 1921, the Secretary of the Navy had not announced his decision as to whether to use or not to use this

(Testimony of John Keeler Robison.)

oil for current purposes; Admiral Robison discussed this matter with Secretary Denby upon repeated occasions other than that at council meetings; the witness was against the use of the reserve for the accomplishment of the current needs, and recommended that the reserve be used for the accomplishment of a military [605—523] reserve.

In point 5 in the policy letter, the last two words "or otherwise" were not in the letter as originally written; those words were put in by Secretary Denby after the witness reported to him that Secretary Fall recommended it; witness told Secretary Denby that the handling of public lands was something that was so frequently done by the Interior Department that he thought they had better be given a chance to do it in their usual way; the words were not in the first draft, but were written in the final draft, before that was taken by the witness, with his own hand; as regards the provision in the letter under discussion, "That all leases and contracts, except as provided in paragraph 6, will be arranged and consummated by the Interior Department, copies of same being furnished to the Navy Department as a matter of information and record only," Secretary Denby wanted that paragraph in order to be relieved of specific approval of each of those leases in the case of areas that were under the law controlled by the Interior Department; the law is something of which witness does not know anything, but the result of the way it was working out was that Secretary

(Testimony of John Keeler Robison.)

Denby was called upon to investigate and pass upon problems that were, he believed, entirely within the purview of the Interior Department.

Prior to the writing of the policy letter, witness was the only one, that he knew about, that made any request of the Interior Department as regards making every effort to expedite the exchange of royalty crude for fuel oil, and deliver all the latter at Pacific Coast points. The argument on those points made by the witness to Secretary Fall, Dr. Bain or Mr. Ambrose, as to why that expedition was wanted, was that as long as that royalty oil was sold, it was no longer Navy property; if it was transformed by exchange into [606—524] anything else, Naval value could be gotten out of it; that at the time the Navy was losing a thousand dollars a day; the number of barrels of storage which it was desired to have at Pearl Harbor was 1,500,000 barrels, and this was, so far as witness knows, never communicated to the Secretary of the Interior prior to this letter of October 25; the fact that the Navy required considerable quantities of fuel at Pearl Harbor was made known; the amount was the one which had been determined theretofore by competent authorities in the Navy Department as the exact amount requisite to meet the emergency needs of the Navy, and the Secretary of the Navy finally approved that figure; prior to that approval by the Secretary of the Navy, the General Board of the Navy, witness believes, determined that to be the amount; witness was not present at that time;

(Testimony of John Keeler Robison.)

upon being requested to state his official opinion with respect to that matter in the Navy Department, he knows he was not in Washington at that time; upon being requested to state when, in 1921, he became familiar with the information in his official capacity, where and upon what authority that amount of 1,500,000 barrels had been determined upon, Admiral Robison answered: "That was in a privileged communication"; as to what he means by a privileged communication, he answered, "There are in all professions, I think, certain communications that are privileged"; that amount is stated in some communication or document in the Navy Department that he describes as privileged; that document originated, he thinks, in the General Board, he is not sure; he does not know what planning section of the General Board acted on that.

Upon being asked the direct question whether he felt free to testify here about the war plans of the Navy Department, the witness answered, "No, sir"; asked if that is not the reason why he did not answer the question just above, he said [607—525] he thought he had answered it; asked whether that was part of the war plans recommended by the General Board and approved by the Secretary of the Navy, he answered, "I think I would prefer not to answer that question, sir, unless it is absolutely essential. It is the duty of those few officers who have any access to such plans for the national defense as may be in existence to refrain

(Testimony of John Keeler Robison.)

from divulging them except in case of necessity. I would prefer not to answer that question. However, this amount was the exact amount that had been determined by Secretary Daniels as Secretary of the Navy as the amount that should be placed at Pearl Harbor for a permanent reserve of fuel oil at that point."

Thereupon the following occurred:

"Admiral, I put to you the direct question whether you are now under any orders with regard to testifying on that subject?

A. I do not think I quite understand your question, sir.

Q. I want to know if you have any orders from naval authority now with respect to the subject of your testimony here with regard to what can and what cannot be disclosed? A. Yes, sir.

Q. Have those orders been reduced to any form of writing?

A. I have received instructions, which I have, and which are placed in writing.

Mr. HOGAN.—I take it, Mr. Roberts, there are certain things that we all understand we do not want to go in. Is there any objection to the Court looking at those instructions as to their going in the record?

Mr. ROBERTS.—Of course those instructions are not mine.

Mr. HOGAN.—No, but I think it will save me a good deal of time.

Mr. ROBERTS.—I have no objection.

(Testimony of John Keeler Robison.)

Q. (By Mr. HOGAN.) With the consent of counsel I ask that you exhibit to the Court your instructions, Admiral, whatever form they are in.

The COURT.—I shall also desire that counsel on the other side see them, gentlemen.

Mr. HOGAN.—We do not want to see them. If counsel on the [608—526] other side desire to see them I suppose they may look at them.

Mr. POMERENE.—We are entirely willing that the Court see them, your Honor. We do not care to see them. We have no desire to.

The COURT.—Well, it is not a question of whether you have a desire, but do you desire the Court to see them without having them offered?

Mr. POMERENE.—Yes, we are entirely satisfied to have the Court see them.

Q. (By Mr. HOGAN.) Will you hand the Court whatever you have there?

(Witness hands paper to Court, which is returned to the witness.)"

Admiral Robison continued testifying, that subsequent to the writing of the policy letter of October 25, 1921, he had conferences with Secretary Fall and other officials of the Department of the Interior during the month of November, 1921, on the subject of naval reserves; in that month, during a conversation with Secretary Fall, the latter criticised the high cost of naval fuel oil storage facilities, and said that he was of the opinion that they could be obtained for much less than we were spending or had been spending on facilities for

(Testimony of John Keeler Robison.)

current use recently constructed by the Navy; witness had given him, Secretary Fall, figures as to the costs obtained by witnesses from records in the Bureau of Yards and Docks; Mr. Fall said he was of the opinion that the thing could be done for much less, and Admiral Robison said, "Well, if it can be done cheaper, we want to do it"; however, naval fuel storage facilities, witness explained to the Secretary, involved not merely tanks, but tanks in which fuel was stored and which are protected from fire hazards, from bombing hazards, from defects in pumps and in piping, to an extent not usual with commercial installations, so that the Navy's costs will normally be considerably higher; witness explained this to Mr. Fall, but agreed that it was wise to obtain information as to [609—527] what tanks would cost in commercial installations, and asked him to get some figures; he said he would get them.

On November 29, 1921, witness received from Secretary Fall letter bearing that date, Exhibit No. 34, with which was enclosed Mr. Doheny's letter of November 28, 1921, Exhibit 33; he received it in his office in the Navy Department; he does not recall the same having been delivered to him by Mr. Cotter; he has no recollection as to that one way or the other; all that he remembers is that these letters reached him November 29; he is able to state that only by reference to the written record of the time, having refreshed his memory by the minutes of the Navy Council meeting, which was held in the after-

(Testimony of John Keeler Robison.)

noon of that day, at which the subject of oil storage was discussed; he had then received the above referred to letters, and he referred to them during the council meeting, but whether he referred to the contents of the letters themselves, he does not now recall.

There was thereupon identified, offered and received in evidence as Defendants' Exhibit "I4," the following extract from the stenographic minutes of the meeting of the Navy Council, held November 29, 1921, reading as follows:

DEFENDANTS' EXHIBIT "I4."

Notes of Minutes of Navy Council Meeting,
November 29, 1921.

The council proceeded with business at 2:10 P. M.
Present: Secretary Denby, presiding; Assistant Secretary Roosevelt; Admiral Coontz; Rear Admirals Washington; McVay; Robison; Taylor; Potter; Stitt; Latimer; Moffett and Smith; Captains Bakenhus (representing the Yards and Docks) and Willard; Commander Rowcliff; Major General Lejeune.

Item No. 2.

Admiral COONTZ.—The principal things I think we should take up this afternoon are (matters) from co-ordinators of the Budget; second, as to the fuel oil, the freight and transportation, and the question as to their connection with the winter cruise. I think first Admiral Robison can tell us

of the oil situation, and Latimer can tell us as to the legality of using it.

Admiral ROBISON.—I take it you are referring to reserve oil.

Admiral COONTZ.—I think that the Secretary wants to know—the supply and how large it is going to be and [610—528] Latimer will tell us if we can use it.

Admiral ROBISON.—We have assurance of the Department of the Interior they can turn it over to us either as fuel oil at such points as we desire or as reserve oil. We have furnished a list of places where we would like to have it. The amounts now available are 60,000 barrels, total will be available January 1st. It is coming at the rate of 1000 barrels a day. This will increase about March or April, and between now and the end of the fiscal year it is estimated we will have 500,000 barrels of fuel oil. The questions as to when and where you are to use it is something more or less for you to decide, and it is also more or less to be decided as a matter of law. As a matter of policy the idea of this whole thing is to transform this unavailable, more or less intangible naval fuel oil reserve into a tangible reserve to be located as in accord with our plan for national defense. The first step was to provide at Pearl Harbor storage for 1,500,000 barrels fuel oil. The tanks for containing this would be entirely paid for by the royalty on the oil. I have here a definite proposition to supply that; a proposition for the comple-

tion of the entire Pearl Harbor Project during the next calendar year. The other steps in the matter of the provision of fuel oil reserves along the Pacific Coast could in accordance with this plan, could be completed within less than five years, that is from the Panama Canal to Puget Sound. That is what I hope to accomplish. I think that is the Secretary's idea.

SECRETARY.—We had that at Cabinet this morning. It is between the two Departments. First the question in my mind is whether we have (the) legal right; second, whether it is desirable to use it now. We might better store it which conforms to the theory. The Secretary of the Interior says if we didn't tackle it now we would not get any three months from now. They are getting 4,000 barrels a day now from one well.

Admiral ROBISON.—A message from the Interior Department within five minutes says the gas pressure is lessening and decreasing; it is very disappointing. They will experience a loss in the payment of royalty to the government.

Admiral COONTZ.—I brought it up for this reason: Inside of two months we will run out of fuel.

Admiral ROBISON.—You can get 500,000 barrels for the rest of the year. It will not do over 40 per cent of your Panama cruise. I think you ought to use every bit of this for reserve. * * *

SECRETARY.—I don't think we can use that oil. I haven't seen the law.

Admiral LATIMER.—The law authorizes you to do anything in the world with that oil—to drill, exchange, use, sell; do anything you want. Your powers couldn't be broader. The only limitation in regard to oil lands is the limitation placed upon you by the Executive order.

SECRETARY.—You mean the Commander-in-Chief's order?

Admiral LATIMER.—That is the only thing.

SECRETARY.—I don't much fear what the law is. I want things like this to go to Congress. I want to explain to Congress. I would rather not have the Navy use it. Our appropriation is insufficient and that use of the oil is only a subterfuge.

Admiral ROBISON.—All I have got to do is to say on this letter is we can get the tanks built.

I cannot say, of course, as to these tanks until I have seen the plans and make sure these plans correspond with our specifications. I sent a memorandum to the Chief of the Bureau of Yards and Docks some three weeks [611—529] ago but Bakenhus has not seen it. * * *

Admiral ROBISON.—What will I do about these tanks at Pearl Harbor?

SECRETARY.—I will have to go into that further.

Captain BAKENHUS.—There is some question about appropriation.

Admiral ROBISON.—It will take us five years to complete our plan, for our war plan reserves on the Pacific.

(Testimony of John Keeler Robison.)

Col. ROOSEVELT.—These filled in five years will put us on war plan reserves?

Admiral ROBISON.—Yes, sir

SECRETARY.—That is a matter of national policy I do not want to decide until after I have seen the President and probably will take it up again with Congress. * * *

Admiral LATIMER.—With regard to these oil lands (reading the law)—('The Secretary of the Navy is directed to take possession of all property.' etc., to 'conserve,' 'develop,' etc.)

SECRETARY.—Under that power we can adopt the policy.

Admiral ROBISON.—Shall I go ahead with those tanks?

SECRETARY.—Not until I have seen that committee.

(Referring to the Congress committee.) [612—529½]

Of the persons present at that Navy Council meeting, the witness testified that Admiral Coontz was Chief of operations, the senior Naval officer, who was an adviser to the Secretary of the Navy; the witness made to the Council the statement attributed to him to the effect that, "A message from the Interior Department within five minutes says the gas pressure is lessening and decreasing; is very disappointing. They will experience a loss in the payment of royalty to the government"; as to his recollection on that, the wells then being brought in on Section 1 strip were less productive

(Testimony of John Keeler Robison.)

than they had expected; and the letter of November 29, 1921, from Secretary Fall, included that statement; he testified that his statement, "I have here a definite proposition to supply that, a proposition for the completion of the entire Pearl Harbor project during the next calendar year" referred to tanks of oil, and that proposition was Mr. Doheny's letter of November 28, 1921, to the Secretary of the Interior, which was the most definite proposition witness had at that time.

His statement attributed to the witness in the above quoted minutes, "All I have got to do is to say on this letter is we can get the tanks built," should have been *that* all that he had to say on that letter, referring to the letter of November 28, 1921, to the Secretary of the Interior, is, "we are assured that we can get the tanks built."

Captain Bakenhus, referred to in the minutes, was an officer representing the Chief of the Bureau of Yards and Docks at that Council meeting.

Thereupon, there were identified, offered and read in evidence, as Defendants' Exhibit "J4," extracts from the minutes of Navy Council meeting held Friday, May 20, 1921, as follows:

DEFENDANTS' EXHIBIT "J4."

"Present: Denby, Roosevelt, Coontz, Washington, McVay, Griffin, Taylor, Stitt, Potter, Lejeune, Latimer, Smith. No. 12.

The Secretary stated that in the matter of Naval Oil Reservations in Wyoming and California—

these reservations would be turned over to the Interior Department as trustee for the Navy." [613—530]

There was next identified, offered and received in evidence minutes of the Navy Council meeting, in so far as they pertained to this subject, held June 30, 1921, which as Defendants' Exhibit "K4" read:

DEFENDANTS' EXHIBIT "K4."

"Extract from Stenographic Notes of Council Meeting, Thursday, 30 June 1921.

Present: Secretary Denby.

Assistant Secretary Roosevelt.

Admiral Coontz.

Rear Admiral McVay.

Rear Admiral Washington.

Rear Admiral Griffin.

Rear Admiral Taylor.

Rear Admiral Potter.

Rear Admiral Parks.

Major General Lejeune.

Rear Admiral Smith.

Captain McCullough, M. C., representing
M. & S.

* * * * *

No. 16.

Admiral POTTER.—The question of securing 12 tankers from the shipping board: We built for them during the war. We got five, and seven more

we could get. We need them for floating oil storage on the west coast. I understand an executive order is necessary. Is your office following that up?

Admiral COONTZ.—Yes, but we do not want to issue order until (after) taking it up with shipping board.

Admiral TAYLOR.—It was their money that paid for them.

Admiral COONTZ.—I think not.

Admiral POTTER.—It was built for them.

Admiral COONTZ.—I will handle it.

SECRETARY.—In regard to oil, it is comparatively easy matter to include in the price of oil the price of storage and the question whether we ought to do that where necessary to exclude oil, whether we ought to make a contract including in the price the tankage, so that nothing will come out of the royalty.

Admiral GRIFFIN.—Secretary Fall said he was going to sound them out on that."

There was thereupon identified, offered and received in evidence extract of stenographic notes of minutes of Navy Council meeting, held 9:10 A. M., October 20, 1921, reading:

Present: Secretary Denby, Asst. Secretary Roosevelt, Admiral Coontz; Rear Admirals Washington, McVay, Robison, Taylor, Potter, Stitt, Latimer, Moffett, Smith; Captain Bakenhus (representing Y. &

D), Captain Willard, Commander Row-cliff.

* * * * *

Admiral POTTER.— * * * Under Fuel and Transportation we are asking for a deficiency of 12½ million. They gave us \$17,000,000. We expended in 1921 \$36,000,000. [614—531] We are endeavoring this year to bring it to \$30,000,000, and the next year \$25,000,000.

SECRETARY.—That is on ordinary activities of the fleet?

Admiral POTTER.—Yes, sir. That is what you are doing every day, unless you change the plan of Operations—

SECRETARY.—The plan of Operations?

Admiral POTTER.—Yes, sir; the present plan of Operations.

SECRETARY.—Unless we can get oil and open the naval reserves and exchange the oil for fuel oil. I don't quite yet know whether we would have to charge that up with the Budget Commissioner's office.

Admiral ROBISON.—I have not instructions yet but want to see the Secretary of the Interior. I hope we can get it. I think you can expand it any way, one still new, 3 of course still in the ground. One of those is no use to us whatever; might as well get the oil out of it.

SECRETARY.—The Wyoming reserve keep.

Admiral ROBISON.—No small portion of believe in continuing contracts at the highest war

(Testimony of John Keeler Robison.)

price for the fuel that we are using which fuel contracts require us to spend for fuel today \$3.25 per barrel at a time when fuel normally would be obtainable at less than one-half of it. I think that will explain your deficiency.

Col. ROOSEVELT.—I told them that would be a very good thing to put in.

ROBISON.—You might say no appreciable dividend has been received from the oil taken from the reserves. All has been turned into the Treasury under Miscellaneous Receipts."

During the reading of the foregoing minutes of the Navy Council meeting, Admiral Robison that in speaking of the Naval reserves as therein reported as "one still new, 3 of course still in the ground; one of those is no use to us whatever; might as well get the oil out of it," he was referring to Naval reserves 1, 2 and 3; reserve No. 2 was the one referred to as "no use to us whatever"; No. 3 "still in the ground" referred to the Wyoming reserve, Teapot Dome; by the statement "no appreciable dividend has been received from the oil taken from the reserves," the witness meant that the Navy had spent a considerable amount of money since the reserves were created, without an iota of Naval advantage from the existence of these as Naval reserves.

After the meeting of the Navy Council on November 29, 1921, minutes of which have been put in evidence as Exhibit 14, the witness took up with the Judge Advocate General of the Navy [615—532] the matter discussed at that meeting; prior

(Testimony of John Keeler Robison.)

to that time he had talked with the Judge Advocate General on the subject, and had explained to him the object that witness had in view in transforming the leak of oil from the reserves into fuel oil in storage at Pearl Harbor and had obtained from the Judge Advocate General an informal, by which he means oral, opinion that the project was correct and legal; after the meeting of the 29th, at which Admiral Latimer, the Judge Advocate General, was present, witness told the Judge Advocate General, in letter dated November 30, 1921, two letters, one of which is Exhibit "A," with the stipulation regarding the opinions of the Judge Advocate General's office, already included in this statement, and the other is now offered and received in evidence as Defendants' Exhibit "M4," dated November 30, 1921, and reading:

DEFENDANTS' EXHIBIT "M4."

"From: Bureau of Engineering.

To: Judge Advocate General.

Subject: Navy Petroleum Reserves — royalty oil from.

1. There is now accumulating for the account of the United States Navy royalty oil from Naval Petroleum Reserves Nos. 1 and 2 amounting to about 1,000 barrels daily. This amount is likely to increase in the near future.

2. Information is requested as to the legality of the proposed method of using this royalty oil to the advantage of the United States Navy. Can this oil

(Testimony of John Keeler Robison.)

be used on board ship? If so, at what price should it be expended? What appropriation should be debited?

J. K. ROBISON,
Chief of Bureau."

On December 5, 1921, the witness received from the Secretary of the Navy the formal opinion of the Judge Advocate General, dated December 2, 1921 (Exhibit No. "C" to aforesaid stipulation); there was a discussion in the Secretary's office among the Secretary, Admiral Latimer and the witness, on December 5, 1921, at which time the Secretary of the Navy formally approved the opinion of the Judge Advocate General, and affixed to the Judge Advocate General's opinion a request that that portion of it which he wished to put into execution—or an order to "Do this"; prior to the time that the Secretary [616—533] wrote these words in acknowledgment of that communication, there was a discussion engaged in by the Secretary, the witness and Admiral Latimer; the Secretary said he had gone over the opinion in detail; that he had approved it; that it seemed that it was necessary for us to go ahead without waste of time to the accomplishment of the Pearl Harbor project, and he told witness to prepare the necessary order from the Secretary to the witness to put that project into effect; witness said, "Mr. Secretary, there is no use of wasting that time. Just put on this opinion, 'O. K. E. D.,' right here, and that is all the order I need," and the Secretary thereupon wrote, "Ap-

(Testimony of John Keeler Robison.)

proved, 5th December, Edwin Denby," at the bottom, and put abreast the Pearl Harbor plan, "Do this. E. D., December 5, 1921"; that was a definite order upon which witness proceeded thereafter; as the Secretary was about to sign the Judge Advocate General's opinion, with his approval, witness said: "Wait a moment, Mr. Secretary. You realize that this is a pretty risky proposition, don't you?" The Secretary said, "Why?" Witness said, "Well, oil is something that no one can touch without risk." "Well," said the Secretary, "that is all right, Robison, but the way you put it you make it a matter of duty and I have got to sign it"; witness wanted to say that about the Secretary; he was that kind of a man.

After receiving the above order from Secretary Denby, witness took the subject up with the Bureau of Yards and Docks; the getting up of preliminary plans had been started nearly a year before; after the above instructions from Secretary Denby, witness does not know just what he told the Bureau of Yards and Docks; he told them to please go ahead and get the stuff out as fast as God would let them; he talked, at that time, to Captain Bakenhus, Acting Chief of the Bureau.

Witness testified that at a Navy Council meeting of [617—534] December 8, 1921, the subject of the Judge Advocate-General's opinion above referred to was a matter of discussion; thereupon there was offered and received in evidence the

minutes of that council meeting, Defendants' Exhibit "N4," reading as follows:

DEFENDANTS' EXHIBIT "N4."

"Extracts from Stenographic Minutes of Council Meeting, Thursday, December 8, 1921.

The Council met at 12:10 P. M.

Present: Secretary Denby, presiding.

Assistant Secretary Roosevelt.

Admiral Coontz.

Rear Admiral Washington.

Rear Admiral McVay.

Rear Admiral Robison.

Rear Admiral Taylor.

Captain Bakenhus, representing Yards and Docks.

Captain Leutze, representing Supplies & Accounts.

Rear Admiral Stiff.

General Neville, representing Marine Corps.

Rear Admiral Latimer.

Rear Admiral Moffett.

Rear Admiral Smith.

Captain Willard.

Commander Rowcliff.

No. 1. (Admiral Coontz brought up revised deficiency bill referring, *inter alia*, to fuel.

SECRETARY.—I am going to the Capitol this afternoon so as to arrange for a hearing . . .

Admiral ROBISON.—The cost of oil is artificially

high owing to unexpired contracts to which our appropriation is still indebted. On the West Coast the current price of oil is higher than it was at the last reading. The best contract is \$1.50 up to \$1.90, when the old price was \$1.48.

.
No. 14. Admiral ROBISON.— on the subject of oil, the Judge Advocate General says it is legal to exchange fuel oil or royalties for storage oil and tanks for Pearl Harbor that for the information of the Department for use of royalty oil to establish them in the form of oil reserves, actual, where plans call for them. The immediate need is appropriation of those tanks for Pearl Harbor. From Yards and Docks I am in receipt of plans and general specifications showing storage. These are somewhat commercial but Navy standard practice. They will be duplicates of what we have already got. With your permission I will ask the Secretary of the Interior to do this but when it comes to actual execution of the contract it be referred to this Department for consideration and you to recommend to him an officer to inspect the work in process of construction.

SECRETARY.—That part we can take up with the Secretary of the Interior. I want the details of the report from the Secretary of the Interior before I take it up with the Appropriations Committee. I want it first.

Admiral ROBISON.—In the letter from Yards and Docks it is necessary to retain control of this

under the Navy Department. The contract by the Interior Department on naval reservation is a contractual relation rather than [618—535] an engineering question.

SECRETARY.—I never questioned there was the slightest illegality. The question, therefore, should not be raised.

Captain BAKENHUS.—I wrote that letter and I included recommendations. I was very doubtful if it was policy to do it without taking first up with Congress.

Admiral COONTZ.—It seems to me, Mr. Secretary, you have settled this. We should not come back with inspection or anything. Let us don't send back to Interior Department.

Admiral LATIMER.—I suggest you leave out (those) two sections.

Admiral COONTZ.—I suggest you re-cast that letter. . . .

SECRETARY.—Anything that goes to the Secretary of the Interior must go through me.

No. 15. Admiral ROBISON.—\$2,279,000 (has been) turned into the Treasury. \$500,000 of that we can use for the storing of oil prior to July 1, 1922. Don't expect to include anything in Pearl Harbor for we will cover that with something else. Hampton Roads cost \$20,000 a year. We may be able to finish up Yorktown where the money is needed. It is up to War Plans. I would like to invite attention that the State of California, with reference to bonuses and royalties on oil lands, is

(Testimony of John Keeler Robison.)

putting in a request to the Department of the Treasury as to the amounts of these royalties. It takes all but 10 per cent. It has been decided that that within the Naval Petroleum Reserves is not included. It has been repeatedly decided in our favor.

SECRETARY.—Draw a letter to the Secretary of the Treasury on that. . . .

ROOSEVELT.—Mr. Secretary, I think in going to Congress on this Naval Reserve for Admiral Robison to prepare a paper for you—

(a) What the naval reserve is, as designated, if possible; quote the phrase to show what it is.

(b) My next thought is they will want to know how much we want to store; then they will want the balance.

(c) What is the estimate we will get out of that particular field.

SECRETARY.—It will take some time

Admiral ROBISON.—I cannot answer b or c.

SECRETARY.—He gave it to me verbally.”

The letter discussed, as shown by the foregoing minutes, which was to be recast, was a letter prepared in the Bureau of Yards and Docks, giving the plans and specifications for a million and a half barrel Pearl Harbor storage plant; it was addressed to the Secretary of the Interior, and was to be signed by the Secretary of the Navy, which is the general practice of the office, to do that way; inter-department correspondence is almost always signed by the head of the executive department; the letter of De-

(Testimony of John Keeler Robison.)

cember 9, 1921, as sent [619—536] out, signed by the acting Secretary of the Navy, is the same as the draft discussed at the Navy Council meeting, with the exception of a couple of paragraphs that were cut out; there may have been some re-arrangement of words or language, but the draft of December 8, under consideration at the meeting, differed from the one that was sent out on December 9, only in that there was eliminated from the one sent any question that witness felt and the Secretary felt had been solved finally so far as the Navy Department went, by the approval of the Judge Advocate General's opinion of December 2; he cannot recall definitely what the language which was the subject of discussion at the Navy meeting was, but to the best of his recollection it was to the effect that better contractual terms might be obtained if Congress would pass a new law definitely setting forth in more exact terms than the existing law the power of the Navy Department to do what it intended to do.

It was that letter that the order was given to re-cast; that matter had been determined, so far as the Navy Department was concerned; when re-cast, the letter became the one dated December 9, 1921, from the Acting Secretary of the Navy, Mr. Roosevelt, to the Secretary of the Interior (Exhibit No. 62); that letter was drafted in the Bureau of Yards and Docks, and passed through the hands of the witness, on its way to the Secretary for signature.

Admiral Robison had a conversation over the tele-

(Testimony of John Keeler Robison.)

phone with Acting Secretary Finney of the Department of the Interior, which conversation is referred to in Mr. Finney's letter of December 13, 1921 (Exhibit No. 63), in which he told Judge Finney that the Navy Department wanted to go ahead with the Pearl Harbor project upon terms similar to those finally actually accomplished in the Pearl Harbor contract; that the Navy would not thereafter want to use any of the royalty oil for current uses, [620—537] and that the Judge Advocate-General, which includes the solicitor's department in the Navy Department, had rendered an opinion that this would be a legal procedure; having called Admiral Robison's attention to the fact that the Navy Department had written to the Interior Department several kinds of letters, asking for current use segregation and exchange to fuel oil of the royalties from the Pacific Coast, and said that he would like to have the matter straightened out, and he wrote for it; the witness drafted letter to the Secretary of the Interior, signed by Secretary Denby, dated December 14, 1921 (Exhibit 66); he was present when Secretary Denby signed it; as to whether he had any talk with Secretary Denby before that letter was sent down to the Interior Department, witness had talks with the Secretary so frequently that he cannot state definitely that he talked this particular thing—yes, he can; there was nothing that he did not talk over, so he must have talked over this. As regards Secretary Denby's custom with regard to signing letters placed before

(Testimony of John Keeler Robison.)

him, he never let any of them go through without knowing what was in them.

There was then identified and introduced in evidence, as Defendants' Exhibit "O4," letter dated December 6, 1921, from the Bureau of Engineering to the Bureau of Supplies and Accounts, reading:

DEFENDANTS' EXHIBIT "O4."

"1. The estimated quantity of fuel oil to be obtained from the exchange of royalty crude oil for fuel oil during the period of 1 November 1921-1 July 1922, is 500,000 barrels. The department has decided that royalty oil will be held in storage.

2. In the event that it is decided to use some or all of this fuel oil for current needs the Bureau of Supplies and Accounts will be promptly advised to that effect.

J. K. ROBISON,
Chief of Bureau."

As to the announcement by Secretary Denby to the witness of decision with regard to the use of fuel oil obtained in exchange for royalty crude, or the storage of that oil, on December 5, Secretary Denby determined that the entire royalty [621-538] oil should be used to pay for the Pearl Harbor contract, and not for current use, and so stated; on November 29 he stated the policy as set forth in the November council minutes of that date, already read; outside of council meetings, the Secretary talked and the witness talked about what the "subterfuge" would be; they had exactly the same

(Testimony of John Keeler Robison.)

opinion, and which one expressed it, he did not know, but the discussion was this: There were people in the Department who desired the use of this oil to satisfy current needs of the Navy; Admiral Robison objected to that to the Secretary and the Secretary sustained those objections upon the ground that, first, the appropriations for the current use of the Navy were, by an announced policy of the administration of President Harding, to be lived within without creating deficits, and to use for the current needs the reserve oil would be exactly the same thing as to use the money, witness felt, and Mr. Denby agreed with him; also witness argued, and Mr. Denby argued, that the original purpose of the Naval reserves was to establish an emergency supply of oil for the Navy; obviously, if they used the oil, it would not be available for any emergency, and no lack of sufficient oil to accomplish some combined maneuvers, witness argued, was a genuine national emergency.

Prior to the commencement of the first Pearl Harbor project, the Navy Department had no above ground storage facilities for naval reserve oil, or that gotten in exchange for naval reserve oil, for future, reserve use; they had a certain amount of oil storage facilities for current naval uses, but no oil storage facilities for a genuine military reserve.

After the correspondence which took place between December 9th and 21st, between the Navy Department and the Interior Department, and prior to the time when Director Bain left Washing-

(Testimony of John Keeler Robison.)

ton for the Pacific Coast, the witness saw Secretary [622—539] Finney, in the latter's office, a couple of times; he saw Director Bain more often than that; Bain left Washington some time before the end of December, 1921, to present the proposition to prospective bidders; witness does not remember their talking over the companies Bain was going to present the project to, but thinks that it was agreed that he was to present it to as many of the big oil companies as he could, they being obviously the only people that could accomplish the project; witness had provided Bain with extra copies of the general specifications in their then state before Bain left; Admiral Robison does not recall accurately the time of his first meeting with Dunn of the White Engineering Corporation, but does not think he met Dunn until January.

At the November council meeting, on November 29, when witness had Mr. Doheny's letter to Mr. Fall of November 28, and Mr. Fall's to witness on November 29, witness said he announced that he was going to look into the matter and see whether the tanks referred to in Mr. Doheny's letter were specification tanks; subsequent to that time, he did nothing with reference to that letter; no action was ever taken in the way of accepting that proposition, or any official action on that proposition; as regards any talk on the subject of the November 28th letter with Dr. Bain, he thinks that occurred only to the extent of saying "We could not take any such proposition as that," and let it drop at

(Testimony of John Keeler Robison.)

once; witness thinks that is the only conversation he had with Dr. Bain or anyone else on the subject; he does not mean to say that the matter was not thought of; he means that would not accomplish what the department was after.

In the month of December, 1921, Admiral Robison talked with Mr. Doheny, Jr., and Mr. Doheny, Sr., talking with the young man first; he visited witness in the latter's office in Washington, November 12, 1921; the subject of his visit [623—540] was to request the Admiral to exert himself on behalf of a former shipmate of both of them, who was then a naval reserve officer, and had some disagreement or other with some regular officer; Doheny, Jr., did not come to see witness about any oil matter; after Doheny, Jr., had discussed with Admiral Robison the subject which the young man came to see him about, Admiral Robison brought up oil matters; he did not tell Doheny, Jr., anything about the details of the Pearl Harbor plan, but did tell him about the evaporation of the Naval assets, and witness' feeling of all but helplessness at the situation, his almost complete inability to accomplish the retention for the Navy of this oil, and he told young Doheny that he thought it would be possible to arrange some means of exchange by which the crude oil could be made fuel oil in storage, where the Navy wanted it; he discussed the drainage situation in general and told Doheny, Jr., the conclusions he, Admiral Robison, had come to at that time regarding the danger and the extent

(Testimony of John Keeler Robison.)

of the drainage of the property, and said that he really would like to know whether he was right or not, and requested Doheny, Jr., to ask his father to help him out and give him some advice in the matter; young Doheny dined with the Admiral at the latter's home in Washington, the night of December 12, and he talked on the subject of oil; the talk narrated above occurred at that time, there being present young Doheny, Mrs. Robison and the Admiral. So far as he remembers, he did not ask Doheny, Jr., anything about the cost of storage or contract for storage at Pearl Harbor.

The witness produced the original of letter dated December 14, 1921, and, reading the same, testified that it referred to the conversation in his home, which conversation he does not remember in detail, but has given in substance; he has a vivid recollection of his interview with "Ned" and the result of it, that result being the interview with his father; referring to [624—541] the statement in the said mentioned letter of December 14, that "My father will probably be in Washington on Saturday, and you might take advantage of that fact to have a chat with him as I suggested," Admiral Robison saw Doheny, Sr., at the end of that week, or the beginning of the next, in the Admiral's office in Washington, and then talked with him about the plan for the Pearl Harbor project; this was a long conversation lasting at least an hour and a half; witness first told Mr. Doheny what the witness believed concerning the Naval re-

(Testimony of John Keeler Robison.)

erves, as to drainage; he told him that he feared that "our property was getting away from us"; that witness was personally responsible for the preservation of that property to the Government, in the first place, and to the Navy in the second, and that the Government was not getting its share, and the Navy was not getting anything; that witness thought the Government would have to go ahead with the drilling of a lot of wells, in fact the complete drilling of No. 2 reserve and the drilling of a considerable number of wells in No. 1 reserve, in order that the trust could be executed; Mr. Doheny agreed with the Admiral; he also told Doheny of the plan for the use of the oil for current naval needs, and how he had fought it, and beaten it, for the purpose of making it available in Pearl Harbor, to accomplish the prevention of the possibility of the invasion of the west coast of the United States. "And I talked to him about what war is like; not in terms of dead men, but in terms of shame, and I told him that it couldn't be done except by the exchange of crude oil, and I appealed to him to help in the accomplishment of the security of this part of the country. I tried to show him that it would not involve any risk to him."

"I told him that he couldn't furnish us any real facilities that would cost him money without sooner or later his getting the money back from the Government, even if he didn't get the oil back out of the ground." "I told him the thing [625—542] involved was so great as to involve the security of

(Testimony of John Keeler Robison.)

this country." The witness was asked, without repeating it in court, to state whether he told Mr. Doheny anything about the necessity for action, and answered: "Oh, yes; but I didn't give him all the information I had, by any means. But when I had got him interested I kept on because I wanted to be sure I could get the job done, and I didn't let him go until he, with red eyes and a white face, said, 'Well, Admiral, go ahead; you can depend upon it you will get one bid.' I stopped right then, but he went on and he said, 'And what is more, I will tell you, Admiral, if you get a bid from me, or from my company, it will be one that won't involve one cent of profit to me.' That was the end of that conversation."

Prior to the time that there was made the statement just testified to, Mr. Doheny had said to the witness that he had already considered the project, but that his people were against it; that they had some interests out here in California but no such considerable interests as they would have to create in order to go ahead with the proposition, and that he had made up his mind to turn it down; witness does not recall seeing Mr. Doheny again, either late in 1921 or early in 1922.

Admiral Robison had visited the home of Edward L. Doheny, Jr., in New York City, but his records indicate that that visit was in the fall of 1922, and he does not think he had visited there prior to the fall of 1922; the visit he refers to was purely social.

(Testimony of John Keeler Robison.)

Admiral Robison saw Dr. Bain after he returned to Washington in January, 1922, at which time Dr. Bain reported to him; he was not present when Dr. Bain made any report of what had been accomplished by the trip to the West, except the report that Bain made to the witness; Dr. Bain told witness that several bids would be received; that he had seen the heads of the Standard Oil Company of California, the Associated Oil [626—543] Company, the General Petroleum Company, and he may have said that he had seen the Pan American officials, too, but witness does not know; witness had told Bain that Mr. Doheny had promised that there would be one bid from the Pan American, or had told that to Mr. Fall, he is not sure which; he informed Secretary Fall of Mr. Doheny's statement practically as soon as he got the word; the testimony shows that Mr. Fall was out of Washington all of December, and until late in January; witness may have told Mr. Finney, of course; witness did not write to Secretary Fall; he never had any correspondence with Secretary Fall, except the official correspondence in the record, and never had any communication of any kind with Secretary Fall while the latter was at Three Rivers, New Mexico; Admiral Robison does not remember whether he was present at the conference between Secretary Finney, Dr. Bain and Mr. Fall, held in January or early in February, 1922; he recalls knowing that the matter was going ahead, and knowing that Secretary Fall had given instruc-

(Testimony of John Keeler Robison.)

tions, but as to whether they had been given to Secretary Finney, Mr. Bain or Mr. Ambrose all at once, he does not know, and does not recall any conference at that time where they were all present at once.

Admiral Robison was in contact with Dr. Bain when the latter, in February, 1922, sent out the first invitation for proposals on the first Pearl Harbor project; at that time witness was handling that matter with Dr. Bain in the Interior Department; witness repeats what he has already said in his testimony, when he says "Bain," it might have been that he saw Ambrose; in short, it was the Bureau of Mines. Witness received Admiral Gregory's memorandum, Exhibit 79, in opposition to a cost-plus-plan of contract, and tried to quiet Admiral Gregory's fears in the matter, as set forth in that memorandum, at the same time assuring Admiral Gregory that his objections [627—544] would be satisfied; he went to Gregory and talked the matter over, and argued to him the advantages in the case of the Pearl Harbor project, where data was lacking concerning certain engineering details of a cost-plus and fixed-fee proposition; Admiral Gregory argued to the witness the disadvantages as ascertained by the recent war experiences in connection with cost-plus contracts. Witness talked the matter over with Dr. Bain and Secretary Fall, and, he thinks, with Secretary Finney. He does not remember what was said to Secretary Fall about Admiral Gregory's position on this subject,

(Testimony of John Keeler Robison.)

not even in substance; this was a matter that was vitally important to the Yards and Docks, and as to which Admiral Gregory was a good witness; it was a matter that Admiral Robison paid very close attention to; he morally supported Admiral Gregory's contention with anybody outside of the Navy Department, with the Interior Department; when he took up Admiral Gregory's position with Secretary Fall, witness supported it; Admiral Gregory and Admiral Robison both talked to Secretary Fall, but the witness' recollection regarding that conversation is too fragmentary to make it possible for him to testify regarding it, as Admiral Gregory was the important man in that matter, and the witness was not; witness cannot recall any conversation with Mr. Finney on the subject, though one might have occurred; witness knows of the revision in the call for bids dated December 17, 1922, and the receiving of letter addressed to him, dated February 24, 1922, and of the telegram therein referred to, which letter, as Exhibit "P4," was read in evidence as follows:

DEFENDANTS' EXHIBIT "P4."

"My dear Admiral:

I wired you today as follows: 'Confirming our conversation, Mr. Dunn and I will call upon you Monday morning at nine thirty.'

I am enclosing a copy of a letter, which I have

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(Testimony of John Keeler Robison.)

the promise that he had gotten from Mr. Doheny would be kept, and that under the circumstances he figured that the loss of time, which was vital, was unnecessary; that it would pay to wait three days before taking any action on Secretary Fall's letter, and then if there was not received any bids, that would be time enough to act, but if bids were received, why, this pessimistic view of the situation would be shown to be pessimistic; the Navy Department did not take any action on Secretary Fall's letter of April 12, 1922, and witness presumes it was placed in his files.

On April 15, 1922, witness learned by telephone from Dr. Bain the substance of the bids upon that day; Bain congratulated the Department of the Navy on the fact that there had been gotten several good bids; he said that he did not know at the time what conditions were attached to them, but they were all of them pretty reasonably close to the Navy's estimate, and that "we were in luck" or words to that effect; that, in [630—547] substance, is what he said at the time of the first conversation about the bids; witness is not certain whether Dr. Bain gave him any figures over the telephone at that time or not, nor whether he stated who was the lowest bidder; he had not then examined the bids, to determine the conditions attached to them; subsequent to that telephone message, witness went into the matter of those bids with Dr. Bain, Mr. Ambrose and Judge Finney, and on April 17, 1922, saw Mr. Ambrose's analysis (Ex-

(Testimony of John Keeler Robison.)

hibit 119) in the Interior Department, and examined it; witness then went over it with Secretary Denby, and told Secretary Denby that he thought that the Pan American bid B was the best one for the Government to accept; he cannot state positively that he took a copy of Mr. Ambrose's analysis and recommendation to the Secretary of the Navy, but he can say that he did take to Mr. Denby every bit of information that he had; in addition, he said to Secretary Denby that he thought the Pan American bid B was the best one to accept; witness told the Secretary the reason why he made this recommendation was that that bid "saved us several hundred thousand dollars and didn't seem to me to cost us anything"; witness informed the Secretary of the Navy of the condition of Pan American bid B, as regards a preferential right to future leases, and told the Secretary that it did not seem to witness that a preferential right had any other price to the Government than the possible decrease by one in the number of bidders in some future contract; the preferential right condition was discussed between Secretary Denby and Admiral Robison, and Admiral Robison's idea of the preferential right, as he explained it to Mr. Denby, and the latter's idea as he explained it to the witness, was about as follows (he cannot give the exact language of this, which occurred two years ago, but in substance): In the first place, witness saw big the two or three or maybe five hundred thousand dollars that was

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(Testimony of John Keeler Robison.)

saved to the Government by [631—548] that bid B; that looked awfully big to witness at the time, and he explained that to Secretary Denby; showed him how instead of having a fixed price—or we got a lower fixed price which was a fixed price minus, a cost-minus contract. There was a definite immediate, considerable saving to the Government involved in bid B; that witness could see; and against that there was nothing except a preferential right to further leases on certain areas in No. 1 Reserve when the Navy should make up its mind it wanted to make such leases; there was no obligation to “us” to make the leases; Secretary Denby suggested that if the terms were not to “our” satisfaction, if “we” couldn’t negotiate satisfactory terms, “we” could always advertise, and it didn’t look to either the witness or Secretary Denby at the time that “we” had made a mistake in accepting bid B.

Admiral Robison was present when Secretary Finney dictated telegram of April 17, 1922, to Secretary Fall (Exhibit 120); that telegram stated the views of witness in the matter; the witness saw a copy of Secretary Fall’s reply, dated April 18, 1922 (Exhibit 121); prior to the time the letter of award, dated April 18, 1922 (Exhibit No. 122), signed by Secretary Finney, was sent to the Pan American Petroleum & Transport Company, witness had taken the matter up with Secretary Denby, that is, he had taken this matter up with Secretary Denby immediately to get the information concern-

(Testimony of John Keeler Robison.)

ing the different bids from Ambrose, and not between the time the telegram was received from Secretary Fall and the letter of award sent; Secretary Denby had instructed witness to go ahead with bid B, and the witness had informed Secretary Finney of that on April 17.

Witness identified Defendants' Exhibit "CC," as "A memorandum for the press for immediate release"; he had knowledge of that statement given to the press at the time it was issued, but he does not remember whether he dictated it or whether he [632—549] revised it after one of the subordinates prepared it; he thinks he dictated it and went over it and corrected the English, and then took it in to the Secretary and got his approval; it was approved by Secretary Denby before it was issued, on that day; witness never did one thing in this oil business without being approved by Secretary Denby first; Admiral Robison does not think he went over this press statement with the Interior Department; but that he did go over one given out by that Department concerning the Mammoth Company to which he added some information to the original draft.

After the notification to the Pan American Company, dated April 18, 1922 (Exhibit No. 122), was sent, witness was present at conference when there was discussed the subject of making the Secretary of Navy a party to the contract, and of giving the Pan American Company some assurance that some definite pieces would be leased under the preferen-

(Testimony of John Keeler Robison.)

tial right clause; Mr. Cotter brought up the question of the Secretary of the Navy being a party in and to the contract, saying that the company had to have the Secretary of the Navy as a party to the contract; that it might be that the Advocate-General was all right, or it might be that he was not, and he, Cotter, wanted to be assured; witness thinks that the executive order of May 25, 1922, was mentioned, Cotter said that the opinion of our Judge Advocate-General and the executive order might both be perfectly legal, but he wanted to be sure; Admiral Robison told Secretary Denby of Mr. Cotter's request, and the Secretary said that it was all right; that he did not know that it made any difference; that he was perfectly willing.

Mr. Cotter also brought up the subject, in conferences between April 18 and April 25, with regard to the Pan American Company's assurance that it would be given a lease to some specified land; Cotter said then, witness thinks, that he [633—550] wished the Government would not accept bid B; that as near as he could see, his company was giving the Government some money, and not getting anything for it at all; he did not say that he wanted bid A accepted, but he said he wished the Government had not accepted bid B; there was not any urging, but "after our decision was made to take bid B," he said he thought "we" had done wisely; that his company had lost on it; he asked that he have something to show to his company to show that he was on the job, that he have a little strip of land

(Testimony of John Keeler Robison.)

to show to them as a lease that would show that it had gotten something out of this alternate bid; it is witness' recollection that at the time there was pending in the Interior Department a plea, which witness had ridiculed, from the Pan American Company, asking for a decrease in royalties from these strip wells of 55½ per cent; at this, witness laughed; he was sorry they had lost money, if they had, and it was at that time, as he recalls it, "that we gave them the additional portion of Section 1."

The witness is familiar with the letter dated April 25, 1922, signed by Acting Secretary Finney and Secretary of the Navy Denby, Exhibit "E" to Amended Bill of Complaint; as to discussion on that subject between witness and anybody in the Interior Department, Dr. Bain told the witness he thought "we might as well give it to them if they wanted it very badly, because we ought to do it for the protection of our property," against drainage by outsiders; the land in Section 35 was being drilled up by the Pacific Oil Company; the witness is familiar with the restrictive agreement between the Government and the Pacific Oil Company, providing against drilling in certain sections except after six months' notice, the restricted area including Section 32 and 33 and all lands within one-half mile of those sections.

Before the contract of April 25, 1922, was formally [634—551] executed, Admiral Robison had a draft thereof, which he got from the Interior De-

(Testimony of John Keeler Robison.)

partment, and took to Secretary Denby; the Admiral and Secretary Denby read over that draft, made several changes in it which were made by both of them together, and which consisted of about a half dozen changes in phraseology; this was done by taking a pencil and scratching out a phrase, or inserting a phrase, as the case might be; there were no material changes made; prior to the witness taking that draft to Secretary Denby, Mr. Nagel, the solicitor of the Navy Department, went over the draft with Admiral Robison, in the latter's office; the witness had his advice. After Secretary Denby and the witness went over this draft and indicated on it changes in the phraseology, as above testified to, Secretary Denby said, respecting the draft of the contract, "It is all right; go ahead and put it through," or words to that effect; thereupon witness took it back to the Interior Department, where he saw Bain, Ambrose and Finney; he thinks he took it to Secretary Finney, and that the latter sent for Dr. Bain, and said, in substance: "Here is what they want. Is it all right? Put it through," and that is the way it was done.

Witness does not recall having known at the time that Mr. Ambrose left for Three Rivers, New Mexico, on April 20, 1922, carrying certain documents and information; witness did not give Ambrose any instructions, or requests, before Ambrose left; Ambrose was not going on any of witness' business. Witness did not communicate to Secretary Fall by Mr. Ambrose, nor did he send the Secre-

(Testimony of John Keeler Robison.)

tary any message about the Pan American Contract through Ambrose, nor send Secretary Fall anything, then or ever, by Ambrose or anybody.

Prior to the time when Secretary Fall left Washington on April 13, 1922, he did not say anything to Admiral Robison [635—552] about who this contract was to be awarded to, nor did anyone in the Interior Department say anything to him prior to that time about who this contract would be awarded to.

Witness does not remember whether he was present when Acting Secretary Finney signed the April 25, 1922, contract (Exhibit "B" to Amended Bill of Complaint), but thinks he was; he took the final draft of the contract to Secretary Denby, and at the same time took to the Secretary the letter of April 25, 1922, which is Exhibit "E" to the Amended Bill of Complaint; they were both accomplished at the same time; he does not remember whether any representative of the Pan American Company was present when he took these papers to Secretary Denby, but Mr. Cotter may have been; so far as the knowledge of the witness goes, Mr. Denby had not met either Mr. Doheny, Sr., or Mr. Doheny, Jr., on April 20, 1922, but he does know that it was some six or seven months afterwards that he introduced Secretary Denby and Mr. Doheny, Sr. Secretary Denby did not read the contract over again, when it was presented by Admiral Robison to the Secretary for his signature; the Secretary asked the witness whether it included the

(Testimony of John Keeler Robison.)

changes that they had made, and witness pointed out to Secretary Denby the places where those changes had been made, and showed him that it was exactly what he wanted, and assured him that there were no other changes included therein; witness had gone over the contract in detail before presenting it to the Secretary; thereupon, the Secretary signed it.

Following the execution of this contract, the matter of carrying out the work of the Pearl Harbor project was a case then for the Bureau of Yards and Docks, the witness' work was done, practically; there were details that came to him, in certain other particulars, but in carrying out the execution of the project, the building of the tanks and the filling of them, that was for the Yards and Docks; the only place [636—553] witness figured in that was in the filling.

Witness identifies letter of May 5, 1922, signed by Acting Secretary Finney, and approved by Secretary Denby (Exhibit 129) and testifies regarding it that while he does not recall, he may have had some talk about that with Secretary Finney, but he did have a talk with Secretary Denby before the latter signed that exhibit, on the subject that he does recall, at which time he told Secretary Denby that "this would get us action quickest, and I didn't think it would do us any harm." In this conversation, that part of the May 5th letter that referred to the Secretary of the Interior appointing a successor to the Chief of the Bureau of Yards and

(Testimony of John Keeler Robison.)

Docks, in certain events, was discussed between Admiral Robison and Mr. Denby, it being one calling the other's attention (witness does not remember which) to the fact that orders to naval officers had to be signed by the Secretary of the Navy, and this was really nothing but verbiage; that it was all right until there was a disagreement, but if there was a disagreement the Secretary of the Navy was the man that had to agree in order that any officer could be assigned to the Navy Department; if there was anything that he did not really agree to, there was always the appeal to the Commander-in-Chief, the President; Admiral Robison and Secretary Denby talked that over, and it seemed that that satisfied the Interior Department, and did not hurt the Navy Department, and it expedited action to agree to it.

Witness does not recall having talked with Mr. Dunn of the White Engineering Company about this May 5, 1922, letter.

Witness cannot tell just when, after the contract of April 25, 1922, was signed, there arose in the Navy Department the question of finding more oil storage facilities at Pearl Harbor than were covered by that contract; something of that [637—554] sort must have come up in 1922, because there were instructions given by the Secretary of the Navy in the fall of 1922, increasing the quantities and establishing the new limit as to the proper amount for that locality; before the Secretary of the Navy approved recommendations or issued orders increas-

(Testimony of John Keeler Robison.)

ing the amount of fuel to be stored at Pearl Harbor, the matter had been the subject of conference in the Navy Department, in which Admiral Robison took part. About May, 1922, Admiral Robison called the attention of those responsible for adequate preparation of our Navy for active service to the fact that our entire reserve of petroleum products up to that time had consisted, aside from those we required for current use, in fuel oil, and to that were added other petroleum products, such as lubricants and gasoline and Diesel oil. He invited also the attention of the head of the war plans section to the desirability, the necessity, if witness' computations were correct, of a complete study of their logistic requirements. This was done, and the result of it was an increase in the amount of fuel oil set to be carried in Pearl Harbor. In this connection, there was discussed the question how long, in the event the Navy was called into active service on the Pacific, 1,500,000 barrels of oil would last the fleet; these discussions took place in the spring of 1922; as regards whether the increase of quantity of fuel oil to be carried in reserve storage at Pearl Harbor, above testified to, was an increase up to 625,000 tons, the witness testifies that the second contract (December 11, 1922) exactly accomplishes, in connection with the first, the requirements of the Navy's plan, no more and no less.

Thereupon, the witness identified, and there was offered in evidence on behalf of defendants, a communication by the Secretary of the Navy to the

(Testimony of John Keeler Robison.)

Secretary of the Interior, dated September 26, 1922, as regards which the witness testified [638—555] that it contained certain figures that ought not to be made public, and it was stipulated by counsel for the plaintiff and for the defendants that the said figures were not necessary for an understanding of the figures made in said letter, and were not material to the issues in this case, and that the substance of such communication, and not the entire document, should be read in evidence. The said communication as shown by the symbols thereon, was prepared in that part of the Navy Department known as "Operations"; it is addressed to the Secretary of the Interior, and bears the signature of Edwin Denby, and in substance states that the Navy Department is anxious to obtain certain information relative to the production and delivery of petroleum products, and that the Interior Department is requested to furnish this information by answering the questions based upon certain assumptions with regard to operations of the Naval fleet during stated periods, requiring stated quantities of fuel oil and other petroleum products. The letter then proceeds to propound the following questions:

"(1). Can the quantity of petroleum products indicated in assumption 'a' be delivered on the dates indicated without using sea transportation at tide-water on the Pacific Coast from the United States fields only without disturbing harmfully other essential war time consumers?

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(Testimony of John Keeler Robison.)

(2). Can these requirements be met solely from the West Coast fields?

(3). If not, what field would furnish these requirements and in about what quantity?

(4). Also in that event what means of overland transportation would be used during each of the months indicated in assumption 'a' and what percentage of each monthly delivery would each means carry?

Your cooperation in this matter, Mr. Secretary, will be appreciated. I hope you will consider the contents of this letter as secret."

It was stipulated that the foregoing communication, dated September 26, 1922, as a whole, stated an inquiry from the Navy Department, to the Interior Department, Bureau of Mines, as to what commercial supply of petroleum products there was around the Pacific Coast, so that if the Navy Department needed to obtain the same from private consumers, [639—556] it would know the sources.

On November 22, 1922, witness sent to the Bureau of Yards and Docks a communication which is Exhibit 165, prior to which time he had seen the Secretary of the Navy's approval of the increase in the amount of reserve fuel to be held at Pearl Harbor; before sending the communication to the Bureau of Yards and Docks, witness had received from Mr. E. L. Doheny the memorandum on the subject of the California oil situation, and had discussed the contents thereof with Dr. Bain, of the

(Testimony of John Keeler Robison.)

Bureau of Mines. Witness identifies memorandum which is Plaintiff's Exhibit 157, which he stated was the subject of a talk between Dr. Bain and himself in the latter part of October, 1922, and that after that talk, witness, in the latter part of that month, had a talk with Mr. Doheny, Sr., in the office of witness, in the Navy Department at Washington; that talk took place October 27, 1922, and immediately it was concluded, the witness dictated memorandum regarding it, which he used so as to fix what took place in his mind, and which he also used to enable him to be sure that he told Secretary Denby the whole story, after which he made that memorandum a part of the Navy Department's files; he dictated this memorandum immediately after his conversation with Mr. Doheny; said memorandum was thereupon offered and received in evidence as Defendants' Exhibit "R4," and reads as follows:

DEFENDANTS' EXHIBIT "R4."

"Bureau of Engineering — October 27, 1922 — Dictated by Rear Admiral J. K. ROBISON.

Memorandum for regular files:

Mr E. L. Doheny, President of the Pan American Petroleum Company, called on me this day. His Company is erecting a fuel oil storage at Pearl Harbor, on conditions that imply the prior right of the Pan American Company to further development within the Naval Petroleum Reserves Nos. 1 and 2. Mr. Doheny is the producer of about

eleven thousand barrels per day of crude petroleum in California. The present price of crude in California has fallen to sixty cents a barrel, from \$1.10. This has the effect, so far as the Government is concerned, of cutting the value of our royalty oil in half. Our interests are the same as those of the Pan American Company. The price of refined oils has not fallen perceptibly [640—557] in California. The reduction in price of fuel oil has been very little. The ratio between present prices of crude and certain kind of petroleum products has decreased. There is talk of further reduction in price of crude, in California, to about thirty cents a barrel. The object of this reduction, as stated by the refiners, is to establish a parity between production and consumption. This will involve a stopping of all development, and the closing of many wells. Our own wells, on the Naval Reserves, have been decreased in output by as much as 5,000 barrels a day. The present average royalty from these wells being 31 per cent (figure furnished by the Department of the Interior), the Government is now losing around 1500 barrels a day. Our present royalties are not far from 11,000, a year. It will take us about twice as long to pay for the Pearl Harbor development as would have been the case if there had been no cut in price of crude. Mr. Doheny believes that the cut in price of crude has already been excessive; that it should have, in no case, exceeded the cost of storage. He is prepared to furnish:

1,000,000 barrels of fuel oil, in storage, at San Francisco, to be available for naval use, on demand—maintenance cost to be paid by his own company; cost of delivery to tankers to be paid by his Company; and cost of transportation from our Reserves to tidewater, to be paid by his company.

Further, in case we desire to use fuel oil (procured from his company) to a greater extent than will be paid for by our approved royalties, he will guarantee the delivery of such oils at ten per cent below the market price.

In return for these concessions, he desires a lease, with authority to commence development as soon as he thinks it is necessary upon certain areas of our No. 1 Reserve not yet developed. These areas do not include that portion of our reserve that it will be profitable to leave in the ground.

The foregoing proposition is attractive to us. It does not measure by any means all that we can get. Mr. Doheny contemplates, by his own protection, the erection of a refinery, and the construction of pipe-lines from the naval reserve to the refinery. In order that this can be done safely, he requires an assured supply of crude oil. He is of the opinion that the mere announcement of the erection of the refinery, and of the entering of his company into the market for crude oil will increase the price of such crude so that the ratio between the price of crude oil which he, as well as the (Government?) produces, to the price of oil products, which have been produced in large part by the Standard Oil Company of California, will have

increased to the advantage of both himself and, incidentally, of course from his point of view, the Government.

I pointed out to Mr. Doheny that we would be unable to contract to purchase, over any period of time, naval requirements of fuel oil, or of any other products; but that there was nothing to prevent our acquiring the right to obtain such products as suggested by him, and with the price of ten per cent below the market rate. I further pointed out to Mr. Doheny that the general plan for the utilization of the naval reserve involves the transformation of our reserves of crude oil under ground into definite amounts of fuel oil and other crude oil products such as lubricating oil, located at strategic points, for naval use when as and if required. I suggested to him that his proposition would be of most [641—558] interest to us if it involved the maximum amount of fuel oil held in storage by him for our account. I invited his attention to the fact that, in addition to the stations on the Pacific Coast, his Company had various stations on the East Coast, viz.:

Galveston,
New Orleans,
Tampa,
Jacksonville,
Norfolk,
New York (Carteret, N. J.),
Providence, R. I.,
Portland, Me., and
Boston;

and that it would be very small expense to his company to provide, at each of these places, a certain amount of fuel oil in storage for the account of the Navy; and to guarantee the continued reservation for naval account. That such a guarantee would be of great value to us; that his project further, in order to become most attractive to the Navy Department, should include the supply of the maximum amount that he should furnish at these various points.

Mr. Doheny agreed in principle with my suggestion. The amount that he can supply at Carteret, N. J., may be made as large as one million barrels. Smaller amounts can be supplied at the other stations. He can supply a very considerable amount at Christobal, Canal Zone, where he has the land and where the supply will involve nothing more than the cost of the tanks. He can supply 100,000 barrels or more at each of the other points heretofore mentioned. I told him that this point would be of great value to us. Our success in handling the Naval Petroleum Reserve proposition, generally, is measured by the amount of reserve that it is possible to create. It seems to me probable that we can secure from the Pan American Company not less than four million barrels of storage in connection with this particular development, and that the cost to the Navy will be approximately nothing except that the Navy will be committed to that Company, definitely and finally, in connec-

tion with the development of certain portions of No. 1 Reserve in California.

I told Mr. Doheny that there were a good many details that I would want to look into, such as the rate of discharge that he could guarantee into the Navy tankers; and the depth (?) of water that could be carried to the points of loading for our tankers, or for other tankers engaged in the supply of our needs.

Mr. Doheny said that these details (seemed all right?) but was not able to furnish me with the specific information at this moment. Indeed, it would take a considerable time to do so; but that, within three or four days he would furnish me with a general memorandum, which memorandum was not to be taken as the final form in which it would be presented, but which was to be furnished me for suggestions by myself as to modifications therein that would enhance the attractiveness of his proposed contract with the Navy Department.

This proposition was originally brought to my attention by Secretary Fall, who is very favorably disposed toward it; but who desires to be sure that our interests are completely safeguarded, and that our [642—559] desires are accomplished to as great an extent as practicable.

From my own point of view, it appears that Mr. Doheny's proposition, while of course intended to defend his own interests that are now suffering to the extent of around \$5,000.00—a figure given by me, and subscribed to by him—is almost equally

(Testimony of John Keeler Robison.)

profitable to the Government as to the Pan American Company. Any increase in the value of our crude oil is directly to our interests, and if we can secure the erection of a reserve by commercial interests such reserve will be almost if not quite as definite an entity toward the national defense as if it were naval property. Further, the Navy would be excused from the payment of any maintenance charges in connection with this reserve. This would free our appropriation Fuel and Transportation from no inconsiderable charges.

From my point of view, therefore, the proposition appears sound—subject to the one condition, that the amount of fuel oil held in store by the Pan American Company should be made as great as we can possibly secure.”

Admiral Robison testifies that when “this proposition was originally brought to” his attention, “by Secretary Fall,” as stated in the foregoing memorandum, Secretary Fall told the witness that Mr. Doheny was much concerned over the state of the oil market in California, and had some sort of a proposition to advance looking toward the stabilization of prices that might be made to the Government’s advantage, as well as to his own; witness told Secretary Fall that anything that came “to our advantage” was of interest to witness and that is about all there is to it, because the witness was not furnished with any details; witness does not remember exactly what, if anything, Secretary Fall said with

(Testimony of John Keeler Robison.)

regard to the Navy's interests or part in that matter, but there was no question that it was a matter for Naval decision.

Admiral Robison identifies as having been received by him from Mr. Doheny letter dated November 6, 1922, Plaintiff's Exhibit No. 158, together with the memorandum enclosed therewith regarding the oil situation in California; that letter and memorandum was received by the witness through the mails; witness told Secretary Denby about it, but took no steps to put it into effect; there were other plans that it [643—560] was necessary that "we accomplish at that time, and the accomplishment of which had to be provided, namely, the plans for an extension of the Pearl Harbor capacity." At the time of the conversation of October 27, 1922, between Admiral Robison and Mr. Doheny, nothing was said by either with regard to an increase in Pearl Harbor project; the Pearl Harbor subject was not mentioned at all except in connection with so much thereof as was then under construction.

In the month of November, 1922, Mr. J. J. Cotter and Mr. J. C. Anderson, of the Pan American Company, came to the witness' office, Mr. Cotter introducing Mr. Anderson to the witness; they called about the 15th or 20th of November, 1922, and brought up the subject of Mr. Doheny's proposition, dated November 6, 1922 (Exhibit 158), and at that time witness told them of the Navy's need for about two and one-half million barrels more of oil in Pearl Harbor, and that he wanted everything

(Testimony of John Keeler Robison.)

that Mr. Doheny offered, and this additional two and one-half million barrels, together with storage facilities therefor. In the conversation, it is the recollection of the witness that he did not talk with Mr. Anderson or Mr. Cotter about leasing any part of the reserve, though he may have introduced that subject; the witness suggested ultimately, in that or in a subsequent conversation, that the lease of the entire No. 1 reserve, subject to retention "by us of that portion that we did not feel required drilling, for protection of the reserve property," and what might roughly be called the western half.

In the conversation with Mr. Doheny on October 27, 1922, nothing was said about leasing the entire reserve to the Pan American Company, and Mr. Doheny did not ask it, or suggest it.

Admiral Robison was the one who first mentioned the matter of making a lease of all of the naval reserve No. 1, [644—561] in connection with this extension of the Pearl Harbor project. Prior to the time when the witness suggested that action by the Government, neither Mr. Doheny nor anybody representing the Pan American Company, made any application for a lease of all of that reserve.

The letter dated November 28, 1922, from the Secretary of the Navy to the Secretary of the Interior, Plaintiff's Exhibit 166, which letter is attached to and made a part of the December 11, 1922, contract, was dictated by Admiral Robison; the letter is signed by Mr. Denby; witness took that letter in person to the Secretary of the Navy and went

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(Testimony of John Keeler Robison.)

over its subject with him before he signed it; prior to the time he dictated that letter, he had received information orally from the Secretary, of the approval of the quantities listed therein as additional facilities to be installed at Pearl Harbor; that information was oral; the figures had been confirmed by the witness, by personal application to the office where they had been compiled. The person that the witness received these oral instructions from was Mr. Denby, the Secretary of the Navy. Prior to the writing of the letter of November 29, 1922, witness may have told Secretary Fall that the Navy was going to ask for additional facilities at Pearl Harbor, but he does not think he did; Secretary Fall had not said anything to the witness, or asked him to get up that sort of an application; "This plan originated in the Navy Department and was based upon necessities."

(31,722)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 999

PAN AMERICAN PETROLEUM & TRANSPORT
COMPANY AND PAN AMERICAN PETROLEUM
COMPANY, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

VOLUME III

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No. 4651

**United States
Circuit Court of Appeals**

For the Ninth Circuit.

Transcript of Record.
(IN THREE VOLUMES.)

**PAN AMERICAN PETROLEUM COMPANY, a
Corporation, and PAN AMERICAN PE-
TROLEUM AND TRANSPORT COM-
PANY, a Corporation,**

Appellants and Cross-Appellees,

vs.

**UNITED STATES OF AMERICA,
Appellee and Cross-Appellant.**

VOLUME III.

(Pages 1025 to 1471, Inclusive.)

**Upon Appeal and Cross-Appeal from the United States
District Court for the Southern District of
California, Northern Division.**

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(Testimony of John Keeler Robison.)

Following the transmitting of that letter of November 29, 1922, witness telephoned to the New York office of the Pan American Company, and asked them to send someone down to Washington, and promptly conferences began, some of which took place in the witness' office, where there were present as [645—562] representatives of the Pan American Company, Mr. Cotter and Mr. Anderson, and sometimes Mr. Cotter alone, at which conferences nothing important took place. There were conferences, of course, between witness and Mr. Denby, but he did not confer with the representatives of the company, nor with the representatives of the Interior Department; most of the conferences took place in the interior department, in the office of the Director of the Bureau of Mines, there being present Admiral Robison, Dr. Bain, sometimes with and sometimes without Mr. Ambrose, Mr. Cotter, sometimes with and sometimes without Mr. Anderson. Witness had one or two or perhaps more conferences with Secretary Fall; there was one conference at the Bureau of Mines, where Mr. Doheny was present; between November 29 or 30 and December 11, there were conferences on this subject about twice a day, at but one of which was Mr. Doheny present, and that was in the office of the Director of the Bureau of Mines, Dr. Bain; that conference was toward the end of the negotiations.

It was in the early part of these negotiations that the matter of the leasing of the entire unleased portion of Naval Reserve No. 1, came up, at which

(Testimony of John Keeler Robison.)

witness said on that subject that he "thought that we could well afford to let the whole of it in; that it would probably increase the benefits that we would get out of the deal"; witness is referring to No. 1 reserve, he means; the witness said this to Dr. Bain, and to Mr. Cotter. These conferences were a continuous set of negotiations, where witness was trying to get as many of the advantages, indicated partially in his memorandum of October 27th, Exhibit "R-4," for the benefit of the Navy, as he could, and he was trying to accomplish that by means of identifying the interests of the Pan American Company with those of the Government, making it to the interests of the Pan American Company that the Navy's [646—563] interests would be protected; he was trying to get all he could for the Navy out of it.

By the statement in his memorandum of October 27, that "the foregoing proposition is attractive to us. It does not measure by any means all that we can get," witness meant that while Mr. Doheny had made an offer, witness thought he could get more out of him than he had offered; in the memorandum he uses this phrase: "It seems to me probable that we can secure from the Pan American Company not less than 4,000,000 barrels of storage in connection with this particular development and that the cost to the Navy," etc.; in that connection, Mr. Doheny had originally offered 1,000,000 barrels of storage, as the memorandum notes, and the witness had in mind obtaining storage for 4,000,000; that

(Testimony of John Keeler Robison.)

does not refer to storage at Pearl Harbor, but storage within the United States, of which Mr. Doheny had offered one million barrels at San Francisco or other Pacific Coast points, California tidewater, to be available for naval use on demand; maintenance cost to be paid by his company; cost of delivery to tankers to be paid by his company; cost of transportation from the reserves to tidewater to be paid by the company. That was what he started out with and he had in that connection a demand that he be given security of oil supply in an increase of his leased areas in No. 1, but at that time, as witness has said, Mr. Doheny made no claim that he should get it all; he did claim that there be some increase; the areas which were mentioned, the witness does not now remember, but they were less than were finally leased, he knows. At that time, according to witness' information, the Pan American Company did not have a refinery on the Pacific Coast; he knows now that they have a refinery, built subsequent to the making of the December 11, 1922, contract. As regards bunkering of ships on the Pacific [647—564] Coast, at that time, the Pan American did not have terminal facilities on the Pacific Coast, but they now have. The four million barrels in storage referred to in witness' memorandum of October 27, 1922, is exclusive of the storage in the Navy's own tanks at Pearl Harbor; at that time, October 27, witness was not talking about Pearl Harbor at all; Mr. Doheny said that they could get storage for a million barrels on

(Testimony of John Keeler Robison.)

this coast, and witness suggested to him the very small added cost to his company and the relatively great advantage to the Navy of setting aside upon demand for naval use a considerable portion of his company's tankage on the Atlantic; witness urged to Mr. Doheny that where with low cost to him great advantage could be given to the Navy, it was wise to include that in any agreement "that we made."

There was talked of in detail the matter relating to the Navy's right to purchase from the Pan American at ten per cent below the market price petroleum products at such time as the Navy wanted same. In the conferences between November 29 and June 11, 1922, there were two subjects that were discussed most, one of them was Pearl Harbor and the other was royalty. [648—565]

The discussion as to Pearl Harbor covered, in substance, these points: "First, we wanted it. Then from Mr. Cotter as to what security they got. 'You are asking us to advance many millions without other security than the flow of oil from the ground.' 'Yes'; I admitted it; that that was what I wanted. And on the subject of royalty I wanted as big a royalty as I could get and urged from the beginning that our royalties should be made high, and cited to them that this was a magnificent opportunity for them to develop a large property by the most economical commercial methods, indeed an unexampld opportunity that enabled them to get the oil out of the ground with the least cost of collecting pipes and with the best location of oil wells; that

(Testimony of John Keeler Robison.)

the property's complete development could be less expensive to them than any other method of handling the property; that the advantages that were involved to them in the ownership of the leasehold to a single large productive property was a great asset to them and that we should get the benefit of it in the form of increased royalties above commercial standards; that the risk—I minimized it, as I said yesterday, and said that the good faith of the country would be involved and had never failed." Anderson wasn't in most of this, Cotter was; Bain and Ambrose were present at some of these conferences and heard these arguments that witness made; indeed Dr. Bain furnished witness with some of the arguments; he gave witness the information as to the value to the producer of the large area, which witness suspected but which Dr. Bain knew. When Mr. Cotter pointed out that his company would be advancing many millions of dollars and would have to depend upon the chances of production in Naval Reserve No. 1, Admiral Robison told him if there wasn't enough oil there, even if the company had no legal claim against the Government for the actual facilities furnished the Government, he had no doubt that the Government would repay the company but if it didn't there was an almighty small chance that the company would not get enough oil out of the reserve to pay for the Pearl Harbor job; the witness said to Cotter that the whole Pearl Harbor job wasn't going to involve a maximum advanced on his part exceeding \$8,000,000, that is, the

(Testimony of John Keeler Robison.)

maximum indebtedness of the Government to the Pan American Company would at no one time prior to the completion of the Pearl Harbor job exceed \$8,000,000 in witness' opinion, which is his opinion now and was then. [649—566] At one time in the conference which witness has spoken of, when Mr. Doheny was present, witness made this statement and Mr. Doheny said it would be worth \$100,000 to him if that could be proved; that it was going to be nearer \$13,000,000. Mr. Anderson took part in the last conference when Mr. Doheny was present, witness having learned from Dr. Bain or Mr. Ambrose and from Mr. Cotter of the demands of Anderson with respect to what the royalty should be, that he was demanding the regulation royalties of from 12½ to 20 per cent. When Mr. Cotter made known to witness that that was Mr. Anderson's demand witness replied that that didn't interest him any, that he was going to get more than commercial royalties out of that or they were not going to get it; witness made a study of the subject and reduced it to a memorandum form which memorandum is in his files; prior to the time of the conference, which witness has referred to, when Mr. Doheny, Mr. Anderson, Dr. Bain, Mr. Cotter, Mr. Ambrose and Admiral Robison were all present, an agreement had been reached that all witness had asked, aside from royalties, was going to be given; before this conference witness had stuck out for a minimum of one-seventh and a maximum of 35 per cent, as the royalties to be reserved in the lease, and he so stated

(Testimony of John Keeler Robison.)

at the conference. Dr. Bain said he had prepared a compromise schedule, which he had submitted to the Secretary of the Interior; witness went to Secretary Fall who said that he had written a letter to Mr. Doheny setting forth this as the best basis that could be agreed upon and that he expected to get from Mr. Doheny an acceptance of that. Admiral Robison said he wanted one-seventh royalty for a minimum and Mr. Fall said "Go ahead and see if you can get it out of the old man; I can't." Admiral Robison then went down to Dr. Bain's office and there had the conference at which the witness brought out all of the arguments he could in favor of increasing that royalty, setting forth his idea of the enormous advantage that it was to a concern to have such an assured supply of oil, the justification that it meant to them, and the commercial advantages as witness saw them; he was seeing their advantages big for the moment and talking the Navy's small; and he urged that the Government get greater royalties than those set forth in that so-called compromise schedule. Witness does not remember all of the talk but he does remember the way it was concluded: He turned around to Mr. Doheny finally and appealed to [650—567] him; witness had previously been assured by Bain and Ambrose that this compromise adjustment was materially better than "we could otherwise obtain and was an excellent bargain for us, quite irrespective of the casual advantages, such as that of 4,000,000 barrels" in storage, and witness appealed to Mr.

(Testimony of John Keeler Robison.)

Doheny to make it bring a royalty of one-seventh for a minimum. Mr. Doheny said he had gone as far as he thought he could. Admiral Robison said he wanted to be sure "that you don't beat us, or bilk us, or some word like that." Mr. Doheny responded that if there was any talk of that kind this is off right now and he said he had gone his limit; he did not state this quietly and witness was convinced he meant what he said and once more he thought he had better act quickly, so he said: "We will accept this proposition, then"; that is the way the final agreement was arrived at.

Witness prepared a memorandum, which was produced from the Navy files, dated December 8, 1922, and testifies that that is a memorandum prepared at the top of which there is a note reading: "Statement by Admiral Robison for his use in presenting case to Secretary of the Navy." He took up the subject of that memorandum with the Secretary of the Navy prior to the conference which he has just testified to; his idea was to obtain from the Secretary authority to come to an agreement; this memorandum stated the case as he saw it at that time, presented the arguments as he presented them in the subsequent conference of the same day, and after he had given it to the Secretary the final instructions that witness received from Mr. Denby were to go ahead and do the best he could; he went over this memorandum with the Secretary and then received those instructions. The memorandum thus identified and referred to by Admiral Robison

was thereupon offered and received in evidence as Defendants' Exhibit "V4," and reads as follows: [651—568]

DEFENDANTS' EXHIBIT "V4."

"8 December, 1922.

Memorandum Concerning Royalties on New Lease to Pan American Petroleum Company in California Naval Reserves.

The value of this new lease is at least one and one-half million based upon the oral statement of Mr. Doheny that he would give that sum for the lease and based upon payment of standard royalties.

Therefore, the total return to the Navy from the new lease should approximate the return to the Government—either in the form of increased royalties or in the form of special facilities—of at least one and one-half million dollars.

The special facilities agreed to by the Pan American Company are in all cases paid for by the Government with interest. Except for the risk involved to the lessee in furnishing these facilities without other hope of payment than the royalty oils, it would appear that his risk involves a loan to the Government at 5%. With current rates of Government loans under $4\frac{1}{2}\%$, it is difficult to see any advantage to the Government other than the acceptance of the risk by the lessee of the absence of sufficient oil in the ground on the leased territory to repay the loans. I say 'loan' because the con-

struction and filling of storage facilities by the lessee prior to payment therefor by the Government amounts to a loan.

As to the risk involved: Current Naval royalties are amounting to over \$1,000,000 a year even with the current extremely low prices for oil to date there has been practically no overexpenditure on the part of the Pan American Company in connection with the erection of the Pearl Harbor storage.

Expenditures to date exceed \$1,000,000. This million dollars should certainly be a reduction from the total risk involved. In addition, the period of construction for the remaining storage will exceed two years, being by the terms of the proposed contract, two years from the date that complete plans and specifications are delivered to the contractor. During these two years additional development of the leased property is bound to increase Government royalties and thus operate as a reduction in net advances by the contractor to the Government.

There is always to be considered the probability that the current price for oil will be materially increased in a short time.

Authentic estimates of the gross quantity of oil in the ground on the area to be leased include a minimum of 69,000,000 barrels by the representative of the Bureau of Mines, an estimate of 75,000,000 barrels by Mr. Doheny himself. Under the system of standard royalties the average royalty to the Government is estimated to be about 14½%. If estimates are anything like sound, the obtainable

royalty oil will considerably exceed in amount that required to extinguish all Government liabilities to the contractor under the terms of the proposed contract. [652—569]

It appears to me from the estimates that we have made that the maximum advances by the contractor for the account of the Government will occur at the time the new storage at Pearl Harbor is being completed filled, namely, about the first of March, 1925. As the gross advances up to that time should be less than \$13,000,000—probably about \$12,000,000—the value of royalty oil delivered to the contractor before that time, taking into account the initial production from the new lease and assuming that the new lease is granted as of date 1 January, 1923, should amount to about \$5,000,000. The accruing royalties after 1 March, 1925 should extinguish the Government's obligation at a rate exceeding \$2,000,000 per annum. All this based upon standard royalties. This figure, of course, gradually becoming less and less as the production from the lease fails.

The productive life of the lease should be not less than fifteen years, perhaps as much as thirty years.

It must not be forgotten that the terms of the lease convert all gas royalties heretofore covered directly in the Treasury and not available for extinguishing the obligation to the Pan American Petroleum Company to the benefit of the Navy Department and of the contractor, nor should it be forgotten that cer-

tain of the areas to be leased are known to be rich in gas. This feature materially increases the value of the lease to the lessee and it materially decreases the risk to the lessee in the advances he is making for the account of the Navy Department by constructing and filling storages.

Under all these circumstances it would appear that with standard royalties the Government will receive a very small return on account of the premium value of the entire lease. I estimate this return as worth perhaps \$1,000,000. It, therefore, seems that the royalties to be paid by the lessee should somewhat exceed the standard royalties. The increase in royalties above the standard should be sufficient to accomplish a present worth of at least \$500,000, perhaps \$1,000,000. With the average return from standard royalties accepted as $14\frac{1}{2}\%$ and with the total oil content taken as 70,000,000 barrels, the increase above standard royalties and with crude oil taken at the average basis of \$1 a barrel in the field, the total increase in royalties should amount to from $1\frac{1}{2}\%$ to 3% above the standard royalties.

If the foregoing analysis is anything near correct the Government's interests can be fully protected by securing as a minimum royalty $1/7$ instead of the standard $1/8$. Further by increasing the maximum royalties for the larger average wells to a figure as much as 30% as has heretofore been recommended by the Secretary of the Interior." [653—570]

(Testimony of John Keeler Robison.)

By the reference to standard royalties in the foregoing memorandum the witness meant the Interior Department's regulation royalties of $12\frac{1}{2}$ to 20 per cent. His reference in the memorandum to "Authentic estimates of the gross quantity of oil in the ground on the area to be leased" refers to an estimate of the oil content furnished witness by Mr. Ambrose; witness does not remember whether that was for the eastern half or for the whole reserve; he thinks it was for that portion of the reserve that the lessee was authorized to drill, that is his present recollection but he does not know; the estimate of 75,000,000 barrels referred to in the memorandum was given him by Mr. Doheny himself in a conversation which witness thinks was some time in the month of November; the reference in the memorandum to Mr. Doheny's statement to the effect that the value of this new lease is at least one and one-half million dollars based upon standard, or Interior Department regulation, royalties, was based upon a statement which witness thinks was made him by Mr. Cotter; he cannot recall what was said on that subject even though his memory be refreshed by the memorandum. The statement in the memorandum that "the average royalty to the Government," based upon the standard royalties, "is estimated to be about $14\frac{1}{2}$ per cent," is based upon information that came from Dr. Bain or Mr. Ambrose.

Prior to the time that the agreement was made on the schedule of royalties that was to go into the

(Testimony of John Keeler Robison.)

December 11th lease Admiral Robison and Dr. Bain or Mr. Ambrose had gone over the difference between what the Government could get from that schedule and what the Government could expect from the standard royalty schedule, and the one that was accepted was shown to be the better.

Witness received Secretary Fall's letter of December 8, 1922 (Exhibit "F3"), but was unable to state when he received it and he cannot now determine the relative chronology of the different events of that day with absolute exactness; it is his best recollection that he received this letter the first thing in the morning, that he proceeded thereafter to the formulation of the last above-quoted memorandum, and then he went to the Secretary of the Navy, and after that to the Bureau of Mines, in the afternoon, and had the conference that he has told of, but he is not certain that that is [654—571] the exact order of events; it is his best recollection. After the conference witness wrote and sent to Secretary Fall a letter which he now identifies dated December 9, 1922, being Exhibit "G3."

As regards the draft of the contract of December 11th, and of the lease bearing the same date, that was drawn up in the Bureau of Mines and was ready, roughly, on December 8th; witness got a copy of it on the 9th and went over it in detail and at length with the Secretary of the Navy, and passed it over to the Judge Advocate-General for study and any necessary revision; there were several changes suggested by the Judge Advocate-

(Testimony of John Keeler Robison.)

General of the Navy in the verbiage of the contract that appeared to that office to better safeguard the naval interests. Witness talked with Mr. Neagle, the Solicitor of the Navy, as well as to the Judge Advocate-General himself, regarding that draft. Admiral Robison identified as having been written by him letter dated December 11, 1922, which is Exhibit "G" to defendants' Exhibit "PP," the latter being the stipulation regarding the actions taken in the office of the Judge Advocate-General. Prior to the time that the draft of the contract was submitted to the Judge Advocate-General and after the witness had the conference in Director Bain's office on the afternoon of December 8, 1922, about which he has testified, he reported to Secretary Denby on the subject, telling the Secretary on either the night of the 8th or the morning of the 9th that he had to accept the terms that began with 12½ per cent and went up to 35 per cent, the terms that are in the lease; the Secretary asked the witness if it was the best he could get and the witness replied in the affirmative and stated that he had tried hard and the Secretary said, "All right."

Mr. J. C. Anderson of the Pan American Company was present throughout the December 8th conference and at that time said he didn't want the contract at any price; he said he could get along with it if the royalties did not exceed the Interior Department regulation royalties, 12½ to 20 per cent, but in regard to the royalties Mr. Doheny him-

(Testimony of John Keeler Robison.)

self said he would agree to, Anderson said he didn't want the contract with them.

Admiral Robison was present when Mr. Denby executed the contract [655—572] and lease of December 11, 1922; the final draft of that contract had been drawn up in the Interior Department; witness does not remember whether he was present when Mr. Doheny on behalf of the Pan American Company signed that contract and lease, he didn't pay much attention to that, the only man whose signature he did pay attention to was Mr. Denby and he cannot say now whether the others signed in his presence or not. When Secretary Denby signed these papers there were present, in addition to Admiral Robison, Mr. Cotter and Mr. Doheny; witness had received the final drafts to present to Secretary Denby for signature from Dr. Bain and he personally took the contract and lease from the Interior Department to the Navy Department accompanied, he thinks, by Mr. Ambrose, as well as by Mr. Doheny and Mr. Cotter. At the time when the contract and lease of December 11, 1922, were presented to Secretary Denby for signature the Secretary asked the witness whether the papers had in them all the changes that "we put in"; Admiral Robison showed Mr. Denby where they had been included in the final draft "as we had directed" in the Judge Advocate-General's office, showed Mr. Denby that they were all in. The Secretary inquired if there was anything else in the contract except as agreed and Admiral Robison assured him that

(Testimony of John Keeler Robison.)

it was identical with what he had been over with the Admiral in detail. The Secretary said then that it was all ready for signature and he might as well finish the job and he signed it; he glanced over it, before signing but didn't spend the time to read it thoroughly at that time. On this occasion witness introduced Mr. Doheny and Mr. Cotter to Secretary Denby; Mr. Denby and Mr. Doheny said they had never met before; the conversation was just an ordinary polite conversation, all of which the witness does not remember, but the Secretary said to Mr. Doheny, in substance, "You have got a big job to do and you have got a fine piece of property," and Mr. Doheny replied, "We have got what I hope will be a fine piece of property, but we certainly have got a big job to do." [656—573]

Thereupon there was offered and received in evidence communication dated Bureau of Engineering, Washington, December 21, 1922, addressed to the Chief of Naval Operations, which was read in evidence as Defendants' Exhibit "W4," and is as follows:

DEFENDANTS' EXHIBIT "W4."

"1. On 11 December, 1922, a contract was made with the Pan American Petroleum & Transport Company which provides for storage of 1,000,000 barrels of fuel oil available until expiration of the contract, for use by the Navy at Los Angeles, California. This storage will be without charge to the Government. When the royalty oil from Naval

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Petroleum Reserves Nos. 1 and 2 have completely paid for the Pearl Harbor project, this Los Angeles storage is to be immediately filled by the contractor with fuel oil. From this oil, the contractor will bunker Government vessels at cost. It is further provided that the contractor shall transport to his refinery or to tidewater at Los Angeles all royalty oil from Naval Petroleum Reserves Nos. 1 and 2 at no cost to the Government for pipe-line charges.

J. K. ROBISON,
Chief of Bureau."

Thereupon there was offered in evidence, as Defendants' Exhibit "K4," letter dated at the Bureau of Mines, Washington, December 30, 1922, addressed to Admiral Robison, reading as follows:

DEFENDANTS' EXHIBIT "X4."

"My dear Admiral:

You will find attached to this letter figures on the average daily production per well on Government and patented land in and adjacent to naval petroleum reserve No. 1, which were prepared by our field engineers in Bakersfield, Calif., from actual production figures. The engineers in preparing these data were asked to include production from patented land as well as from Government land in order that we might have a better idea of the probable productivity of the undrilled portion of the eastern half of this reserve as well as the productivity of producing wells on Government land.

I believe that in considering royalty rates to be applied to the eastern half of the reserve you will be most interested in the right-hand column of the first sheet attached, which extends over the past four years of the entire structure, and therefore, gives a better idea as to what may be expected from the undrilled portion as well as the drilled portion of the eastern half of this reserve.

The second sheet was prepared in the Washington office to give a comparison of two royalty scales on the actual production figures from the western portion of reserve No. 1 and immediately adjacent to it. The royalty scales used were the regulation royalty and a special scale used in the contract of December 11, 1922, with the Pan American Petroleum & Transport Co. In brief these figures show:

	Barrels per day.
Average production per well on structure for past 47 months.....	481.7
Average royalty under regulation royalty scale	91.5
Average royalty under Pan American roy- alty scale	108.8

Cordially yours,

H. FOSTER BAIN,
Director." [657—574]

There was then offered and received in evidence as Defendants' Exhibit "Y4," letter dated Bureau of Mines, January 4, 1923, addressed to Admiral Robison, and reading:

DEFENDANTS' EXHIBIT "Y4."

"My dear Admiral:

This is just to clear up a possible doubt in the wording of the contract as to the effect of including gas and gasoline from old leases in the product turned over by the Navy to the Pan American, thus hastening payment. Will you please have the Secretary sign three copies and keep one for yourself to go with your copy of the contract.

Sincerely yours,

H. FOSTER BAIN,
Director."

And as Exhibit "Z4" there was received in evidence letter dated January 4, 1923, from Admiral Robison to Director Bain, reading:

DEFENDANTS' EXHIBIT "Z4."

"My dear Director:

I am returning herewith the original and one copy of the letter of the Pan American Petroleum & Transport Co. of December 29, 1922, supplementing the contract entered into by this company and the Government under date of December 11, 1922. The original and two carbon copies of this letter have been signed by the Secretary of the Navy; one carbon copy is being retained and will be attached to the Navy Department's copy of the contract mentioned.

Very respectfully,

J. K. ROBISON,
Engineer in Chief, U. S. Navy,
Chief of Bureau."

(Testimony of John Keeler Robison.)

An Exhibit "A5," letter dated January 4, 1923, from Dr. Bain to Admiral Robison was received in evidence, and is as follows:

DEFENDANTS' EXHIBIT "A5."

"My dear Admiral:

This letter is an acknowledgment of the receipt of the original and one carbon copy of the letter of the Pan American Petroleum & Transport Co., December 29, 1922, supplementing the contract entered into by this company and the Government on December 11, 1922, which were sent to this office after having received the approval of the Secretary of the Navy. One copy will be attached to the Interior Department's copy of the contract and the other delivered to the Pan American Petroleum & Transport Co.

Cordially,

H. FOSTER BAIN,
Director." [658—575]

In January, 1923, Admiral Robison told Mr. Cotter that the time was coming when the Navy wanted the approximately 1,500,000 barrels of oil referred to in the April 25, 1922, contract delivered in the tanks, but that "We didn't want to pay the full price for it if we could get it for less. The market price of oil at that time was \$1.00 at tidewater, California. He urged to me that the contract allowed them to charge us the posted market price. I stated to him Mr. Doheny's promise to me at the interview that I had with him originally, and said

(Testimony of John Keeler Robison.)

that I thought whether that was included in the contract or not that he would give us that oil as cheaply as he could get it"; after further discussion and some telegraphic correspondence between Mr. Cotter and officers of his company on the Pacific Coast Cotter advised that the company had found it was possible for them to obtain fuel oil at 90 cents a barrel; the Bureau of Supplies and Accounts of the Navy, which purchases the oil for current use, found by investigation that 90 cents was a lower price than that Bureau could obtain the oil for, and that $46\frac{2}{3}$ cents per barrel was slightly below the then prevailing freight rate from the Pacific Coast to Pearl Harbor; the Bureau of Supplies and Accounts found that they could not arrange for the supply at that time of approximately 1,500,000 barrels of fuel oil, delivered in the tanks at Pearl Harbor, at $\$1.36\frac{2}{3}$ a barrel; this result was reported to Secretary Denby and the papers resulting in directions to the Pan American Company to furnish the oil at that price at that time resulted as shown by Defendants' Exhibits "P3," "Q3" and "R3," which witness identifies. From that time on Admiral Robison had no connection with the operations at Pearl Harbor under the two contracts in suit, Admiral Gregory of the Bureau of Yards and Docks had charge of that. The oil delivered in the tanks at Pearl Harbor by the Pan American Company under the April 25, 1922, contract was tested and passed by Navy inspectors.

(Testimony of John Keeler Robison.)

The Navy has at this time 1,000,000 barrels of storage on the Pacific Coast, 3,000,000 barrels of oil in storage at designated places on the Atlantic Coast as provided in the contract of December 11, 1922; official records of the Department show this.

Admiral Robison remembers the proposition made to the Government by the American Oil Engineering Corporation's letter of August 27, 1921, Plaintiff's [659—576] Exhibit 55. The only time he saw that communication was in the Interior Department; he had a conversation with Mr. Fall about it; he read the letter over and laughed at the proposition; he understood it then as he understands it now; the proposition was one under which all expenses were to be paid by the Government and amounted to a request that the contractor be given one-eighth of the naval reserve; when he saw that proposition in the Interior Department he just laughed, talked about it to Mr. Fall just as he talks about it now, and that ended it.

The appeal made in November, 1921, by Ramsey, assignee of the United Midway Company, and by the Pan American Company to the Secretary of the Interior for a reduction of royalties provided in their July, 1921, leases was brought to Admiral Robison's attention by Mr. Fall who consulted with him regarding the Navy's views on that subject; witness said then that if these lessees were losing money he was sorry but he did not see that it was any of the Government's concern; as regards any recommendation on the subject that the witness

(Testimony of John Keeler Robison.)

made, the original leases provided for a 55½ royalty; the production of these wells was very much below what had been hoped and expected; it was represented by the lessees that they were losing money under this contract and, seriously, that they wanted the royalties reduced; witness objected to that and his objection was sustained; but in relief certain added areas were given them; witness agreed to this, referred the matter to Mr. Denby, and he said he thought it was all right, and witness spoke to Mr. Fall and to Dr. Bain; it was only upon the basis that the leasing of the remainder of Section 1 was necessary for our protection that these relief leases were entered into.

In the early part of the year 1924 Admiral Robison attended conferences in the Navy Department at which was discussed the subject of the ways and means of completing the Pearl Harbor project, conferences being held with the Acting Secretary of the Navy, Mr. Roosevelt, and Mr. Cotter of the Pan American Company, and he presumed with other officers of the Navy, but he does not recall them at the moment. At this time no action was taken, Acting Secretary Roosevelt saying that it was vitally important that the thing be completed; that it was very desirable from the point of view of the Navy Department that it be completed, that the work in progress be prosecuted immediately to completion. [660—577]

(Testimony of John Keeler Robison.)

Cross-examination.

On cross-examination Admiral Robison testified: The witness thinks that he saw a letter to Secretary Fall containing an application by the Pan American Company for relief from this 55½% royalty. The witness dismissed it right away. He said to Secretary Fall that he thought it ought not to be done but at that same time Secretary Fall did not say what he intended to do. The witness talked to Secretary Fall before he went west to Three Rivers about it. There wasn't anything done there that wasn't done with the witness' knowledge. Witness could not determine without reference to the written records whether Secretary Fall told him what Secretary Fall was going to do before leaving for the west. Witness does not think that he told Secretary Fall before the latter left that they could go ahead with No. 1—the additional leases to the Pan American and Midway, but thinks he told the Acting Secretary Finney and that it was Secretary Finney that communicated to him what Secretary Fall thought ought to be done about it,—but it may have been Secretary Fall.

Witness did not suggest that if there was any other leasing to be done in the case of No. 1 section, it ought to be done by competitive bidding. Witness thought that if the Pan [661—578] American Company had bid 55% and made a loss of that they would have to stand by their bargain. The idea of giving them another lease to bring down their royalties right alongside the first one was

(Testimony of John Keeler Robison.)

that it didn't bring down their royalties on the existing lease, but gave them an additional area at a lower royalty rate. The purpose was to give them relief and they alone could be relieved by that. Witness meant not that if they had made a bad bid they ought to stand by it, but ought to be relieved from it, but that if it could be done to the Government's advantage they ought to be relieved by indirection if they could not be relieved directly. The terms on which the additional part of No. 1 was leased, as witness was advised by Dr. Bain at the time, were, in view of the low production from the wells already brought in in the strip leases, about as good as the Government could hope to get from anybody. In view of the fact that the leases already made in No. 1 section were to the same parties that were taking up the remainder of the area, they could handle the remainder of the area to greater advantage from the point of view of the cost of production than any other concern. What would be to their advantage would not cost the Government anything.

Dr. Bain told the witness that it was necessary to make that lease anyway for the protection of the Reserve from drainage. As to where the drainage would come from, that was a matter of opinion. The witness went into that question then. He realized that the Pan American Company had No. 6 right outside of the Reserve there. They have not drilled any wells on No. 1 since they got it; witness thinks that the Government's protection in No. 1

(Testimony of John Keeler Robison.)

section is incomplete. Witness had no authority and had been relieved of all responsibility in connection with these Reserve matters for some time—approximately from the time Government counsel were appointed in these suits. Up to that time witness did not force the Pan American Company to drill any [662—579] additional wells for the protection of No. 1—up to February 28, 1924.

At the time that that matter was put up to the witness, he did not know and does not know of any financial transaction between Mr. Fall and Mr. Doheny, and had not at that time any hearsay on the subject.

The witness took up the matter on October 8 or 9 immediately upon his appointment and saw Secretary Fall first on October 9. He thinks that they didn't get in the conference on that day to the question of building storage with royalty oil. He thinks that they got to that question within a week and that the matter went on progressively from that time. He had the principal contemporaneous advice of Dr. Bain and Mr. Ambrose on the question of the condition of the reserve and what they would require.

The letter of October 25th refers to a conference of October 22d; to the best of witness' recollection, Dr. Bain and Secretary Fall were there—he doesn't think there was anyone else. If the records in Washington indicate that Dr. Bain did not arrive in Washington until Saturday afternoon, October 22, and he so testified in this case, he probably

(Testimony of John Keeler Robison.)

couldn't have been at that conference. The witness was quite sure that he had seen both Dr. Bain and Mr. Ambrose between the 8th and the 22d. He is not as sure of that as he is of anything in this matter, but is quite sure that he did see them during those two weeks. He never thought about any doubt of their being there that two weeks until the morning of the cross-examination.

"Q. You told us in a good deal of detail what you said to them and what they said to you that lead up to the letter of October 25th, did you not?

A. Yes. Or through Secretary Fall. And I am quite sure I saw them during that time. Of course it is possible I did not see anyone in the Interior Department except Secretary Fall." [663—580]

As a result of these conferences it was determined so far as the witness was concerned, subject to Secretary Denby's approval, that matters which were set forth in the letter of October 25th should be done, and as the result of the conferences that the witness had late in October, it was determined that No. 2 reserve could not be saved and should be leased up; that No. 3 should be set aside for the moment and nothing decided about it and nothing done until further information was had; that as to No. 1 certain strip leases were required, and that those would be a strip lease in the northern part of Section 2, a strip lease in 34 at the eastern edge, and certain strip leases around section 36 in the

(Testimony of John Keeler Robison.)

center of the reserve, and that bids should be taken for those. Nothing was said as to whether they should be advertised or how bids should be obtained. Witness did not understand whether or not bidding was had by the ordinary forms of competitive bidding. The manner of securing tenders for public land is a matter and manner with which witness is quite unfamiliar but he understood that the methods pursued were those common in handling such matters in the Interior Department.

Witness was advised that the Pan American Company had made the best bid for the strip on the northern part of Section 2, but did not ever understand that there had been any bidding for Section 34, the strip on the east part. Something was said to the witness about what is now the Belridge lease—the question of the lease was referred to the witness. The amounts of royalties were stated, and it was recommended that the Navy agree to that lease. This recommendation may have been made by Secretary Fall or by Dr. Bain. To the witness the Interior Department was one person.

It is very difficult for the witness to discriminate for the reason he just gave. The matter was referred by the witness to Secretary Denby, and the witness stated the information he had obtained which was to the effect that the terms of the lease on the east half of the east half of Section 34 were reported to [664—581] be as good as could be obtained, and that the royalties were high. Witness recommended that Secretary Denby approve

(Testimony of John Keeler Robison.)

the lease. The Secretary said, "All right, tell them to go ahead,"—and it was done. That was done orally. The witness understood that they got no bids that were in any degree satisfactory for stripping around Section 36. As to having understood from Dr. Bain that further information had been obtained in dictating that it was unnecessary to lease there at that time—his memorandum of February 7th—that was true in part but in part it was not true, as witness looked upon it. Section 36 at that time was producing, and according to the records as long as witness had charge of the matter, continued to produce large quantities of gas at least. Witness was familiar with the fact that the gas well was not in the oil sands but some 300 feet above, and yet it was gas—it was valuable—and it was the gas of the Government as well as that of the companies operating Section 36. The witness means that he thought he might have to offset the gas that was producing—that is done now. Witness' recollection is that from that time on further leasing in No. 1 was not discussed until the bid came in, and the Pan American requested further leases in 3 and 4 when the question of the making of those leases came up.

With regard to any conference in October, 1921, with Secretary Fall with regard to keeping the matter of these leases and contracts secret, witness' recollection is that there were no leases and contracts or proposed leases and contracts in October, 1921, and that the first suggestion as to secrecy

(Testimony of John Keeler Robison.)

came after the Pearl Harbor job was taken into serious consideration.

Witness remembers counsel's examining witness in a deposition in the case of U. S. vs. Mammoth Oil Company in which witness testified that it was the intention between himself and Secretary Fall that no information should be given out which would state what was being done in full until after these contracts with the Pan American and Mammoth Oil Company had been completed—that [665—582] it was the intention that the public and Congress should not get knowledge of what was being done until it had been in fact done, and that the witness thought that it was in October, 1921, when they originally undertook the work—that Secretary Fall and witness made an agreement that information should not be given out until after this matter was entirely completed.

Witness then stated that his present memory differs from what it was at the time of this deposition; that he did not think there was any agreement in October, 1921, concerning the release of information; that he has not looked up further data but that he thinks that on that matter the agreement to make information public through the Interior Department only after the consummation of the contracts, was reached some time in the spring of 1922 and not in October, 1921. The witness said, "I am of the opinion that I made a mistake in that statement." The witness remembers that counsel calls witness' attention in connection with that tes-

(Testimony of John Keeler Robison.)

timony to a memorandum of C. S. Williams of the Bureau of Operations, and that counsel had asked witness if that memorandum had come before him. Counsel then read from the memorandum as follows:

"On the 4th of November, 1921, (3) the arrangements made with the Interior Department and the Standard Oil Company will undoubtedly operate to allow more steaming by ships of the fleet and will consequently contribute very largely to its efficiency. There may be a certain amount of danger in getting too much publicity, because as soon as it is known what the character of the arrangements are Congress will undoubtedly use those arrangements as a reason for cutting down appropriation for fuel and transportation. If this is done of course the reserves which we so badly need and which we seek to establish will not be established. Furthermore, it is conceivable that the whole project might be met with hostility in certain quarters because it operates to some extent to increase appropriations under fuel and transportation beyond what is set down in the bill, and in another way it operates to create reserve fuel storage the construction of which has not been specifically authorized by Congress. In view of the foregoing it would seem advisable to close the arrangements as soon as possible without undue publicity."

(Testimony of John Keeler Robison.)

Witness did not recall what his answer was at that time but his present answer is that that memorandum represents the idea of converting the royalty into current use—fuel oil—which the witness opposed. That is what it is talking about. [666—583]

Counsel then read further from the memorandum as follows:

“Furthermore, it is conceivable that the whole project might be met with open hostility in certain quarters because it operates to some extent to increase appropriations under fuel and transportation beyond what is set down in the bill; and in another way it operates to create reserve fuel storage the construction of which has not been specifically authorized by Congress.”

The witness stated that the last quotation does not refer to fuel oil but that the Williams memorandum says the whole project should be kept as secret as possible. Witness added that he presumed counsel had read the whole of the memorandum—which current use of the fuel the witness objected to. That is the part that increases the appropriation for fuel and transportation. The witness thought at that time that the whole statement as counsel put it as to the policy to be pursued was wise. The memorandum is dated November 4, 1921. It did not refresh witness' recollection as to whether he and Secretary Fall had agreed upon a policy of secrecy before that time. There had been no defi-

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(Testimony of John Keeler Robison.)

nite agreement—the witness and the Secretary had not done anything at that time. It seems to indicate that the witness' previous recollection was more accurate than it was at the time of the cross-examination.

C. S. Williams was a rear admiral and is now president of the Naval War College. The memorandum dated November 4, 1921, was then offered and received in evidence and was marked "U. S. Exhibit No. 259," and is as follows:

PLAINTIFF'S EXHIBIT No. 259.

"NAVY DEPARTMENT.

Office of Naval Operations.

Washington.

P. D. 131-25.

4 November, 1921.

Op.-12 D.

SECRET.

From: Director of War Plans.

To: Chief of Naval Operations.

Subject: Naval Petroleum Reserves.

Reference: (a) Bu. of Eng. 14370-162-1/2 of 29
October, 1921.

1. In reply to Captain Cole's inquiry as to 'what steps are desirable—(a) immediately the information still required from the Interior is received; (b) at various intervals thereafter,' it would seem that no very extensive or definite measures can be recommended at this time. It is considered that the ordinary procedure of [667-584] routine administration would handle the case of Naval Petroleum

Reserves after the preliminary arrangements have been made and the contracts have been secured.

2. It would, of course, be necessary to keep some of the officers in the Department (war plans section, Supplies & Accounts, Yards & Docks and Engineering) informed of the state of fulfillment of the contract, in order that they might know of the resources at their command. Outside of this, the principal action will be in the way of routine administration.

3. The arrangements made with the Interior Department and the Standard Oil Company will undoubtedly operate to allow more steaming by ships of the fleet and will consequently contribute very largely to its efficiency. There may be a certain amount of danger in giving too much publicity, because as soon as it is known what the character of the arrangements are, Congress will undoubtedly use these arrangements as a reason for cutting down appropriation for fuel and transportation. If this is done, of course the reserves which we so badly need, and which we seek to establish, will not be established. Furthermore, it is conceivable that the whole project might be met with open hostility in certain quarters because it operates to some extent to increase appropriations under fuel and transportation beyond what is set down in the bill; and in another way it operates to create reserve fuel storage, the construction of which has not been specifically authorized by Congress. In view of the foregoing it would seem advisable to close the

(Testimony of John Keeler Robison.)

arrangements as soon as possible without undue publicity.

4. It might be desirable from some points of view to inform the Commanders-in-Chief that the limitation on steaming is not expected to be as stringent as was feared, after the provisions of the proposed arrangements became operative, and the reasons therefor. It is believed, however, to be unnecessary to publish abroad or give extensive knowledge to the arrangements which have been made, but rather leave the question of the amount of fuel expenditure to be of purely administrative arrangement handled by the Department, and general instructions to the Commanders-in-Chief without going into details as to the reasons therefor.

C. S. WILLIAMS."

The witness has no record of any conference with Secretary Fall, Mr. Ambrose and Mr. Bain in January, 1922, in connection with No. 1 reserve. He could not remember January, 1922, except as a name. He remembered Dr. Bain's visit to the west of which he had testified yesterday. Witness also remembered that after Dr. Bain and Secretary Fall and Mr. Ambrose had gotten back they had a conference with the witness on No. 3—but the witness does not recall this conference including anything else. Dr. Bain had theretofore reported what he had found in the west and the witness thinks that he did not first report it to witness in the presence of Secretary Fall and Mr. Ambrose in this very conference in late January. Witness did not recall

(Testimony of John Keeler Robison.)

that at that time they [668—585] discussed the question of secrecy as to both the Mammoth contract or what became of the Mammoth contract, and the proposed contract on No. 1 reserve, but they may have done so. Witness did not remember what he said in the Mammoth deposition which was given a couple of months ago. He had gone over his records and documents before he gave that deposition and tried to prepare himself, and presumes that if he had gone over them once more he could again refresh his recollection. He had not gone over these documents in connection with the Mammoth once more before he came into this court. [669—586]

The witness then stated that he testified at page 139 of the Mammoth deposition that the witness, Secretary Fall, Ambrose and Bain, on that day in January, discussed the difficulties in regard to the exchange of oil for storage, and that at that, or some other time they discussed the fact that Congress, or some members of Congress rather, would undoubtedly make trouble if the matter were brought to its attention; that the witness knew that he was practically alone in insisting that if Congress had passed a law that gave the Navy Department definite power, they would be recreant in their trust, if it was wise for them to exercise that power, if they failed to do so, and that to be both wise and silent was exactly the witness' view.

Witness then stated that he could not state the day when this matter was talked over with Fall,

(Testimony of John Keeler Robison.)

Bain and Ambrose together, that it must have been prior to the date that invitations for bids were sent out for the No. 1 Reserve work; that the witness thought that that date was February 15, 1922, and that the witness did not think that he had any other conference with the three gentlemen mentioned between the date late in January, on the eve of the beginning of the month of February, and February 15th. The witness did not think that he and Secretary Fall had any agreement that no information should be given out until after the contracts or leases referred to both Reserves Nos. 1 and 3 had been closed, but they did have an agreement that no information should be given out that would disclose their plans. The witness did not mean the plan to make an exchange contract and the plan to make a lease of No. 3, but meant the quantities in reserve at various points, but was not sure that they did not make it include the general plan for exchange. The agreement was that the Interior Department should make any statement that was to be made on the subject. In the witness' view it was Navy business, of course, but different people are handled different ways and Secretary Fall was of the opinion that the Executive Order made it an Interior Department affair. Witness found that he was able to advance the Navy business best by yielding entirely to the Secretary's view in that matter on all unimportant details. Whether the witness ever had any serious disagreement with Secretary Fall about an important detail depends on what one

(Testimony of John Keeler Robison.)

calls important, but the witness thought that he accomplished the Navy's desires to an extent that he [670—587] had not originally contemplated.

The agreement as to not giving out information was one of the reasons, but not the only reason, why the witness made certain replies to certain letters from members of Congress about these projects.

The witness then stated that he wrote a letter to Congressman Kelley, dated March 24, 1922. This letter was then offered and received in evidence, and marked U. S. Exhibit 260, and is as follows:

U. S. EXHIBIT No. 260.

"24 March, 1922.

My dear Congressman:

On Monday morning Congressman French of the House Appropriations Committee called me on the telephone and requested me to furnish certain information relative to the operation of the Naval Petroleum Reserves.

As you doubtless know by an Executive Order of the President, dated 31 May 1921, the general operation, conservation and administration of the Petroleum Reserves was turned over to the Secretary of the Interior. In compliance with the provisions of this order the Navy Department has come to a general agreement with the Department of the Interior relative to the Reserves and the Secretary of the Navy has designated me as his representative to confer with that Department in all matters relating to the Reserves.

(Testimony of John Keeler Robison.)

In accordance with the general agreement arrived at between the two Departments the Department of the Interior is taking steps to have Naval Petroleum Reserves Nos. 1 and 2 drilled with offset wells in every case where adjacent property is drilled. It has been further agreed":

At this point the reading was suspended and the witness stated that it had been then agreed to drill up all the balance of No. 2 reserve and that they called that offset wells.

The reading of Exhibit 260 was then resumed, as follows:

"(a) That the amount of drilling with consequent exhaustion of the Reserves shall be kept as low as practicable without risking the depletion of the Reserves by other parties.

(b) That the equivalent of all royalty oil shall be delivered to the Navy in the form of fuel oil at such points on the Pacific Coast as may be found necessary for Naval use, and that this exchange of crude oil for fuel oil will be effected on as favorable terms as it is possible to obtain. It is presumed that under favorable circumstances and terms arrangements may be made for including points on the Atlantic Coast for the delivery of an equivalent supply of fuel oil to the Navy.

(c) That the equivalent of the royalty oil will be placed in storage at such points as the Navy may designate.

(d) That the Interior Department will exercise its best efforts to obtain for the Navy as large royal-

(Testimony of John Keeler Robison.)

ties and as favorable terms as practicable by public competition or otherwise. [671—588]

(e) That the development of Naval Petroleum Reserve No. 3 is to be undertaken only to protect the Government against depletion of the Reserve by other parties.

In connection with this program it has been estimated that the Navy will obtain by 30 June 1923 royalty oil amounting to 592,200 barrels, which will give an equivalent in fuel oil of 567,400 barrels. For the fiscal year ending 1 July 1923, the royalty oil to be obtained is estimated at 1,350,000 which will give an equivalent in fuel oil of 1,286,460 barrels. Under the terms of the agreement this oil will become a reserve—above ground instead of under ground as now.

The following data with reference to the Naval Petroleum Reserves are submitted for your information:"

Counsel thereupon summarized a portion of the letter as follows:

"Total withdrawn acres, so much; title in United States, acres, so much in each reserve; patented to Southern Pacific, acres so much; to others, acres so much; in litigation, favorable and unfavorable; lands on which leases have been granted; lands not in dispute and not leased; leased wells, and so on. I won't read all of those figures unless someone requires it, as they are very long."

Counsel then resumed reading the letter, Exhibit U. S. 260, as follows:

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(Testimony of John Keeler Robison.)

"As to No. 2 Reserve it is generally admitted that no Reserve as a Reserve now exists and it will be necessary to drill up within a short the entire Reserve. In order to meet this situation the Department of the Interior is granting leases from time to time to various operators to drill these lands on a royalty basis varying from 12½ to 25 per cent depending upon the production of the individual lease.

Trusting that the above information is that which you desire and assuring you that if there is any further information which I can furnish I shall be glad to do so, I am

Very respectfully,

J. K. ROBISON,
Engineer in Chief, U. S. N.
Chief of Bureau.

Hon. P. H. Kelley,
House of Representatives,
Washington, D. C."

The witness then continued: Mr. Kelley was Chairman of the Sub-Committee of the House Committee on Naval Affairs on appropriations at that time. The reason why the witness pointed out in that letter that he had a plan almost at consummation for the exchange of fuel oil for tankage is that the list of figures that counsel omitted was furnished to answer certain specific inquiries addressed to witness by Congressman French. That letter in-

(Testimony of John Keeler Robison.)

cluded what, at the time it was written, [672—589] was believed by witness to be all the information that should become a part of the printed public records at that time in order to accord with the agreed policy as to secrecy.

The witness stated that he remembered having been asked about that letter in his previous deposition and that he had answered that question by saying that Mr. Kelley was Chairman of the Sub-Committee of the House Committee on Appropriations—that counsel had asked witness a question that he had not answered as to why he failed to make the answer to Mr. Kelley full and complete—that there was an agreement between the Secretary of the Interior and the Secretary of the Navy that in matters dealing with the Reserves publicity should come from the Interior Department, because that was where they were being all handled and the place from which the information originated. This agreement was in effect March 24, 1922, and for several months prior thereto. They gave out no information that was original at that time. In that letter witness gave out information that was not as complete as it might have been, and in so doing followed out the agreement that none should be given out only by the Interior Department, because he gave out no information that had not already been made public.

The witness then stated that the foregoing answers were still correct answers to the questions.

The witness then identified a letter dated April

1068 *Pan American Petroleum Company et al.*

(Testimony of John Keeler Robison.)

17, 1922, from Congressman N. J. Sinnott, and a copy of the witness' letter of April 19th in reply thereto. These two letters were then offered and received in evidence and were markd U. S. Exhibit 261, and are as follows:

U. S. EXHIBIT No. 261.

“HOUSE OF REPRESENTATIVES,

Committee on Public Lands.

Washington, D. C.

April 17, 1922.

Admiral J. K. Robison,
Chief, Bureau of Engineering,
Navy Department,
Washington, D. C.

My dear Admiral Robison:

I would be glad if you would furnish me with the following information regarding the Naval Petroleum Reserves:

(1) The date of withdrawal acts of each of the three Reserves—Nos. 1, 2, and 3.

(2) The total acreage in each of the three Reserves. [673—590]

(3) Total amount of private holdings in each one of the Reserves.

(4) The total acreage disposed of since March 4, 1921.

(5) Total amount of public lands yet available in each of the Reserves for leasing development or other disposition.

(6) What if any disposition has the Depart-

(Testimony of John Keeler Robison.)

ment in contemplation with reference to any of the three Reserves in the immediate future.

(7) Lands embraced in the Sinclair contract regarding the Teapot Dome Reserve No. 3, in Wyoming.

(8) What lands if any remain for leasing or development contracts in the Reserve No. 3, Wyoming.

(9) What lands if any are yet subject to leasing or development contracts in Naval Reserve No. 1, California.

I should also be glad to have any data as to the total amount of oil production from these reserves from the Government lands, and character of any offset wells, depth of wells, thickness of sand, daily production of wells, on lands which are immediately adjacent to the lands offered for lease, the purpose being for leasing and development; any maps or Geological data that may properly go with the lands subject to offer.

With best wishes, I remain

Yours very truly,

/S/ N. J. SINNOTT."

EDB-H.

"219032-690-6-c.

19 April 1922.

My dear Mr. Sinnott:

Your letter of April 17th, requesting certain information regarding the Naval Petroleum Reserves, has reached me and I am very sorry to say that I am unable to give satisfactory answers to several of your questions. As you know, the President, on 31

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(Testimony of John Keeler Robison.)

May 1921, signed an executive order transferring the care, operation and preservation of these reserves to the Department of the Interior. Since that date I am not able to give all details of what has transpired. However, I submit what information that I have, as follows:

	No. 1	No. 2.	No. 3
(1) Date withdrawn	27 Sept. 1909	27 Sept. 1909	27 Sept. 1909
Withdrawal confirmed.	2 July 1910	2 July 1910	2 July 1910
Date, Naval Reserve	2 Sept. 1912	13 Dec. 1912	30 Apr. 1915
(2) Total acreage	37,760	30,080	9,480

Referring to question (3) et seq. of your letter, I am not able to give this information but it can probably be obtained from the Department of the Interior. [674—591]

Regretting that I am not able to supply more of the information desired, I am

Very sincerely yours,

J. K. ROBISON,

Engineer-in-Chief, U. S. Navy.

Honorable N. J. Sinnott,

House of Representatives,

Washington, D. C.

The witness in saying that he was not able to supply the information meant that he could not have given all of it and should not have given any of it, he thought, in view of the agreement—that he felt bound by the agreement that the information should come from the Interior Department. Some of the questions the witness could have obtained information in detail enough to give him the answers. The witness then identified letter of April 20, to him,

(Testimony of John Keeler Robison.)

from Representative James McClintic, and the letter of April 27th from the witness to him. These two letters were then offered and received in evidence and were marked U. S. Exhibit 262, and are as follows:

U. S. EXHIBIT No. 262.

“HOUSE OF REPRESENTATIVES U. S.

Committee on Naval Affairs,

Washington, D. C.

Rear Admiral John K. Robison,

Bureau of Engineering,

Navy Department,

Washington, D. C.

My dear Admiral Robison:

I shall appreciate the courtesy if you can furnish me with the following information:

Total area of three naval reserves (give answers separately).

Total number of acres and private holdings in each one of the three naval reserves.

Total number of acres that were leased for development since March 4, 1921.

Total number of acres now available for development; contracts leased on royalty basis. [675—592]

Total number of acres in the St. Clair contract on the Tea Pot Dome in the naval reserve No. 3 in Wyoming.

Has the Navy any additional contracts in contem-

1070 *Pan American Petroleum Company et al.*

(Testimony of John Keeler Robison.)

May 1921, signed an executive order transferring the care, operation and preservation of these reserves to the Department of the Interior. Since that date I am not able to give all details of what has transpired. However, I submit what information that I have, as follows:

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Regretting that I am not able to supply more of the information desired, I am

Very sincerely yours,

J. K. ROBISON,

Engineer-in-Chief, U. S. Navy.

Honorable N. J. Sinnott,

House of Representatives,

Washington, D. C.

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“HOUSE OF REPRESENTATIVES U. S.

Committee on Naval Affairs,
Washington, D. C.

Rear Admiral John K. Robison,
Bureau of Engineering,
Navy Department,
Washington, D. C.

My dear Admiral Robison:

I shall appreciate the courtesy if you can furnish me with the following information:

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Total number of acres and private holdings in each one of the three naval reserves.

Total number of acres that were leased for development since March 4, 1921.

Total number of acres now available for development; contracts leased on royalty basis. [675—592]

Total number of acres in the St. Clair contract on the Tea Pot Dome in the naval reserve No. 3 in Wyoming.

Has the Navy any additional contracts in contem-

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(Testimony of John Keeler Robison.)

plation for development in any one of the three naval reserves?

With my thanks for any trouble you may go to in this connection, I remain

Cordially yours,

JVM:D. /S/ JAMES McCLINTIC."

And the answer of the 22d of April, 1922:

"22 April, 1922.

My dear Mr. McClintic:

Replying to your letter of April 20th, requesting certain information concerning Naval Fuel Reserves, I have to submit the following:

The acreage of the Reserves is as follows:

No. 1—37,760.

No. 2—30,080.

No. 3— 9,480.

The contract recently executed with the Mammoth Oil Company (Mr. H. F. Sinclair, President) covers Reserve No. 3 entirely.

With respect to the remaining questions in your letter, I am sorry to state that I am not in a position to give you accurate data. This matter, as you know, is being handled by the Department of the Interior and I would suggest that inquiry be made of that Department for this data.

Regretting that I am unable to inform you more fully on the subject, I am

Very sincerely yours,

That was signed J. T. Tompkins, Acting Chief of Bureau, the witness' assistant, and he would have signed that in the witness' absence. Witness be-

(Testimony of John Keeler Robison.)

lieved that he told him of the policy not to give information from the Navy Department touching the contract.

In April, 1921, at the time these letters back and forward were in the course of receipt and delivery, the contract with the Pan American Company was in very active execution—the witness was actually working over it at that time, as he has already testified. [676—593]

The press memorandum of April 18th, Exhibit "CC," was then called to the witness' attention by counsel, and witness stated that he did not dictate it; that the words "line of credit" were not his, and that he does not know what it meant, and that he had been wrong in saying that he dictated it. The record shows it to be a fact that it was dictated and given out in the Interior Department. The witness prepared at or about that time a release for the press that he mistook this for in his testimony on the preceding day. The memorandum for the press that witness prepared from the Navy Department went out, he thinks. Witness does not remember testifying on the subject in the Mammoth deposition, but thinks that what he prepared was used.

It is usual in the Navy to advertise for bids for construction of shore stations and portions of shore stations. Some of them may form parts of the war plans and are not given out until they come to advertise them to get contracts for them—even if they do, they are advertised and bidders are asked to

(Testimony of John Keeler Robison.)

bid on them and it is not expected to keep them entirely secret after bids have been asked on them.

After the Navy had started to build something like a tank farm of twenty or thirty tanks up into the air, they do not expect to keep that as a military secret at all. There was no military policy to cause a lease to be kept secret—a lease had nothing to do with work that was going to be put in storage facilities. If there is no reference in the December 11 lease to additional facilities at Pearl Harbor, there was no reason to keep that lease secret at all. The witness was perfectly well aware of the long continued policy of the Navy to advertise for bids on any ordinary construction.

This whole thing was an extraordinary performance taken all together—it was entirely out of the ordinary.

There was a difference at that time between the tankage project at Pearl Harbor as a project physically to be put there and a tankage project at any other base, like Yorktown. The Navy does not want to give out its projects anywhere at any time, and if it is under the necessity to take competitive bids, it must give them out. Usually when the Department goes to [677—594] Congress for leave to start a project of this kind, they go and ask for an appropriation for a particular place and to spend so much money at that place, but they did not do so in this case.

The witness does not know that the Yards and Docks Department asked the Congressional Com-

(Testimony of John Keeler Robison.)

mittee for one million dollars for fuel oil reserve storage at Pearl Harbor in the bill in which this very proviso under which they are operating is contained. From May, 1920, on, witness was on duty in the Navy Department, but had no knowledge of the above fact at the moment. He had heard counsel say it before, but counsel was the only person he had heard it from. Witness never knew the fact that the Navy Department had gone to Congress and asked for this million dollars for this very project, fuel reserve storage. Of course, if Congress had appropriated it, that appropriation would have been spent under the ordinary contract advertised in the ordinary way.

The witness had discussed over and over again with Doctor Bain, Secretary Fall and others in the Interior Department, the fact that in order to make this contract, they would have to make it without cash, that they had no cash to spend on it, and that if it were done, it would have to be done in some way that would avoid the receipt of cash and the payment out of cash. The witness knew very well and said to those gentlemen that if the royalty oil was sold, the proceeds thereof had to go into the U. S. Treasury as miscellaneous receipts, and explained to them that if this happened, it could not be gotten out except by appropriation by the Congress. He had also told them that a large sum had already gone into the Treasury as miscellaneous receipts which could not be made available until Congress appropriated it. Secretary Fall's letter of July

(Testimony of John Keeler Robison.)

had suggested a method of utilizing that royalty oil; but when the witness suggested the Pearl Harbor project that involved the provision of a complete tank farm, to the best of the witness' recollection, Secretary Fall did say that he questioned the propriety under the law of doing that. The witness told him that witness had authority to store the oil and that nobody could store liquid without a container. Secretary Fall did not show the witness the letter of July 23d—he had written a letter of July something or other, 1921—he did not show it to witness but the latter had it in his files. The witness does not recall [678—595] Secretary Fall ever showing him that letter. As a matter of fact the idea for the Pearl Harbor business came to the witness originally and entirely without suggestion from Secretary Fall. Secretary Fall said to the witness that he considered that "our" authority to exchange covered the acts that "we" were proposing. As to Secretary Fall's suggestion with regard to the legality, he informed witness that he was one of those who wrote that law, and the witness believed that a statement of that sort from the Secretary of the Interior was of more than ordinary weight and it did have a considerable effect upon the witness. The witness had successfully combated to the satisfaction of Secretary Fall his statement that he questioned the legality of it and thinks that he convinced Secretary Fall that the latter was wrong. Ultimately the witness took up the matter with the Judge Advocate General, and thinks that he told

(Testimony of John Keeler Robison.)

Secretary Fall that the Judge Advocate General thought what was proposed was correct.

On April 12 Secretary Fall wrote a letter saying that there was grave doubt of bids and that letter was addressed to the Secretary of the Navy. No action was taken on it because witness waited for the three days until the bids would be opened.

“Q. You understood my question, Admiral, did you, as to whether you went to Mr. Doheny to ask him if he would bid because Secretary Fall doubted on account of the probably legality of it whether anyone would bid? What have you to say to that?

A. Well, there isn't any question that when I went to Mr. Doheny it was with the idea that this was a very complex question where there was only one possible justification of our action in the law, and it took a man who had faith in the Government—

Q. You haven't answered my question, Admiral.

A. I think I had that in mind at that time.

Q. Haven't you testified and said that it was because of Secretary Fall's expressed doubts that you went to Mr. Doheny?

A. I can answer that question as follows: I have made a large number of formal statements on oath or on honor concerning this matter. I have never made [679—596] any attempt to make one statement agree with another and I don't intend to begin along that line. If you ask me a question as to my present recollection you will get an exactly correct answer for the moment. If you ask me what I

(Testimony of John Keeler Robison.)

testified at some other time, I don't know.

Q. (By Mr. ROBERTS.) I will ask you if at page 949 of the Senate Record, when you were before the Senate Committee in the investigation of the oil leases, did you not testify this with regard to the matter:

'Senator NORRIS.—Secretary Fall?

Admiral ROBISON.—Yes; as Senator. I rather thought he knew what was meant by it.

Senator NORRIS.—Well, I think that you would be justified in following that.

Admiral ROBISON.—And he told me that after advancing such objections, as you have just made, and after hearing me as to the needs of the situation, it was all right; he advised me that it was all right, and that he could arrange to bring it about, he thought. Later he did advise me that there was grave doubt as to whether, in view of some question as to the legality of undertaking such an extensive project as was involved in this million and a half barrels, he could get any bids from anybody, to put it across. Well, I felt very badly about it—and I don't know whether this is quite pertinent to your question, but I would like to state it because I want to pay a tribute to a man. I told this young officer, who had been with me aboard ship, and who was a friend of mine, about it, and I said, "I don't know how to handle the thing. Talk to your dad, won't you?" I got a letter from him saying that he had talked to his father, and his father would see me within a day or so and talk it over. That he agreed

(Testimony of John Keeler Robison.)

that the defensive well proposition was necessary. And then I got hold of the old man—of Mr. Doheny, the President of the Pan American Petroleum & Transport Company, and I recited the circumstances, and I appealed to him as a Californian to help me accomplish what I showed him was needed, and he promised me that we would have at least one bid. And that is the only way this thing was accomplished, I believe.'

Q. Did you so testify?

A. Yes, I did.

Q. There is just a little more of it, another question and answer:

'Senator NORRIS.—I understood you to say that Secretary Fall—

Admiral ROBISON.—(Interposing.) I said that Secretary Fall said he dreaded lest we have no bids.

Senator NORRIS.—And he said that was on account of lack of legal authority?

Admiral ROBISON.—He said that was because there was some question in the mind of those other people. He assured me that he had gone into it and was sure that we did have the legal authority to go ahead.'

Q. Did you so testify?

A. Yes."

The witness then stated that he had testified on page 157 of the Mammoth deposition that Secretary Fall told witness that he feared on account of the question as to the legality of this bartering of royalty oil for storage, that people would not bid for this

(Testimony of John Keeler Robison.)

contract and lease in California. He told the witness that, as witness remembers, early in November, 1921; and as a result of that witness went to Mr. Doheny, Junior, told him that the Secretary had doubts about the bidding and asked him if he would procure to have his father bid in any event, or endeavor to do so. The witness asked Mr. Doheny, Jr., to [680—597] get his father's interest aroused in the proposition, which was one that in witness' opinion was vital to the defense of California, and he told the witness that he would. The witness has no alterations to suggest in this testimony.

The witness thought that he remembered a conference where the terms of a letter were changed, or the draft of a letter, and that, as the witness remembers at the moment, the Bureau of Yards and Docks had prepared, or Captain Bacon, who was in the Bureau of Yards and Docks, had prepared, a letter including the general plans for a million and a half barrels of storage and these were to go to the Secretary of the Interior; and the letter of transmittal, after the formal reference and description of them, expressed some doubt as to whether or not the proceeding being undertaken to accomplish the erection and filling of these tanks with the crude oil was a correct one. To the best of witness' recollection there was a suggestion in it as to the advisability of additional legislation, but the matter was determined on the 5th of December when the Secretary of the Navy had approved the opinion of

(Testimony of John Keeler Robison.)

the Judge Advocate-General, so far as the Navy Department went, and it was by the Secretary of the Navy determined to be improper to express doubt of a decision that they had already arrived at.

The language may have been that in view of the doubtfulness of the method of procedure, bids would not be likely to be had unless some additional legislation authorizing this thing specifically were applied for and gotten. It was something along that general line, but referring particularly to the doubt as to the authority of the project.

The witness was opposed to exchanging crude oil for current fuel oil under the supposed authority of the Act of June 4, 1920. This opposition was based on the idea that to use the crude oil to get fuel oil was in effect using the crude oil like money—like spending one's cash. The witness differentiated in his own mind how spending the crude oil for construction work out at Pearl Harbor was not using the crude oil like money—it was the use of the crude oil for exactly the purpose set forth by the Secretary of the Navy when he asked the Congress to pass the law that was passed. If the crude oil were used up, it [681—598] was gone. One would be spending cash for not a permanent asset, but for a current operation, and the other way the cash would be spent for the particular permanent asset authorized by law and intended by the original national policy.

The witness thought that they ought to use this oil because the Navy was losing 1000 barrels, or

(Testimony of John Keeler Robison.)

thereabouts, a day—coming from royalties in No. 2 Reserve and going into the United States Treasury. The witness knew that it was thereby lost to the Navy. They did not have to try to get it back by an appropriation; they did not have it when it was gone. If they had it, it was theirs; if they put it back in Congress and had to appeal to them once more, they would have lost it in between times. They were losing 1000 barrels of oil a day, at \$1.10 per barrel, \$1100.00. At the time the witness conceived this plan he was conscious of the fact that it had no fuel storage reserve, or fuel reserve storage. They had an inadequate current use capacity, and the plans of the Navy, since some time during the Great War, had been to establish fuel reserve storage. [682—599]

So far as the witness knew when they arrived at this plan Congress had not been asked to appropriate for any of that fuel reserve plan, except in the request that led up to the act of June 4, 1920,—that is, the witness means, the request for the passage of the act of June 4, 1920,—this proviso to the act.

The project at Pearl Harbor was for a complete unit of 1,500,000 barrels of fuel oil with pumping stations and fire protection and its own wharf, its own channel.

As to whether applications had been made to Congress for appropriations for fuel oil projects, according to the witness' recollection the entire, whole storage was accomplished without specific

(Testimony of John Keeler Robison.)

authorization by Congress, under Admiral Bradford. The witness had no cognizance of any appropriation for fuel depots or depots for coal and other fuel—he did not think there was any other fuel station. He did not think that certain activities in the direction or storage or tankage projects conducted during the World War were specifically approved by Congress, but that would have been a war proposition; and aside from activities during the war, witness knows of none.

When Dr. Bain came back from California in January, the witness thinks "1922," he heard from him of a lawyer who had expressed doubts as to the legality of this project—only one—a man named Sutro. The witness does not think that he knows the name of Mr. Weil in that connection. At that time when Dr. Bain got back, he expressed the belief to witness that all of those concerns, with the possible exception of the Standard Oil Company on account of some objections that he thought were but temporary, of their company—witness thinks he gave the name of Sutro—would furnish bids in accordance with these specifications. At that time in January, witness believed that the attorneys of the Associated Oil Company and the General Petroleum Company had approved the plans. That was witness' understanding at that time—that the General Petroleum Company and the Associated Oil Company, both [683—600] were supporters of the plan that witness and Dr. Bain were figuring on. He said that a

(Testimony of John Keeler Robison.)

bid could be gotten from the Union, but it was not wanted because they were British owned in a large measure. He did not tell witness that the Union had given him the impression that they did not want to bid—witness got quite a different impression. Witness' understanding was that the Standard Oil Company had made objections that Dr. Bain thought were but temporary, but that the General Petroleum Company and Associated would bid, and the Union would bid if they were given a chance, but it was not thought proper to have other than a completely American company engaged in this project.

About that meeting with Mr. Doheny when he came to witness' office in December, during the conversation he said that his company did not want to go into this proposition. It is quite out of the question for witness to tell the order of events in a conversation like that. He told witness that his company—that he had heard of this from the Interior Department and that he had considered it, but that there was great opposition to the matter in his company and he determined not to go into it. Witness at that time had seen the letter of November 28 which said in effect, "Our company will build storage for so many barrels of fuel oil at Pearl Harbor for so many barrels of crude oil, royalty oil, and in consideration of leases to be granted to us," or words to that effect. The witness doesn't know what he got from Mr. Doheny's letter with regard to "leases

(Testimony of John Keeler Robison.)

to be granted to us," but knows that he didn't get any—not any on that million and a half barrels. Witness did not pay any attention to the statement that there must be other leases granted or other leases to be granted because that letter of his of the 28th, or whatever it was, or that letter that he wrote in November, really was important in that it furnished some figures as to the cost of tankage, and that was practically the only available part of that letter to witness. He used that figure later. [684—601]

Witness' attention was called to Fall's letter of November 29, 1921 (Exhibit 34) to the witness.

The witness was deeply interested in this thing at this time and would therefore scrutinize with care anything that Secretary Fall sent him on that subject.

"Q. What did you understand Secretary Fall to mean by this language: 'Should you think best to accept this proposition, then of course it would be necessary in my judgment to turn over to Colonel Doheny, if we can do so, leases upon further wells in the naval reserve in which he is now drilling?' A. Yes. Well, that is what it looked like."

His proposal at that time involved additional leases to his company—witness don't remember how many. In the conference in December with Mr. Doheny, nothing was said about further leases. There were no further leases in the plan that was proposed. After having received this letter, to-

(Testimony of John Keeler Robison.)

gether with Mr. Doheny's letter referring to the same leases, when Mr. Doheny saw witness about two weeks later further leases were not mentioned at all—not a bit. When witness said that "Then it looked like it," witness meant that it looked as though Secretary Fall thought that in order to accomplish the proposition submitted by Mr. Doheny on the 28th or 29th of November the granting of further leases to the Pan American Company would be a necessity. Witness had not had any talk on that subject with Secretary Fall—the only talk that he had had with Secretary Fall that led up to those leases was concerning the apparently excessive cost of naval fuel storage facilities. He objected to them. The witness doesn't remember Secretary Fall's leaving on the 1st of December, but does remember that he left at the end of the month—that is witness' recollection. Witness thought Secretary Fall went home for the holidays or something of that kind. Witness saw Secretary Fall during December and told the head of the Interior Department—if Mr. Fall was not there, he told Judge Finney—what Mr. Doheny had said to witness about the 14th of December.

To the witness the Interior Department was a person—the witness don't differentiate and never has between them. The head of the Interior Department if it is Judge Finney, is just [685—602] as much to the witness as if it is Secretary Fall or Secretary Work. About the 19th or 20th of December the witness got from this red-eyed,

(Testimony of John Keeler Robison.)

white-faced man this proposal of doing this work absolutely at cost. Witness at once advised Secretary Fall in person what he had got. Witness repeats that he meant the head of the Interior Department—that counsel said Secretary Fall. Witness had no independent memory of whom he talked to about that proposal—man who was important to witness was Secretary Denby. The rest of the people were tools.

Witness told Secretary Denby as soon as he got that proposal that he was going to get a bid at cost—just exactly what witness got from Mr. Doheny and witness knew that he was going to get a bid at cost and without profit to anybody, and that is what witness told Secretary Denby.

Witness also told either Secretary Finney or Secretary Fall, one or the other of them, that fact in December—or it might have been Dr. Bain. Witness told him anyway—he was a tool—witness means the master of that Interior Department was a complete tool of witness'. They were all under witness' hand in naval matters. Witness thought that the tool whom he told about getting this bid at cost was Secretary Fall, and his best recollection is that it was Secretary Fall. It is clear that witness told Bain that—witness is sure that he said "without profit"—he thinks he told Dr. Bain that. The part that impressed witness strongly was that Mr. Doheny was going to give a bid—his bid without profit was a supplementary statement by

(Testimony of John Keeler Robison.)

himself that pleased witness very much, but that was not so important as that the bid should be put in that would accomplish what witness felt would be a necessity. Witness does not want to do business generally with a man that doesn't make some money. The witness wants it to be to that man's interest that the contract be accomplished.

Witness did not have any talk with Secretary Fall about the letter of April 12, 1922, Exhibit 102, before Secretary [686—603] Fall sent it over to Secretary Denby—the one where he said “Better take it up with Congress again”—that was a surprise to witness. It occurred to witness that if taken up with Congress by the language used in the Act, that would constitute an approval of this changed contract, but it didn't occur to witness that it was needed. Witness did not say yesterday that it didn't occur to him that it was needed because they had until the 15th only to wait to determine whether they could accomplish the work; it having been determined by people in whom witness had confidence that it was a legal proposition. Witness thought it was worth while to wait three days and see whether they could get it done. At that time witness was the only man that knew that they were going to get one bid, and the only reason he knew it was because he had faith. Witness says that because he heard the promise made and had repeated that promise to Secretary Denby and to Secretary Fall, and

(Testimony of John Keeler Robison.)

when this letter came in witness said to Secretary Denby, "Let us wait three days, because remember I have got a promise from Mr. Doheny that we will get one bid at least." The witness does not remember any discussion between him and Secretary Denby whether this provision of the act of Congress would not be wise in order to remove all doubt of legality—they had no doubt—except the statement that they would wait three days and have time enough to act then.

Witness saw when it came in—the letter dated April 12, U. S. Exhibit No. 103—it was from Secretary Fall and discussed it with Secretary Denby.

After reading the letter the witness stated that he didn't know that was a request for information from the Chicago, Bridge & Iron Works. Witness told the Secretary that it didn't seem possible to him to handle the matter other than through an oil company without the exchange of royalty into cash, and that it did seem to the witness perfectly possible to handle it through an oil company to the Navy's advantage. He remembers [687—604] nothing else. At the time that letter came in, witness had the promise of a bid without profit and had faith that there would be such a bid.

"Q. Well, did you turn to Secretary Denby and say, 'I know we are going to get one bid without any profit at all in it,' and that 'therefore Secretary Fall's idea that there will be a contractor's profit amounts to nothing?'

(Testimony of John Keeler Robison.)

A. I did.

Q. You then told Secretary Denby that there was going to be a bid without profit?

A. I did.

Q. Had you had that matter confirmed to you again after Mr. Doheny's original conversation with you?

A. In but that one conference."

Counsel then read to the witness from the other letter of April 12,—

" 'I am therefore holding up the proposed contracts indirectly by taking abundant time for a consideration of bids, and so forth, with the purpose that meantime this amendment may be adopted and that we may obtain the results suggested by the large savings which I am confident will accrue.' "

Witness does not know whether or not he said to Secretary Denby that if one of the bids was to be at cost there couldn't be any saving below cost. That language didn't make any impression on the witness' mind because it was definitely determined that they were going to get a bid at cost on the 15th of April, and witness made his faith known to his chief and he agreed to wait.

Witness knew nothing about other bids at that time. He did not know until after the bids had been opened that the Associated Oil Company would not bid except with the approval of Congress. He had been informed that Mr. Sutro of the Standard Oil Company had been down to Wash-

(Testimony of John Keeler Robison.)

ington and talked with Bain and Finney and stated that the Standard Oil Company would not bid, but witness thought they would bid just the same but didn't much want a bid from the Standard Oil Company because those were the people he wanted to be protected against. Witness didn't care much for the Associated Oil Company—the Pacific. He thought there was one way to get safety and that was to get [688—605] protection against the people who were their neighbors. The witness thought there was no other company that could give the company quite as good service as was given by the Pan American unless it was the General Petroleum Company, and he hoped that they would receive a favorable bid from the General Petroleum Company. He thought that up to that time nobody had told him that their lawyer was unalterably opposed to the contract arrangement.

Witness saw Dr. Bain of the Bureau of Mines and Mr. Ambrose very frequently. They were not constantly discussing their hopes and fears as to whether there would be bids. Witness was trying to get knowledge from petroleum engineers.

Between February 15 and April 15, there was a lot of stuff that witness went over. The general petroleum situation was taken up, the rate of production, causes of changes of price, location of new fields, and all that sort of thing; foreign production, imports and exports, variation in quality of fuel that we could use, the possibility of

(Testimony of John Keeler Robison.)

using—oh, there was a lot of things. The general petroleum question.

Now, whether witness says that that was taken up at this particular time, that is not correct; but it was taken up by him with them at one time or another. The witness presumes that he testified concerning the letter of April 12 about the Chicago Bridge & Iron Company from Secretary Fall, in the Mammoth case. He presumed—he didn't know—whether he had given a different statement and as to what he said to Secretary Denby about it—he never will use the same words twice, probably—he thought counsel was sticking on words. In the Mammoth case witness testified that he saw the letter, discussed it with Secretary Denby and told him that he did not think they would save any money; that the bids that had been received provided for the construction of the facilities at Pearl Harbor without profit, and they could not do any better. Obviously witness made a mistake because they had not received any bids on the 12th of April. [689—606]

Witness thinks he testified in the Mammoth case as to the letter of April 12, 1922, in which Secretary Fall called attention to some proposed legislation. At that time witness testified, "Secretary Fall himself says here to hold up the making of the contract until Secretary Denby would act on the recommendation in that letter,"—that this was April 12—that they had the bids at that time—that he did not tell Secretary Denby to disregard it because he

(Testimony of John Keeler Robison.)

knew he was going to get a bid—he had it.

Witness states that he was obviously inaccurate in that statement. As to the accuracy of his recollection about all these various matters, he would prefer to let the record speak for itself. It is as accurate as he can make it and he has been prayerfully intent to make it correct.

Witness is right now because the bids were not open until the 15th. Witness knew that he had the promise of one bid—he had faith as he said.

Secretary Fall told witness nothing in October, 1921, as to his conversation with Mr. Doheny about a bid on Pearl Harbor project. Toward the end of November, the question of the Pearl Harbor project had been placed under consideration by Mr. Doheny as is evidenced by his letter. On the subject of Secretary Fall's conference with Mr. Doheny in that letter Secretary Fall originally said that too much was being paid altogether for storage facilities. That he thought they could get tanks for twenty-five cents a barrel. Witness discussed that point at some length with reference to the peculiar conditions in Navy tank farms, and so forth, and the location of tank farm that they were proposing, and the Secretary said he would find out what it would cost to get them out there. Witness don't know whether his inquiry as to cost was directed to but one person, but did understand that he was going to find out from some one or other—witness don't know whom—what it would cost to put up tanks in Pearl Harbor. That is the only

(Testimony of John Keeler Robison.)

conversation witness knows of that could have [690—607] referred to Mr. Doheny. Witness thinks now that Mr. Doheny's name was not mentioned by the witness and Secretary Fall prior to November 28 on this or any other subject, and that prior to November 28 witness had no knowledge either from Secretary Fall or from any other source that Mr. Doheny had been approached on this Pearl Harbor project.

Immediately the letter of November 28 was sent to witness with Mr. Fall's letter of November 29, and after the Council meeting of November 29 witness took up with the Judge Advocate General the legality of the Storage project. The reason why witness took the matter up with the Council and the Judge Advocate General was not because of the letter of November 28 making a proffer or showing there was someone who would make a proffer on the subject, but witness wanted to get Secretary Denby's final formal and definite approval of the project, and his formal, final and definite disapproval of the project to use the royalty oil for current needs.

Witness does not think that he knew the J. G. White Engineering Corporation was in the matter until after the bids were invited on February 15.

Witness does not remember stating in direct testimony when he first knew the J. G. White Engineering Company was interested, and does not remember speaking of that Company or Mr. Dunn, and said

(Testimony of John Keeler Robison.)

"I am afraid I am suffering from senility. I don't recall."

Referring to some letter of February 24 or thereabouts saying something about a call on witness, Mr. Dunn and Mr. Cotter came to witness' office together and witness there met Mr. Dunn for the first time and afterwards took them over to Admiral Gregory about some technical matters that were not in witness' department. Witness does not think he had any discussion with Gano Dunn save on the general question of the advisability of the use of some engineering construction—a general contractor in an engineering capacity. These gentlemen called on witness to say that the invitations that were then outstanding were very unsatisfactory because they were attempting to get lump sum bids and this was a job on which they could not work except on a cost-plus basis as things then stood. [691—608]

The witness did not say to those gentlemen that their principal had agreed with witness to bid without profit and at cost—that wouldn't make any difference. If there was a bid that was to be at cost, it would not be cost-plus profit or cost-plus a fixed fee. Witness was expected to get a bid that would be a cost bid and in that cost bid the usual engineering fee should be paid. Witness would not have objected to engineering fee to Mr. Dunn's concern if it were a proper fee and a proper concern.

When Admiral Gregory talked with witness on the question, witness told him about the cost bid he had expected to be stated in terms of figures.

(Testimony of John Keeler Robison.)

When you go into competitive bids you have got to get up figures, witness thinks. He had not expected a bid to be presented in terms of, "We will do this work at exact cost,"—he had expected a bid that would say, "We will do this work for so much" which figure would have been the originally estimated cost of the project on a fixed price proposition.

Witness first learned what the Pan American bids were on the evening of April 15 or the morning of April 16. He found that one bid was not in those terms at cost. It was obvious from the terms of proposal B that proposal A was not at cost. Witness was not surprised to find that proposal A was not a cost bid at all because it looked like the accomplishment of the promise itself. The promise had been to make a bid at cost and they made one not at cost and that looked like the accomplishment of the promise.

Bid A looked to him to be as nearly as possible a bid in exact compliance with the proposal originally made to him. His estimates had shown—some figure or other which he cannot remember as the estimated cost of the project. Bid A did slightly—no, did considerably exceed that estimate. But in view of the character of the information concerning the work to be done, and in view of the fact that a hazard has a definite value, an insurance, let us say, he thought that Bid A was a very reasonable bid and that it [692—609] involved no prospective—or no assured prospective profit.

(Testimony of John Keeler Robison.)

There was a possibility of profit in it, true, and there was a possibility of loss in it, he thought.

Proposal B likewise had a limit in it, a lower limit than proposal A, and a further provision that if actual costs were less than this lower limit, the Government would receive the benefits of any savings accomplished. There was a proposal of a little bit better than a cost bid. That proposal seemed to the witness to say: "I will give you this proposition for cost and in any event for not more than so much." There was one other thing in it—the consideration was to be a preferential right to any leases in Reserve No. 1. Witness took that up with Secretary Denby who said, "Well, if they don't meet our requirements we can always throw it open to public bidding by advertising, and that is our protection." Whether he said that to witness or witness said it to him, they agreed that that was a fact. They knew that before they threw it open to public bidding, they had to submit it to Mr. Doheny's concern, and that he was to have equal rights with any bidder if it was thrown open. Witness did not know then that *that* in effect they would destroy competition. The preferential right had a great deal more value than witness suspected at the time.

The bid was opened on the 15th and the contract was awarded on the 18th—was entered into on the 25th, so that the 15th was Saturday, and they didn't consider it but a few hours. It looked good to them

(Testimony of John Keeler Robison.)

then because it gave them an assured advantage of a couple of hundred thousand dollars and a prospective possible advantage of whatever savings they could make. The gross as it turned out was about \$500,000 and the thing looked like \$500,000 at the time. Five hundred thousand dollars was not a picayunish amount to pay for a lease on the remainder of that reserve. [693—610]

Witness would not agree to a lease of that territory for \$500,000. Witness realized that it was going to reduce the number of competitors by one in the first instance, or he figures that now, but that didn't seem to him to destroy competition at that time. It did have that effect afterwards. Witness was not present when Dr. Bain and Mr. Cotter were discussing the probable value of that preferential right—when Bain joshed Cotter when Cotter said it was not worth anything.

The first information witness got about this proposal B was a telephone communication from Bain who congratulated witness on the success of the competition. He said he had had several bids and they were all lower than expected—he said that at that time. [694—611]

He said that he did not know the Associated Oil Company's bid was conditional on Congressional action. He had not looked up the modifications or conditions attached to any of the bids at the time of this telephone message. At that time Bain knew that witness was expecting a bid at cost from the Pan American, for witness had told him so, and he

(Testimony of John Keeler Robison.)

called the witness up and congratulated him on having gotten bids. Later, on Monday morning, the 17th, witness thinks he went over and looked things over and got from Mr. Ambrose a digest of all the bids with the circumstances attached to each, conditions, and thereafter witness took that digest of the bids over to Mr. Denby, or a copy of it, and used it in discussing the matter with Mr. Denby. There was no question which was the lower bid. The question was which of the two Pan American bids was the better for the Government. Pan American had made an unqualified bid in accordance with the specifications and was entitled to the contract, and the question, as witness looked upon it, was which of the two bids offered by the Pan American was to the advantage of the Government. Witness brought back Secretary Denby's answer. In the first place witness had talked with Bain and Ambrose and went and got Denby's answer, and then brought Secretary Denby's answer back to them, where he said to go ahead on B. It was after witness had gotten Secretary Denby's approval that Secretary Finney sent some telegram out to Secretary Fall. Witness was present when that telegram was dictated. Witness had not been informed by Director Bain or Secretary Finney that Secretary Fall had left instructions that no lease was to be closed without his being advised of the circumstances. Witness did not know that until now—counsel's statement gives him that information. At all events, a telegram was sent to Secretary Fall and a reply re-

(Testimony of John Keeler Robison.)

ceived from him. Then on the 18th, Secretary Finney wrote the letter of award which was not delivered in witness' presence. He does not know that it was mailed to Cotter. He was merely informed that that letter was sent. He saw a copy of that formal letter of award, but never had a copy of it in his possession.

The question of the two additional leases, the Northeast quarter of 3, and the strip lease back of the Belridge in 34, was included in the letter of April 25th, the covering letter, a separate letter accomplished at the same time as the contract. Witness would imagine that it was about the 20th when he [695—612] saw Mr. Cotter, after the award, and Mr. Cotter said he would prefer that the Government had taken proposal A. He said he thought witness had done the best thing for the Government, but that he (Mr. Cotter) wished the Government had taken A rather than B, and he said something in general terms that he wanted something to show his company that he had gotten some leases. Bain was there and said that this lease in the northeast quarter of 3 and this lease back of the Belridge would be all right to give because they have got to be given anyway. Witness never heard Doctor Bain say that was not the reason, but that the reason was these two leases were given was that there would be more royalty oil under the contract. The last was not a portion of the reason on April 25th, witness thinks. He never heard that expressed and certainly he and Bain did not give that as amongst

(Testimony of John Keeler Robison.)

themselves as a reason why those additional leases ought to be given. He may have been of cognate advantage to the Government. Witness did not understand that counsel was asking whether that was discussed. Witness has stated that Bain said, "Yes, give him those two leases because we have got to have that protection in that corner anyway," and that was the thing that was expressed at the time the leases were agreed to.

Something like this may have been further said at that time: "And besides those leases will give us additional royalty oil of which the Navy will get the benefit." That is the way they talked to witness all the time. Witness felt that Bain or Ambrose all the time were trying to help witness accomplish the Navy's interests.

Witness, after examining papers, stated that he saw only two wells that they had drilled in the northeast quarter of 3 on the lease that was applied for and granted June 5th, of which only one was producing, as witness remembers, 381 barrels, the one right opposite the corner of 35, just opposite the Pacific Oil block on 35.

At the time that question was discussed, witness knew of the temporary reserve nondrilling agreement with the Pacific Oil Company that had been set up. It covers sections 32 and 33 and all lands within one-half mile of those sections, so that these areas in Section 34 and Section 3 were immediately adjacent. Witness had not been advised by Doctor Bain that after that reserve was set up before April

(Testimony of John Keeler Robison.)

25, 1922, there was no necessity of doing any more drilling in Sections 34 and 3. [696—613] On the contrary, the extra drilling in 34, adjacent to the Belridge lease, was felt and is felt by witness to be very desirable drilling for the protection of the Government's interests against the Pacific Oil Company's holdings in 35. Witness really does not know whether the protective lease in Section 3 has been drilled. He has been out there and looked at it, but could not answer the question at this time. He does not think there are enough wells in Section 3.

The Act of June 4, 1920, carries with it an appropriation of one-half million dollars, which was spent for fuel oil storage facilities—several tanks at Coca Sola, and also for some tankage on the Atlantic seaboard. The entire \$500,000 was appropriated and spent for tanks and pipes and facilities, etc. A question came up before witness which witness referred to the Judge Advocate-General, as to whether any part of that half million dollars could be spent for dredging up to the tank at Coca Sola, and witness was of the opinion that it could not be and took the Judge Advocate-General's opinion and he advised that it could not be. Witness has been informed that in the opinion of many eminent lawyers there was no difference between the dredging at Coca Sola and the dredging at Pearl Harbor, but witness found a difference, as a fact, but when it comes to matters of fact in connection with the law, witness is quite incompetent. He took the view that it was not available because he figured that Coca Sola

(Testimony of John Keeler Robison.)

was a case where it was not necessary. In the case of Pearl Harbor it was absolutely necessary, but an entirely incidental function. The Government had the tanks at Coca Sola already and could get to them, but could not have gotten in the same way to the tanks at Pearl Harbor. There was a great deal of difference. In the one case it was quite inaccessible, and in the other it was only difficult of access.

Witness thinks there were more than 38 tanks built there out of that appropriation which witness thinks are full of current use oil, but were built as for reserve oil. When they were built, there was no reserve oil to go in them because all of the reserve oil was being used to fill tanks at Pearl Harbor and elsewhere. Some of that half million dollars was also used to build tankage at Yorktown, or somewhere on the Pacific Coast. Witness is not particularly interested where it is—it is tanks. Witness thinks that at present the oil that is in it is supplied from the appropriation for current [697—614] use. When they had exhausted that \$500,000 they stopped building those tanks, as they did not have anything else to go on with.

The witness' intention was to accomplish the approved plan for the national defense, which, translated into other terms, means that the witness meant to go on from one project to another, so that when the crude royalty oil had paid for one, they would go on to the next until the entire project was completed. The estimate of \$103,000,000 has been made

(Testimony of John Keeler Robison.)

of the gross value of the entire system of required fuel oil. These are plans approved by the Board of Navy and are not submitted in detail to Congress, and the provisions that witness has been speaking of have not been submitted to Congress in detail as far as witness knows.

In general, the entire plan was submitted to Congress and was approved by them in 1920 by the Act of June 4, 1920. Witness refers to the language in the proviso and to the language in the letter of the Secretary of the Navy transmitting that proviso to the proper Congressional Committees.

After April 25th, 1922, witness suggested that a revision of the plans be done by those competent to do so. Witness went over to Operations personally and asked that they go over the question of the plans and also told Operations that he would have crude oil available to go on to other projects to be built under those plans ultimately. Witness thinks he got information as to whether there was under consideration the fact of increasing the fuel oil storage at Pearl Harbor, or he knew they were going over it; but he knew in November—he does not remember the exact date—what the answer was. Some of the papers then were introduced. By November 20th witness knew that the Navy had approved an increase of storage tankage at Pearl Harbor.

It was on or about the 27th of October that witness first had knowledge that Mr. Doheny, or his company, had a plan about the California Reserves.

(Testimony of John Keeler Robison.)

Witness did not know it on the 28th of July or thereabouts, as far as he knows.

Witness thinks he knew of the letter of July 28th from Mr. Cotter, Exhibit 140, to Mr. Fall. The particular portion of it that witness recalls is the next to last paragraph where it says, "We hope you will see your way clear to authorize us to suspend operations both of drilling and production to such extent as we may find it necessary." This thing says that he has not got a [698—615] plan but is going to get one. The plan that he was going to get did not make any impression on witness' mind—he had not seen it yet.

At that time Secretary Fall took up with witness the question of shutting down as much as possible all drilling on the Reserves. Witness does not know that that condition of shut down has remained practically from that time to this, but thinks that it remained in effect until Government counsel took charge and thinks that Government counsel opened them up again. He does not think Government counsel was personally responsible for it, but knows that the number of flowing wells was greatly increased about the time the matter was formally placed in court, both in the Reserve and immediately adjacent to it.

The so-called policy letter of the 25th of October, 1921, in one of the first paragraphs, required that as much of the oil as possible within the Reserve be retained in the ground, and witness has always tried to

(Testimony of John Keeler Robison.)

accomplish the intent of that policy, and has not received anything but support from any source.

Answering a question as to whether the policy declared in the policy letter caused witness not to lease up the western part of the Reserve—the part in neutral color—witness stated that, “in the letter of the 25th of October we announced to the Secretary of the Interior our desire that no unnecessary drilling be done. The spirit of that involves the closing in of our offset wells when people outside of the reserve will close down theirs, and the Bureau of Mines did succeed, or at least informed me that by agreement certain wells in Section 35 and 36, as I remember it, had been closed down and that we were closing down corresponding wells in Sections 1 and 2. Now, that was not an isolated instance.”

The oil was to be kept in the ground if they could on the green part permanently. Witness is talking about this—when he can keep the oil in the ground, he will keep it, and when he has got to take it out in order to keep somebody else from getting it, he has taken it out. That is not the only reason why the oil has to be taken out, but the controlling reason—witness has always said so. He never said that the only controlling reason for the making of the lease of December 11, 1922, was to get the storage built. He has always said to Government counsel that to him the most important function [699—616] of the lease of December 11th was the accomplishment of the national security, of the stor-

(Testimony of John Keeler Robison.)

age; that to him that is the most important result in that lease, but that lease could not have been accomplished had witness been unable to say to the Secretary of the Navy that it involved the drilling of no lands that he did not consider it necessary to drill in order to protect Government property from drainage to outside concerns.

Witness had not stated in so many words that drainage was not the consideration in his mind that moved him to make the lease at all, or to be for it, but did say to Government counsel that the most important consideration to witness was the National security.

Witness said to Government counsel that with regard to Mr. Doheny's proposition of November 6, 1922, all he said about the low price of royalty oils had no effect on witness' mind at all—that it was not witness' practice to gamble in prices over a period of fifteen years, and that Mr. Doheny did not refer at all in that memorandum to drainage and did not place it on the subject of drainage whatever.

Answering a further question as to whether witness had not said that he did not give any consideration to drainage and said that he wanted the job done and was going to make the lease, witness said that he did want that job in Pearl Harbor done and did want it very deeply, and that it was to him the most important result, a more important result in his opinion even than the protection of Government's property.

(Testimony of John Keeler Robison.)

Witness did not say to Government counsel that there was no necessity to make any lease at that time, December 11, 1922, in that reserve, on the subject of drainage. He does not think he said that any further leasing could have waited indefinitely if he had not wanted that storage built, but he did say that there was little additional immediate need for leasing, which need for additional leasing was around 36. That was needed at once. Witness does not think that he ever said to anybody that if they had to lease up the whole reserve to get the storage project done, he was prepared to lease it all, but does not think he said that he was prepared to lease such portion of the reserve as was liable to drainage to outside concerns. [700—617]

At the time witness agreed to the giving of the lease of December 11th, he believed and was conscious of the fact that the Pan American Company could take every stitch of oil out of the reserve covered by the lease, except as restricted by the terms thereof, and witness gave the lease in part because it was necessary to give that much to get the covenants that the Government got, and in part because witness believed that that area had to be developed and must be developed in the near future—certainly within the life of the lease—in order to protect Government's property against other people getting the oil out of it.

Witness understands the life of the lease to extend until it is dry—that might be thirty years, or three hundred he hopes, and therefore he was willing to

(Testimony of John Keeler Robison.)

pledge that territory for that length of time and thought that drainage might occur during that time, and in much less time, and knew that drainage was occurring when the lease was entered into.

Q. "Now what was that you said to me, that you couldn't have gotten Secretary Denby's consent to him that it was necessary to make it on account to him that it was necessary to make it on account of drainage?"

A. "That there was no property leased that was not liable to drainage by outside concerns."

Witness did not tell him it was liable to immediate drainage and did not think he used the term about this 300 year period before this moment. Witness did not tell Secretary Denby any period that it was likely to be drained out in, and the Secretary did not ask witness. That is, in witness' opinion, an area where the Government interests will be best protected by drilling the property now.

Witness thinks he asked Doctor Bain about that subject. He did not tell witness that unless the Government wanted the royalty oil for Pearl Harbor there was no technical necessity for making any lease at the present time, except the offsetting lease around 36. There is only one portion of that area, namely, Section 24, just two miles north of Section 36—it is the only area in that white portion, or the portion in which the Pan American Company have the right to drill, where Doctor Bain did not advise witness that it was desirable that the Government do lease it now. Witness does not think that Doctor

(Testimony of John Keeler Robison.)

Bain said to him that except for the Navy's desire immediately for the royalty oil, there was no technical reason to lease up that territory at that time. [701—618]

Witness will not say he did not say so, but will say that witness does not think he said anything of that kind. He certainly said nothing of that kind that impressed witness.

Q. "As a matter of fact Dr. Bain didn't suggest the leasing of the whole reserve, or any major portion, of it, did he?"

A. "I did."

Q. "You did?"

A. "I did."

By that time witness had not become a technical oil man, in witness' judgment. [702—619] The witness took up this naval reserve matter first with Secretary Fall on October 9 and was in constant touch with him from that time forward. Witness knows Secretary Fall's signature and on being shown his travel voucher showing that Secretary Fall returned to Washington October 17, P. M., and left Washington A. M., July 31, witness stated that he thought that to be Secretary Fall's signature.

It was stipulated between counsel that Secretary Fall returned to Washington in the afternoon of October 17.

Witness stated that it was quite clear that he could not have conferred with Secretary Fall and continued in conference with him from the 9th for-

(Testimony of John Keeler Robison.)

ward if he didn't get back to Washington until the afternoon of the 17th; but the witness was in Washington, therefore the date is in error in saying that witness took the matter up with Secretary Fall on October 9th. He could not have taken it up with him much before October 18; and the letter of October 25th must therefore have followed conferences that were within a few days of that date.

Counsel then stated that he found from the certified copy of Mr. Ambrose's travel voucher that he was away from Washington and didn't arrive in Washington until October 19th.

The witness stated that if Ambrose was out of Washington, witness did not see him prior to that date, and that whatever conferences there were where Secretary Fall or Mr. Ambrose were concerned, that led up to the letter of October 25, must have been within a week or must have covered about a week.

The witness had no conferences with anyone else in the Interior Department except Fall, Ambrose and Bain leading up to the so-called policy letter.

The witness submitted informally to Secretary Fall a draft of the letter of October 25 before the final draft was made. The words, "Or otherwise" were added at Secretary Fall's request in paragraph five where it is said, "The Interior Department will exercise its best efforts to obtain for the Navy [703—620] as large royalties and as favorable terms as practicable by public competition, or otherwise." When Secretary Fall requested wit-

(Testimony of John Keeler Robison.)

ness to add those words to that paragraph, he told witness that Dr. Bain—or Dr. Bain told witness, one or the other—that the handling of those matters could sometimes, especially in connection with pending claims, be handled best without public competition. Witness told Secretary Denby about it and told him in effect what witness had been told on this subject. Witness' recollection is that the paragraph as originally drawn was drawn by witness, and that he did not show the matter to Secretary Denby in its drafted form until after the words "or otherwise" had been included, and that witness told Secretary Denby that these had been included at the instance of the Interior Department, particularly to provide for the cases of pending claims on oil lands in the reserve. It had been explained to witness that where there were pending claims, those were to be settled under the act of February 25, 1920. Of course witness knew that it wasn't so that such pending claims are always settled by the grant of a lease or some part of the reserve or some part of section 1, for instance the Midway lease in section 1 that counsel spoke of yesterday. Some times those pending claims were not granted but in lieu of granting the claim, a lease was granted and that is always what was done under the act of February 25th, the claimant surrendering his claim to patent and getting a lease on all or some part of what he was claiming by his patent, by negotiations—that is the word witness was looking for awhile back—"negotia-

(Testimony of John Keeler Robison.)

tions." The royalties were not fixed by the Interior Department's regulations from 12 to 25% in the case of this United Midway lease on section 1. That was the argument that was presented to witness and that was the matter that witness was considering when the words "or otherwise" were written in. Witness had no thought that a contract for construction would be let otherwise than upon competition. [704—621]

In 1917 in a talk with Mr. Doheny he did not say that No. 1 would be gone and he did not say that No. 2 was gone. He said that one of them is already practically destroyed as a reserve, and the other is in a fair way to becoming so, or words to that effect.

When witness became charged with these naval reserve matters he investigated in a general way to see what had in fact been the development in and near No. 1. He does not remember when he first knew that the first well in Section 36-23 was drilled in the year 1919—he did know the date of the drilling of the various wells. He became aware of the time when the first well was drilled in Section 36-24 which lies just outside the reserve—in the year 1920, and became aware of the fact that the first well that was drilled in Section 35 next to the Section 36 just referred to, was drilled subsequently in the year 1920.

He recalled in general terms the letter from Secretary Fall to Secretary Denby dated April 12, 1922, which is Exhibit 103 referring to this pro-

(Testimony of John Keeler Robison.)

posed amendment by congressional action. He thinks this letter was called to his attention in the hearing before the Senate Committee on Public Lands and Surveys.

Witness testified that at that hearing Senator Walsh asked whether that matter ever came before witness and witness said that he had no recollection of that letter. Witness also testified that Senator Walsh asked what the witness said now about the policy outlined in it, and the witness said, "Well, it sounds pretty good." Witness states that he further went to Senator Walsh after going to witness' office and investigating the files and informed the Senator that witness had made a mistake and was informed by the Senator that a correction on that matter was of no importance. [705—622]

The only lawyer witness recalls objecting on behalf of an oil company to these proposed contracts was Mr. Sutro. Witness testified in the Mammoth deposition that there were two of them—two lawyers who expressed opinion of the illegality of the proposition before the Mammoth oil lease was signed, and a third one that witness did not recall. This was before the Mammoth lease was signed.

Witness recalls now Mr. Sutro and no others who came to his knowledge before the Mammoth lease was signed on April 7, 1922. Witness does not think he ever heard the name of the other lawyer or lawyers.

Witness does not recall at this time any further

(Testimony of John Keeler Robison.)

conference with Mr. Doheny, Sr., subsequent to December 19th or 20th, 1921, and the contract of April 25, 1922. He heard part of Mr. Doheny's testimony before the Senate Committee but does not remember the date. He thinks that Mr. Doheny made the statement that witness came to New York to discuss the tankage with him at his son's house in the winter, and that he could not fix the date, but that it was in cold weather. Witness does not think that he was in that house at that time, and does not think that he saw Mr. Doheny, Sr. except—in connection with this matter—in New York. Witness does not recall hearing any testimony given by Mr. Doheny to the effect that this weather was cold and that Admiral Robison came to Mr. Doheny's son's house in New York and talked with Mr. Doheny about it there—that Admiral Robison came there from Washington on purpose to talk with Mr. Doheny about it—that it was cold weather and that Admiral Robison came up to the house and Mr. Doheny's son asked him up to the house to meet the Admiral—that Mr. Doheny's son, by the way, had been in the Navy and was on the boat that the Admiral was Captain on, the "Huntington," and that Mr. Doheny's son invited Mr. Doheny to come up and meet Admiral Robison and they talked over this proposition up there—that if Mr. Doheny was to fix it from any [706—623] other circumstances than just a guess, he would say that it was some time along in the latter part of the winter, the latter part of Janu-

(Testimony of John Keeler Robison.)

ary or February. Witness does not recall seeing either of the Dohenys in New York at or about that time. He doesn't say that he didn't do so, but he knows that he didn't go to New York especially for that purpose to see anybody. The best of his recollection is that he did not see Mr. Doheny, Sr., after the conference in December, 1921, until after the contract of April 25, 1922, had been awarded or closed.

Witness did not O. K. on Mr. Doheny's letter the proposition in Mr. Doheny's letter of November 28 sent witness by Secretary Fall with his letter of November 29, 1921. Witness thought that the proposal was incomplete. It did not include but one item that was of importance to witness, and that was the knowledge of the price of commercial tankage. That was the one item in that letter that really interested witness and the information that here was one concern that was willing to undertake the Pearl Harbor construction for the Government.

When Mr. Doheny talked to witness in December, 1921, he said the matter had been under consideration by him, that it had been brought to his attention by the Interior Department, but that the people of his concern objected to it—that they had some interest, witness thought he said, in the vicinity of California, but no such considerable interests as would justify in the opinion of the rest of his company the large expenditures that would be required. Witness understood from what he said

(Testimony of John Keeler Robison.)

that he meant interest by way of ownership or leases of oil lands. He did not state to witness when or where they had changed their minds after the letter of November 28, 1921, was written, but said that he had made up his mind to give it up or to stay out of it. Witness thinks that is the term that he used.

Witness was familiar with the invitation of March 7 which Dr. Bain or the Interior Department sent out to various [707—624] persons—the last invitation. It was not gone over carefully with witness before it went out in the same sense that the later proceedings—the contract—was; only sufficiently for witness to be assured that the major points of the Navy's desires were incorporated. It is the best of witness' recollection that he knew of the clause in the invitation which invited alternative bids. Witness understood that request for alternative bids meant about the same as it does in Naval contracts where the opportunity is frequently offered to prospective bidders to accomplish the Government's purpose as set forth in the specifications by methods differing somewhat from those set forth in the specifications. Witness did not think from a reading of the invitation that it was an invitation for an alternative which involved leasing of any part of the reserve. Some time or other before the date the bids were submitted, Mr. Cotter told witness that his company proposed to submit an alternative bid. He did not state to witness then that that alternative would involve

(Testimony of John Keeler Robison.)

a preferential right to lease. Witness did not know that until after the bids were opened.

Dr. Bain did not say to witness prior to the issuance of the invitation of March 7 that he had been advised that the Pan American Company desired the opportunity to submit an alternative bid.

Witness had discussion between the 1st of March and the 15th of April with Dr. Bain about prospective bidders and about the expectation of bids and that sort of matter, and kept in touch with him closely on that subject particularly because during that period it was necessary to keep in close touch with him in order to be assured of the prompt dispatch of plans as they were accumulating in the Bureau of Yards and Docks.

Witness' best recollection is that when the bids came in and he was apprised of them, there was no discussion to the effect that proposal B was not in accordance with the invitation— [708—625] that nobody raised that question or discussed it. Witness can't tell what he thought then as to how large the extent of the preferential right was that was being asked.

The preferential right when granted did not follow proposal B but only granted a preferential right of what one may roughly call the eastern half of the reserve. That was done in accordance with the recommendation of Mr. Ambrose—the report that he rendered in which he said that if the preferential right were granted at all it ought to be limited to the eastern half of the reserve—which report

(Testimony of John Keeler Robison.)

was in accord with conversation engaged in at the time, the only part of the reserve then in danger of drainage.

Witness saw the report of H. Foster Bain dated February 4, 1922, and may have had a copy of it in his files furnished him by Dr. Bain. The recommendation there is that in view of the unsatisfactory nature of the bids received over here in the middle of Section 36, and in the light of additional information gathered in California, it was recommended that the area in Section 6 and Section 25 be not leased for the present. The first was in Section 2, and then—no, he didn't get prospective bids around 36.

From April 25th forward it was the policy to make any further leases in Naval Reserve No. 1 with witness' knowledge and with his co-operation with the Interior Department. The extent of those leases and the urgency of those leases was limited, however. It was witness' idea and he had expressed it to the Interior Department that they did not want again to be behind hand in the development of any areas—if the other fellow along their borders was going to drill and witness knew of it, he wanted to lease at once with the least possible delay. Witness does not know between April 25th and December 11, 1922, what other fellows were going to drill anywhere there. The information along that line would come from the Bureau of Mines. Witness' present recollection [709—626] is that the information which came to witness was

(Testimony of John Keeler Robison.)

that every one was shut down. Witness recalls that at the instance of the Pan American Company, Secretary Fall took up with the Standard, the Pacific and the Carmen people, as sublessees through the Pacific, the question of closing down any bordering drilling and closing down any production as far as possible. Witness was not merely agreeable but urged that policy.

Witness' present recollection is that in the summer of 1922 when witness was in California on other Government business, he met both the Dohenys and several of their associates in the oil business, and that on one date they made a trip where they covered the Elk Hills land. This was in June or May, 1923, that witness went with them to the reserve. Witness does not think that he saw Mr. Doheny in the summer of 1922, and he has no records of any conference with Mr. Cotter, but thinks he may have seen Mr. Cotter because the start of the Pearl Harbor project involved considerable communication between the J. G. White people and Admiral Gregory, and when they were in town the sometimes—not always—called at witness' office. Witness thinks he recalls Mr. Cotter's letter of July 28, but doesn't think he discussed that letter with anybody from the Pan American Company until the meeting with Mr. Doheny in October. Witness' belief is that Mr. Doheny communicated with the Interior Department; that witness was informed of the communication, and that Mr. Doheny or Mr. Cotter or someone of the Pan Ameri-

(Testimony of John Keeler Robison.)

can Company communicated with witness, and that an appointment was arranged in witness' office where Mr. Doheny could call upon witness. Witness thinks that it was Dr. Bain that spoke to witness about this plan having been submitted to Secretary Fall and the latter favored it. Witness thinks the general subject of the fluctuation of oil prices was discussed with Secretary Fall before witness saw Mr. Doheny, and that a general decision or conclusion had been reached that it wasn't wise for the Government to meddle in any regulation of [710—627] prices whatever their interest as producer or consumer might be. Witness thinks that a general discussion was the only thing that happened as to Secretary Fall, as to Mr. Doheny's proposed plan before witness saw Mr. Doheny. Witness cannot say whether he had the plan before him then. He does not know whether he had the plan before him in any discussion with Dr. Bain before he saw Mr. Doheny. He can only fix the time when he first saw Mr. Doheny by the fact that he at that time made a memorandum of the conversation. This was made before witness discussed it with Secretary Denby, but is not certain whether it was before or after he discussed Mr. Doheny's outline of plan with Secretary Fall and Dr. Bain. He thinks it was before. He thinks he did not have a discussion on the plan in the Interior Department with Secretary Fall until after he made the memorandum. He is not certain but thinks that is so. Witness read the memoran-

(Testimony of John Keeler Robison.)

dum—Exhibit “R4”—and states that something took place in that conversation that is not set forth in this memorandum—that in connection with the proposition for the storage of the oil for Government account in California the question of the establishment of a terminal on this Coast was discussed. Witness had considerable conversation at that time concerning the accessibility of any facilities that should be made available for the Navy either on the Atlantic or Pacific coasts to the Navy tankers, which are of relatively deep draught and relatively great length. That is referred to in some particulars here, but it is not covered in full. And witness stated they talked about the use of heavy oil, heavier than Navy standard oil, the oil that was used in many commercial plants for fuel, and witness told Mr. Doheny of some experiments that they had made in that connection, of the difficulties they had experienced, and Mr. Doheny told witness of a process that they had which—the reason witness says that is because other reference has refreshed his memory in that—for improving the viscosity of fuels. Witness had written to Mr. Doheny on that subject earlier in the year and had received an answer from [711—628] him on that subject, but they discussed it at this time. They discussed the reasons for the facilities that witness was asking. Witness does not think that Mr. Doheny said anything at that time to witness about the proposition being based upon his purpose or desire to get into the production of oil in Southern California.

(Testimony of John Keeler Robison.)

He discussed the effect upon the prices of the introduction of another large refinery in this vicinity. He did not say his company could not go into the thing unless he was guaranteed oil territory and oil. The witness that said at this interview he thinks witness knew that the Interior Department and the Navy Department over a period of several years before had been in negotiation with various large oil companies, for having them hold fuel oil in commercial storage for the Navy—he knew that to have been attempted in the fall and winter of 1921 and 1922. They had found the limit which they could go in that respect. Witness thinks that he did not take that up with Mr. Doheny as a separate proposition apart from a guarantee of royalty oil and a lease of the reserves. Witness thinks he did not ask him what arrangements could be made for commercial storage of fuel oil as a separate proposition, not hooked up with this reserve proposition. Witness never thought of it in that way until after he had succeeded in accomplishing some of the provisions of the contract of December 11, 1922.

After the conference with Mr. Doheny he agreed to submit a further memorandum, and did within a few days submit further memorandum of November 6th with a letter to witness which is in evidence. There were interlineations in this further memorandum in paragraphs "c" and "d" and page number three at the top but in fact the fifth page in order. These were inserted by witness, and therefore ob-

(Testimony of John Keeler Robison.)

viously the matter contained in those insertions was a matter that was very clear in witness' mind.

The contract of December 11, 1922, was gone over very carefully by the witness before it was executed, and at that time witness thought he was entirely familiar with its provisions. [712—629] Witness thinks some differences will be found between the letter of November 6 and the contract, but these will speak for themselves. Witness was careful to compare the two and knew what was going on then. He doesn't know whether he or Secretary Denby took up the contract of December 11, 1922, with the Judge Advocate-General's Department and had them go over it. It was considered by the Judge Advocate-General and certain changes were made in it in that office or recommended by that office. Witness' recollection is that this letter Exh. 164, requesting further instructions as to what storage facilities were to be provided on the west coast of the United States including the Hawaiian Islands was written by witness two or three days prior to the time witness received knowledge of the result of the studies that had been made that led to the increase in the Pearl Harbor proposition—and that when witness wrote that letter, he had in mind to get instructions with what he should go ahead, and thinks that on November 22 he got instructions. He doesn't remember that in the discussions with Mr. Doheny, and in the discussions that led up to the letter of November 29 he dis-

(Testimony of John Keeler Robison.)

cussed the fact that Mr. Doheny had the prior and preference right to any leasing on the reserve but this was well understood by the witness. He thinks that he had a discussion with Dr. Bain in December or November, 1922, just prior to the time of this contract and while it was under discussion, to the effect that the Navy would lease the whole reserve if they got enough for it.

Witness thinks he said that—and he indeed was responsible for that being done. When witness told the Interior Department to go ahead with the contract of December 11, he said in effect, "Well, the matter is settled—we are going ahead with the additional storage; the Navy Department badly needs additional storage at Pearl Harbor. It has been decided to go ahead at once with the additional project for 2,700,000 barrels of storage at Pearl Harbor." Witness thinks that is what he said because that is what he felt at the time and undoubtedly he was speaking freely and frankly with those people, but witness doesn't think he [713—630] ever said to anybody it was uncertain witness might hold his present position—that administrations change and if the matter is postponed, the requirement of storage may never be accomplished.

The question of whether the price of oil was going up or down, or whether a refinery on the Pacific coast might alter that over a period of months or years, wasn't a matter of great consequence to witness but did interest him because it was a matter of great consequence with the Do-

(Testimony of John Keeler Robison.)

henys with whom he was doing business. That was set forth in the November 6th memorandum, or the conversation of the 27th or both. It was of interest to them. It was of some interest to the Government although that is not the sort of business the Government is engaged in. It would not have been a reason for entering into this big contract at all. It didn't affect witness in the least so far as he knows.

Mr. Doheny, so far as witness knows, never requested a lease upon the whole reserve. In his memorandum of November 6 he did set forth on separate pages various portions of the reserve that might be included in such a lease, some of them including more sections and others less, and the more he got the more he gave us. He offered different terms for different additional leases. The last page contains very few sections and that page says "No pipe line." Witness presumes the other pages don't have such reservation.

It was then stipulated by counsel that these were different choices or different suggestions, and that the only one that had a notation on was the last one, in Mr. Anderson's handwriting which said, "No pipe line."

The controlling reason for that contract so far as the Government was concerned was not a question of price maintenance or price stabilization, but was that the Navy would get this storage project under way. To witness' mind this was the most important advantage. To the mind of the

(Testimony of John Keeler Robison.)

Secretary of Navy witness believes the most important advantage was that permanent security against drainage would be secured. Witness is unable [714—631] to state that, but to witness the most important advantage was the provision of security to the nation.

The proposition of November 6 suggests areas for lease on all or part of Reserve No. 1. It contemplates a leasing of area in No. 1. At the end of the discussion about terms there was no difficulty about the other matters in the memorandum except the terms of the royalties to be inserted in the lease. There were discussions of provisions to go into the lease. As to whether other terms went into the contract practically as they are in the memorandum, it is witness' recollection that the memorandum did not provide for so much storage on the Atlantic as the Navy secured in the contract and lease—or that the memorandum included all the ports that the Navy had in the final contract. The proposition made in the first of November—witness don't know whether it was one or one and a half million barrels on the West Coast, and witness don't remember which they finally got into the contract. He thinks they got one and one-half million barrels. Of course, there wasn't in early November any consideration of the 2,700,000 barrel stuff in Pearl Harbor. They came up after November 22d obviously.

The major difficulty in the lease was about the royalties. Mr. Anderson asked for a flat 12½ per

(Testimony of John Keeler Robison.)

cent royalty and insisted on $12\frac{1}{2}$ per cent to 20% He insisted on the Interior regulation royalty, whatever that is. He asked for a flat $12\frac{1}{2}$ per cent, and insisted that he couldn't do the entire job without loss at anything in excess of regulation royalties. Witness' position was one-seventh to he thinks 35 per cent. Witness received information from the Bureau of Mines where the calculations were made as to the effect of the schemes, and thinks that such a letter will probably be a matter of record in this trial, a report from Dr. Bain. Witness don't remember what the date of the report was, but he got the information prior to December 11th. [715—632] Witness thinks he sent it to witness after that date. He wanted to be sure that he had it in his files, because it was one of the things that witness had to have to justify himself in his own mind for accepting the royalties that they did accede to.

The memorandum dated December 9th, and the letter of December 11th, signed H. Foster Bain, were given the witness at that time. These memoranda were offered and received in evidence, the letter of December 9th being marked U. S. Exhibit 263, and the letter of December 11th being marked U. S. Exhibit 264.

(Testimony of John Keeler Robison.)

U. S. Exhibit 263 reads as follows:

U. S. EXHIBIT No. 263.

"December 9, 1922.

Memorandum for Secretary:

According to the best figures available in Washington the average production per well per day at present in Naval Petroleum Reserve No. 1 is 241 barrels.

Below is listed the operating wells by section and the total number of barrels per day from each group of wells. These figures may be only approximately correct since we do not have here accurate data as to Standard Oil and Pacific runs. I passed these approximate figures over to Admiral Robison and they seemed to meet his immediate needs. If it is desirable I will ask Campbell to get more accurate figures in California, though the Standard and Pacific may perhaps not wish to give us the details."

Then the sections and the wells and the production are given. "Total, 131 wells. Production, barrels, 31,638. Average 241 barrels. Respectfully, H. Foster Bain, Director."

1130 *Pan American Petroleum Company et al.*
(Testimony of John Keeler Robison.)

U. S. Exhibit 264 reads as follows:

U. S. EXHIBIT No. 264.

“December 11, 1922.

Rear Admiral J. K. Robison,
Room 2016 Navy Building,
Washington, D. C.

My dear Admiral:

I transmit herewith copy of a memorandum to Secretary Fall, dated December 9, regarding the present average daily production per well in Naval Reserve No. 1, and the area immediately adjacent.

Please advise me if you wish these figures worked up for a period extending over the past several years.

Cordially yours,

H. FOSTER BAIN,
Director.

Witness continuing: The summary working up the figures over a period of forty-seven months and dated December 30th, was not in witness' hands on the date of December 11th, but [716—633] this was and witness used the figures as to production and made his own guess as to the value of those royalties set forth in the contract, and witness had Doctor Bain and Mr. Ambrose each independently assure him that these were materially better royalties than the Interior Department schedule. Witness' calculation was done with a pencil and a piece of paper, but was not an engineering computation. It was sufficient, however, to corroborate the infor-

(Testimony of John Keeler Robison.)

mation that witness got from Bain. Witness thinks he could make a calculation on the average per well per day per calendar month, but did it a little bit differently to that. He had gotten other information that is not in that as to the fact that wells flow a little bit heavier to start with than they do after they have been running a year and a half. If one is leasing to exhaustion, as this lease was to be, there would not be a flush production during the fifteenth or twentieth year of the lease. The part that was really important to witness was to use the age of a well in connection with the production of it to see something about what the future might bring forth. Witness was concerned not so much with the immediate revenue as with the gross revenue to the Government. The immediate revenue would be heavier than the gross revenue with whatever system one used because the thing would run off as the wells got older. Witness went to Secretary Fall about the question of royalties. He does not think that at that time Mr. Doheny's agreement had been received, but it is witness' recollection that Mr. Fall told him that he had the old man's word for it and that he thought he would agree to it formally. From Secretary Fall's statement to witness, he and Mr. Doheny had been in personal contact on the subject and in discussion, and Mr. Fall said to witness he had gotten Mr. Doheny to agree that he would agree to a certain set of royalties which Mr. Fall handed to witness, and witness said he wanted bigger ones.

(Testimony of John Keeler Robison.)

The witness will have known at that time what royalties had been bid for small remaining tracts in No. 2 all surrounded by drillers, but does not know it now. There was 55 in No. 1—that was too high because it was one that involved a loss to the man who was drilling the well. They could not expect that to be repeated.

“Q. In speaking of the No. 2 leases I refer to the Titus leases let in June 1922, and the Equitable Petroleum Corporation lease let in July, 1922.

Mr. HOGAN.—1922?

Mr. ROBERTS.—1922, yes; five of them.

Mr. HOGAN.—I think they are in evidence.

Mr. ROBERTS.—Yes. I will get you the amounts of the royalties too. The Equitable Petroleum Lease runs from 12½ to 35 per cent in the case of oil both over and less than 30 degrees Baume. The Titus leases run from 12½ to 20 per cent—

Mr. HOGAN.—Is that up to date?

Mr. ROBERTS.—Yes, this is June 3, 1922. They run from 12½ to 20 per cent up to 100 barrels per day, and up to 69 per cent on production over 100 barrels a day in the case of oil over 30 degrees Baume, and 64 per cent for oil less than 30 degrees Baume.

Another Titus lease of the same date carries for oil over 100 barrels a day 71 per cent over 30 degrees, and 66 per cent under 30 degrees.

Another of the same leases carries 77 per cent for all oil over 100 barrels a day over 30 degrees

(Testimony of John Keeler Robison.)

Baume, and 72 per cent for all over 100 barrels a day under 30 degrees Baume.

Another Titus lease carries 69— [719—636]

The WITNESS.—For what capacity well was that?

Mr. HOGAN.—All of them from $12\frac{1}{2}$ to 20 per cent—

Mr. ROBERTS.—Up to 100 barrels.

The WITNESS.—For what capacity of well was it they were paying 69 per cent?

Mr. ROBERTS.—Well, that was untried land. That was the bid for a lease.

The WITNESS.—Well, in their bid. I just ask for information.

Mr. ROBERTS.—The testimony here shows that bidding was done in this way: The Interior Department fixed the amount of royalties that should be paid up to a 100 barrel well. Up to 20, $12\frac{1}{2}$ per cent; from 20 to 50 $14\frac{2}{3}$ per cent in cases under 30 Baume; from 50 to 100, $16\frac{2}{3}$ per cent; and then asked the bidder to say what flat royalty he would pay for all production over 100 barrels a day in any well. And the other figures I have read here are for that excess production of over 100 barrels a day."

Witness continuing, stated that he knew of the amounts of those leases, and while the figures were not quoted at the time the December 11th contract was being determined, these figures such as counsel had just read, the question of ability to get larger royalty was actively discussed and it was deter-

(Testimony of John Keeler Robison.)

mined that advertising should not be done. That is where the value came to the Pan American Company in bid B. Witness thinks at that time he made a mistake in the value to them of that preferential right. It was of real value to them then. Witness has not or did not have a calculation that he made of the relative royalties called Secretary Fall's compromise royalties and the regulation royalties. He made no calculations after the 30th of December. Throughout the whole transaction the general practice was for witness to prepare the policy letter that went over Secretary Denby's signature to the Interior Department in Naval reserve matters. Up to the end of December, 1922, cash was paid into the treasury for gas and casing-head gasoline that came out of the Naval reserve lands to California—in other words, the lessee who recovered gas or casing-head gasoline under the terms of his lease paid the royalty in whatever fiscal agent the United States designated to receive its moneys out here as cash. Witness thinks it was the contract of [720—637] December 11th covered for any wells drilled under that lease, but it did not cover prior wells on either the Pan American or any other leases. When that fact became known, there was a supplementary agreement by way of a letter exchange in which the gas and casing-head gasoline was to be used as an exchange medium for the contract for construction of storage and filling the same—the witness plugged that leak—in other words stopped that loss to the Navy.

(Testimony of John Keeler Robison.)

The Navy was not going to lose that cash to the treasury any more.

Witness does not know whether Secretary Fall had before him a copy of Mr Doheny's memorandum when Secretary Fall discussed Mr. Doheny's plan in the autumn of 1922 with witness. He does not remember seeing any memorandum sent by Mr. Doheny to the Interior Department at that time. In the November 6th letter, or whether in that October conference, the 27th of October, the Interior Department communication was referred to and in one of them he furnished witness a copy of it.

The plan for increased storage facilities was purely a naval matter, but Secretary Fall did say to witness when he discussed Mr. Doheny's plan with regard to naval reserves that he thought that plan was valuable both to the Navy and to Mr. Doheny, or would prove valuable to both of them. He was of the opinion that the suggestions offered by the Pan American Company through Mr. Doheny were not without merit from the Government's point of view.

Witness does not of course know how much or how often Secretary Fall and Mr. Doheny were in conference about this plan. Witness has knowledge of record as to the ability of the Navy to buy fuel oils and petroleum products at less than the current market price. Frequently the Navy has been able to do better than the quoted market price on fuel oil and matters of that kind. Fre-

(Testimony of John Keeler Robison.)

quently they have been able to buy petroleum products below the posted market price. It depends upon the condition of the [721—638] market. Usually with a firm market the demand for large quantity requires the payment of a premium, and in a falling market the demand for a large quantity enables you to get a price concession. During the war the conditions were widely variable. Immediately subsequent to the war the Navy was as it appears of record hampered by some hang-over war contracts that caused them to pay \$3.25 a barrel for fuel oil on the east coast so that during the period witness has been most familiar with the oil situation the matter has been rather a troubled one. Witness thinks the war is not yet over in that business.

When witness discussed this matter with Mr. Do-heny and he said that this would require the advance of a very large amount of money, witness argued to him that if he did not get that money out of the royalty, he would of course get it by act of Congress. There was no suggestion then made either by him or witness that that matter could be assured by going to Congress and having Congress authorize the contract. Witness thinks he had made plain to him prior to that time the urgent necessity of the accomplishment of the proposition at Pearl Harbor without delay.

It is a fact, of course, that the Pan American Company paid for facilities that belonged to the United States, and the Government agreed to pay

(Testimony of John Keeler Robison.)

it interest—that is, to pay the Pan American Company interest on the loan. That is what it amounted to. The Government collected interest on it. The witness expects that the Government was agreeing to pay compound interest in the contract of December 11, 1922—the Government collected compound interest, he believes, on all payments made to the Pan American Petroleum & Transport Co. in the early part of the contract. For a few months at the beginning of the contract of April 25, 1922, the Government was advancing by turning over more royalty. Witness thinks the Government must be very much their debtor at this time. The contract provided that Mr. Doheny's company would pay the Government [722—639] compound interest if the balance were in favor of the Government. The witness' recollection is that the contract provided for compound interest at 5%. The contract will speak for itself though in that respect. He thinks it does. Computed on monthly balances.

The discussion as to royalties consummated on December 8 in the final agreement to the so-called compromise royalties that Secretary Fall had turned over to witness—the papers enabled witness to fix the date, of course, and not his recollection, but he can fix it on the 6th of December—the contract was already roughly drafted at that time. It was expected confidently that they would be able to come to an agreement, and witness expected that he would get Mr. Doheny to lift the lowest royalty

(Testimony of John Keeler Robison.)

to one-seventh, but he didn't do it.

When witness reported the matter to Mr. Denby, Mr. Denby asked witness whether he had gotten the best bid he could and witness said he had, and Mr. Denby said to go ahead and close it. There was no discussion then about advertising. There was a discussion as to whether a better proposition could be had from other people, and witness told Mr. Denby that he did not believe the Government could get a better proposition than it was getting or witness would not recommend the acceptance of that. Witness didn't think Mr. Denby said, "Have you tried to get a better proposition from anybody else?" or anything of that kind. Witness don't think Mr. Denby asked witness whether witness had made any inquiry amongst the oil people as to whether he could do any better. Mr. Denby merely said to witness, "Do you think you have done the best you can" or words to that effect—it was of somewhat greater length, of course. Witness can't remember any more than he can remember—that is all—and that is all that he can remember.

The witness on being asked the day before about the proposition of the American Oil Engineering Company, said that proposition he laughed at. He didn't think he had to investigate [723—640] it much—he thought it was foolish because those people put a proposition in that witness understands as follows:—and it was upon his understanding of their proposition that he laughed. Their proposition said they would go ahead and drill the Navy

(Testimony of John Keeler Robison.)

some wells and dispose of the oil for the Navy as witness recalls it, and the Navy was to repay them all their cost and give them 12½ per cent royalty not on enough oil to repay their costs, but on the gross output of the wells forever. In other words it looked to the Navy as if the American Oil Engineering Company were risking nothing and that—they asked the Navy—they were going to drill in accordance with the Navy's plans. They did not furnish the Navy with anything except supervisory work. It looked as if it was a question of "You give me one-eighth of the naval reserves and I will say 'Thank you.' " That is the way it looks to the witness who thinks he has thoroughly stated that proposition. In the first place the company agreed to drill whatever wells the United States asked should be drilled and to look to whatever came out of the ground to reimburse them so that if they drilled dry holes they lost. [724—641]

Mr. Denby had a fixed idea that the immediate necessity was the drilling of offset wells where they were required. Witness thinks that it was his idea to keep as much of the oil in the ground as long as he could, and the policy of his department was fixed by him. Witness understood that the policy when the reserves were created was to retain as much of the petroleum as could be retained in the ground against some time when petroleum would become so scarce or so dear that the United States would need to drill on this reserve supply. The policy that was adopted in

(Testimony of John Keeler Robison.)

building this tank storage resulted in that with each barrel of oil that came out of the reserve there the Government got, let us say, one-fourth, or 30 per cent, if the royalty was high enough, and the person who drilled the reserve got the balance, and of the royalty oil that the Government got, this 30 per cent, or 25 per cent, or whatever it would be, approximately two-thirds—it is a little bit nearer 55 and 45 witness thinks—was spent for physical facilities at Pearl Harbor, and one-third was spent for fuel oil to go into it. What witness wants done if he can get it done, is that if all of the oil was to be kept, Congress could have appropriated the money to build the storage and all of the oil could have been kept [725—642] for the Navy's use, either under or above ground. Witness did not go to Congress to get it done in this instance.

Redirect Examination.

On redirect examination by Mr. HOGAN, the witness testified:

When witness said, in answer to one of Mr. Roberts' questions, that this contract was not ordinary but that it was extraordinary and unusual at that time and place, witness meant the circumstances of the particular period and the particular location were unusual and extraordinary. The fuel storage project at Pearl Harbor is the one witness is referring to.

Referring to witness' answer in cross-examination that along in April, 1922, and prior to the

(Testimony of John Keeler Robison.)

time when Secretary Fall sent Secretary Denby the former's letter of April 12, 1922, suggesting an amendment to the then pending naval appropriation bill, Secretary Fall said to witness prior to the writing of that letter, that he feared the Government would not get satisfactory bids because of doubts which "these people" had on the subject—witness stated that Bain had come back and made his report to Fall. It may be that after he got back subsequent information was received by Secretary Fall. Witness did not get such information, but may have known that such information was received. He does not recall now.

When Secretary Fall spoke to witness about the fear that satisfactory bids would not be obtained on the date the bids were opened because of the doubts "these people" had been expressing on the subject of the legality or feasibility of the plan, the people that he talked to witness about, witness presumes, were Mr. Sutro and the other gentlemen to whom Mr. Roberts invited witness' attention, and whose names he did not know.

With respect to the negotiations which led up to witness' agreeing to the schedule of royalty which is set forth in the December 11th lease with the Pan American Company, the agreement which was being made to provide these other facilities and the contemplated supplementary contract for the extension of Pearl Harbor, had a very considerable effect upon witness in agreeing to that scale of royalties because as set forth in the mem-

(Testimony of John Keeler Robison.)

orandum introduced in evidence here, the value of these facilities to the Navy was estimated by witness at a very considerable sum. [726—643]

When witness determined, as witness told Mr. Roberts, to go ahead and accept that scale of royalties without going out and advertising and seeking competition on the lease alone, these factors had the effect of persuading witness that the royalties included in the lease had an effective value somewhat in excess of the listed value, because of the value to the Navy of the special facilities or services, not measured in terms of royalty but offered by the terms of the contract and the lease of the 11th of December.

Witness knows what the experience of the Navy was in the summer of 1924 on the Pacific Coast when it sought bids for the furnishing here at San Pedro of two million barrels of fuel oil. They got it for 10% below the market price from the Pan American Company. The market price at that time was \$1.40 witness thinks and it is his recollection that the contract was made at \$1.26, and that the Standard and the Associated bid \$1.40.

Recross-examination.

On recross-examination, the witness testified as follows:

Witness did not say that he thought it was all right to cut down the royalties in that December 11, 1922, lease below what witness thought they ought to be because of the other things the Government was getting, but witness thought the other

(Testimony of John Keeler Robison.)

things were a part of the real royalty the Government was receiving. Witness considered those were part of the royalties the Government received from the contract. Witness did not add any amount to each tract for those other things—a fixed amount was of course impossible. There is in evidence a memorandum which witness made at that time wherein he considered that subject had presented it to the Secretary of the Navy, and that would be what witness thought then, so it is a good deal better than what witness thinks now. [727—644]

Thereupon it was stipulated and agreed by counsel for the parties that in response to the invitation for bids on Sections 2, 6 and 25, testified to by the witness Finney, that said witness had, complaint to request made of him while testifying, furnished certified copies of bids received for leases on said Sections 6 and 25, of Reserve No. 1; that the same were bulky and, therefore, counsel for the defendants have agreed that there may be received in evidence as exhibits the following memoranda, which contain the salient facts relating to said bids, and the said memoranda were thereupon received in evidence as Defendants' Exhibits "B5" and "C5," and they read, respectively, as follows:

DEFENDANTS' EXHIBIT "B5."

MEMORANDUM RE BIDS SECTION SIX

31-24 NAVAL RESERVE NO. 1.

Request for bids was sent to Union Oil Company, General Petroleum Company, Pan American Petroleum & Transport Company, Associated Oil Company, Pacific Oil Company and Standard Oil Company of California.

The Government fixed the royalty for oil of 30° and under at 12½ per cent up to 20 barrels, and 16⅔ per cent over 20 to 50 barrels, and for oil less than 30° Baume at 12½ per cent for wells up to 20 barrels, and 14⅔ per cent between 20 and 50 barrels, and the bidding consisted in the royalty offered for wells over 50 barrels.

Two bids were received, as follows:

	Less than 30°	Over 30°
General Petroleum	50-100 bbls. 16⅔ per cent	20 per cent
	Over 100 bbls. 20	25
Standard Oil Co.	50-150 bbls. 16⅔ per cent	20
	Over 150 bbls. 25	25

The Standard Oil Company bid on this tract in Section 6 contingent on their receiving lease for the tract bid upon in Section 2, and as they were not high bidder on Section 2, therefore their bid on Section 6 was eliminated, leaving only one bid received to be considered on this section, that of the General Petroleum, which was 16⅔ and 20 per cent for 50 to 100 barrels, and 20 to 25 per cent for over 100 barrels."

DEFENDANTS' EXHIBIT "C5."

"MEMORANDUM REGARDING BIDS SECTION 25-30-23 NAVAL RESERVE No. 1.

The Government fixed the royalty at $12\frac{1}{2}$ per cent for wells not exceeding 20 barrels, and the bidding consisted of offers of royalty on wells over 20 barrels. There were only two bids received, as follows: [728-644-A]

General Petroleum Company	Less than 30°	Over 30°
20 to 50 bbls.	14 $\frac{2}{7}$ per cent	16 $\frac{2}{3}$ per cent
50 to 100 bbls.	16 $\frac{2}{3}$	20
Over 100 bbls.	20	25
Standard Oil Company		
20 to 50 bbls.	14 $\frac{2}{7}$ per cent	16 $\frac{2}{3}$ per cent
50 to 150 bbls.	16 $\frac{2}{3}$ per cent	20
Over 150 bbls.	25	25

The Standard bid on this tract was conditioned on their receiving lease in Section 2-31-24, and as they were not high bidder for the latter tract, there was only one bid received and considered for this tract in Section 25, that of the General Petroleum Company, which ran up to 20 and 25 per cent for wells over 100 bbls.

It was recommended by Bain and approved by Finney to Fall February 4, 1922, that no lease be granted on either Section 6 or 25 in view of the unsatisfactory bids the fact that half of the proposed lease in Section 6 was within the temporary reserve to be arranged with P. O., and 'in the light of additional information gathered while in California.' " [729-644-B]

Thereupon, the following stipulation entered into by the parties, acting by their respective solicitors, was read in evidence, the plat referred to in said stipulation being marked Defendants' Exhibit "E5,"

and the same being annexed to this statement of the evidence:

"Beginning October 30, 1919, the Standard Oil Co. of California drilled eighteen (18) wells in two rows of nine (9) each, located approximately as shown on the attached plat, across the southern end of Sec. 36, T. 30 S., R. 24 E., immediately adjoining Naval Reserve No. 1 California, the south line of said wells consisting of (from west to east) wells Nos. 4, 5, 8, 14, 15, 29, 30, 31 and 17, and the north line of said wells consisting of (from west to east) wells Nos. 2, 1, 3, 9, 16, 32, 33, 34, and 25.

The respective dates upon which each of these wells was brought into production, the respective daily initial production of each well, the total production of each well from the time of its being brought in up to March 31, 1924, and the total production of these eighteen wells up to March 31, 1924, is set forth in the following table: [730—645]

Well No.	Date Started producing	Daily Initial production	Production to March 31, 1924
4	9- 7-1920	5,402	1,439,555
5	8-26-1920	4,723	969,158
8	11-25-1920	5,950	1,374,850
14	1-22-1921	4,000	810,930
15	4- 3-1921	2,073	508,425
29	5-22-1921	1,628	257,462
30	8-24-1921	270	76,476
31	8- 6-1921	204	123,891
17	3-16-1921	2,900	285,354
2	9-12-1920	1,500	377,085

vs. United States of America.

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Well No.	Date Started Producing	Daily Initial Production	Production to March 31, 1924
1	2-12-1920	6,000	2,009,497
3	7-22-1920	6,000	1,752,419
9	11-21-1920	5,500	1,259,066
16	8-18-1921	200	103,113
32	5-20-1921	1,540	273,807
33	7-23-1921	287	118,147
34	8-23-1921	227	117,780
25	2-26-1921	3,896	406,587
Total			12,374,366

Beginning March 30, 1920, the Pacific Oil Company drilled seventeen (17) wells located approximately as shown on attached plat. The wells in question are in the southern end of Section 35, T. 30 S., R. 24 E., immediately adjoining Naval Reserve No. 1, California, the south line of said wells consisting of (from west to east) wells Nos. 11, 13, 14, 15, 16, 17, 18, 19 and 21, and the north line of said wells consisting of (from west to east) wells Nos. 9, 49, 51, 52, 54, 55, 57 and 22.

The respective dates upon which each of these wells was brought into production, the respective daily initial production of each well, the total production of each well from the time of its being brought in up to March 31, 1924, and the total production of these seventeen (17) wells up to March 31, 1924, is as set forth in the following table:

Well No.	Date Started Producing	Daily Initial Production	Production to March 31, 1924
11	April 21, 1922	408	116,747
13	Aug. 29, 1922	568	138,595
14	Mar. 28, 1922	895	185,811
15	June 9, 1922	71	32,017

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(Testimony of John Keeler Robison.)

Well No.	Date Started producing	Daily Initial production	Production to March 31, 1924
16	Jan. 13, 1923	63	30,231
17	Ja. 7, 1923	WW Abandoned	
18	Aug. 1, 1921	372	166,929
19	Aug. 3, 1921	67	146,596
21	Aug. 23, 1920	3,763	810,498
9	Aug. 11, 1922	1,066	270,477
49	Jan. 14, 1922	170	246,816
51	Oct. 12, 1922	246	49,270
52	Aug. 13, 1921	1,451	416,865
54	Dec. 12, 1921	564	108,170
55	Apr. 28, 1921	1,486	455,987
57	Oct. 14, 1920	2,651	803,545
22	July 26, 1920	4,889	877,771
Total			4,856,325

Beginning September 5, 1921, the Pan American Petroleum Co. and the United Midway Oil Land Co. (the latter on land now held by the Pan American Petroleum Company), drilled fourteen (14) wells, in two rows, located approximately as shown on the attached plat, [731—646] across the north end of Sec. 1, T. 31 S., R. 24 E., in Naval Reserve No. 1, California, the north line of said wells consisting of (from west to east) wells Nos. 4H, 3H, 2H, 1H, 1D, 2D, 3D, 4D, and 5D, and the south line of said wells consisting of (from west to east) wells Nos. 5H, 6D, 7D, 8D and 9D.

The respective dates upon which each of these wells was brought into production, the respective daily initial production of each well, the total pro-

duction of each well from the time of its being brought in up to March 31, 1924, and the total production of these fourteen (14) wells up to March 31, 1924, is as set forth in the following table:

Well No.	Date Started producing	Daily Initial production	Production to March 31, 1924
4 H	Jan. 14, 1922	783	142,293
3 H	May 3, 1922	50	161,456
2 H	Nov. 8, 1921	885	722,464
1 H	Sept. 30, 1921	108	74,071
1 D	Oct. 7, 1921	291	71,830
2 D	Oct. 8, 1921	222	56,789
3 D	Nov. 4, 1921	303	39,694
4 D	Nov. 10, 1921	243	71,428
5 D	Jan. 31, 1922	228	56,944
8 H	Oct. 26, 1921	185	25,737
6 D	Dec. 5, 1921	218	42,580
7 D	Nov. 28, 1921	142	28,763
8 D	Jan. 2, 1922	260	43,938
9 D	Mar. 12, 1922	132	23,728
Total			1,561,625

Beginning March 22, 1922, the Pan American Petroleum Company drilled fifteen (15) wells, in two rows, located approximately as shown on the attached plat, across the north end of Sec. 2, T. 31 S., R. 24 E., in Naval Reserve No. 1, California, the north line of said wells consisting of (from west to east) wells Nos. 9F, 8F, 7F, 6F, 5F, 4F, 3F, 2F, and 1F, and the south line of said wells consisting of (from west to east) wells Nos. 18F, 17F, 16F, 15F, 14F, and 10F.

The respective dates upon which each of these wells was brought into production, the respective daily initial production of each well, the total production of each well from the time of its being brought in up to March 31, 1924, and the total production of these fifteen (15) wells up to March 31, 1924, is as set forth in the following table:

Well No.	Date Started producing		Daily Initial production	Production to March 31, 1924
9 F	July	7, 1922	459	140,731
8 F	July	7, 1922	239	46,618
7 F	June	6, 1922	981	182,454
6 F	June	6, 1922	603	226,980
5 F	May	20, 1922	1,230	262,144
4 F	May	28, 1922	120	19,069
3 F	Jan.	27, 1923	351	57,365
2 F	July	4, 1922	127	72,102
1 F	July	4, 1922	31	11,547
18 F	Aug.	8, 1922	403	78,447
17 F	July	21, 1922	600	162,340
16 F	Nov.	6, 1922	44	63,584
15 F	Feb.	24, 1924	130	5,029
14 F	July	31, 1922	150	28,883
10 F	Sept.	28, 1922	126	61,264
Total				1,418,539

[732—647]

Thereupon the following stipulation entered into by the parties, acting by their respective solicitors, was read in evidence:

“The following is a true, correct and accurate statement of wells drilled upon the lands herein-

after described within the exterior boundaries of and adjacent to Naval Petroleum Reserve Number One, California, in the years stated and by the companies stated:

Section 36, Township 30 south, Range
23 East

Section 31, Township 30 South, Range
24 East

Section 27, Township 30 South, Range
24 East

Section 26, Township 30 South, Range
24 East

Section 35, Township 30 South, Range
24 East

Section 36, Township 30 south, Range
24 East

Section 31, Township 30 South, Range
25 East

Number		By whom drilled
Date drilled	wells drilled	
1921	10	Standard Oil Co.
1921	6	Pacific Oil Co.
1922	3	Pacific Oil Co.
1923	2	Pacific Oil Co.
1924	5	Pacific Oil Co.
1921	2	Union Oil Co.
	2	Associated Oil Co.
1922	4	Union Oil Co.
	2	Associated Oil Co.
1924	2	Standard Oil Co."

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1924	3	Associated Oil Co.
1921	19	Pacific Oil Co.
1922	13	Pacific Oil Co.
1923	7	Pacific Oil Co.
1924	11	Pacific Oil Co.
1921	28	Standard Oil Co.
1924	1	Standard Oil Co.
1921	13	Standard Oil Co.
1924	2	Standard Oil Co.

[733—647-A]

Thereupon there was offered and received, as Defendants' Exhibit "F5," letter dated New York, July 16, 1921, addressed to Secretary of the Interior Fall, at Washington, and being a reply to letter from Mr. Fall to Mr. Doheny, dated July 18, 1921, which is Plaintiff's Exhibit No. 12. Defendants' said Exhibit "F5" reads as follows:

DEFENDANTS' EXHIBIT "F5."

"My dear Secretary:

I received your letter and want to protest that I have done nothing that anyone knowing your disposition for fairness would not do under the circumstances. Nevertheless I want to express my appreciation for the complimentary way in which you mentioned me to the 'big chief.'

I note by the morning papers that Green and I are responsible for the latest revolt in Mexico. They have not even paid me the compliment of associating me with your good self this time, and I am sore about it. It is however just as false as if they had

said that the U. S. Government *was* behind it all. What won't those fellows charge up to the 'Huasteca' Company and its officials?

I am glad Mrs. Fall is to meet us at Albuquerque and remain until you reach L. A. on your trip. When do you start?

I hope you will have good weather for the visit to the parks and will have some leisure when you arrive in Los Angeles.

We will take good care of Mrs. Fall and the grandchild.

Don't work too hard this Summer, save yourself for some other day—Best regards, Be good, God Bless you. Adios.

Your friend,

E. L. DOHENY."

There was thereupon offered and received in evidence, as Defendants' Exhibit "G5," letter dated December 6, 1922, from E. L. Doheny to Albert B. Fall, the same being reply to Plaintiff's Exhibit No. 142; said Exhibit "G5" reads as follows:

DEFENDANTS' EXHIBIT "G5."

"My dear Mr. Secretary:

Upon going over accumulated mail on my desk, after my return several days ago, from my trip to Alaska, I find your letter of July 28th, confirming your telegram of that date, and now send you this belated acknowledgment.

I am greatly pleased to note that the authority which you gave to your representative at Bakers-

field, Mr. Campbell, has worked out some good results in connection with the temporary flood of oil which has increased the production beyond the capacity of the refineries in this State. The need for storing this surplus is undoubtedly the cause of the decrease in the price of oil, inasmuch as oil purchased in excess of the capacity of the refinery must be stored by the purchaser at a cost of 35¢ to 50¢ per barrel over the cost of such oil as may be treated immediately and find its way into the market. [734—648]

In connection with this situation I have developed some ideas which I desire to place before you, which I think will work out to the advantage of the Government and the oil producers, generally, in this State. I am preparing a statement of the situation here and of the plan which I would like, under certain conditions, to undertake to carry out, which will give relief of a substantial character and provide additional market for the flush, unrestricted production of the oil fields here.

I had a very wonderful trip to Alaska, enjoying the pleasure of sailing in the quiet waters of those inland seas for nearly a month. I was not looking for anything except rest, and I had a very tranquil period of absolute rest which was not coupled with any anxiety about any particular matter, although the oil situation in California had been completely upset and dislocated prior to my leaving there.

Mrs. Doheny and I both wished that you and Mrs. Fall could have been with us on the trip. Except

for the fogs and rain, which were considerable, no more *ideal seas could be found* for an enjoyable cruise. There was no possibility of sea-sickness as the waters were absolutely at rest wherever we went. The duty of looking out for hidden rocks and swift currents devolved upon the officers of the ship who were perfectly competent. A very wise and capable pilot had control over the helm at all times and we rested in perfect security, floating on the bosom of the waters and enjoying the sensation of looking on new scenes whenever it was light enough to observe.

You were often in our minds while we were enjoying this period of absolute leisure. There is much in Alaska to recall to the minds of the old prospector the events of the stirring times between 1880 and 1910 when that country was the mecca of all of those who respond to the lure of gold. My mind often reverted to the time when I too carried a pack and followed the winding trails which it was hoped would lead to the rainbow's end.

We bought a totem pole seventeen feet high which now graces our lawn at the Ranch.

Mrs. Doheny bought for Mrs. Fall a potlash bowl, in which the presents which are made to some favored member of a tribe are supposed to be put when they are properly used as the receptacle for the gifts of friends. She will be bringing it on to her when we come east next month.

Viewed from the standpoint of the prospector, we certainly followed the long, long trail. We

visited glaciers on land and sailed among the icebergs detached from the glaciers at sea. We listened to the stories of the old prospectors who went up the Stikine in the early '70's and followed the excitement attending the discovery of the Cassiar and Cariboo Placers. These names fell from the mouths of prospectors sitting around the campfires of the early '70's, and many a story I have heard of those trying times which tried not only men's souls but also their feet soles and their shoulders.

I am beginning to get garrulous, however, and I had better close this by saying that I had a splendid rest among the memories of a departed army of fellow-goldseekers, and that I have returned full of ginger and the desire to continue the work of development to which I have dedicated myself.

Hoping to see you at a not distant date and to find that your health and that of Mrs. Fall has been good, and that everything you are connected with is 'panning' out as [735—649] you would like, I remain with very best wishes, in which Mrs. Doheny joins me.

Yours very sincerely,

E. L. DOHENY.

N. B.—Mrs. D. tells me she forwarded the potlash bowl from Juneau.

E.L.D."

Thereupon, as Exhibit "H5," there was received in evidence a stipulation regarding the progress of the Pearl Harbor construction work, the delivery of all oil required under contract of April 25, 1922,

in which the tanks constructed at Pearl Harbor, and the cost thereof, and the value of oil received by the Pan American Company on account of the contract, to the date of the trial; the said exhibit is not set forth herein, as all of the figures and facts stipulated therein are hereinafter covered by the testimony received by the court after the filing of the memorandum opinion, on May 28, 1925, which said testimony was heard by the court July 11, 1925.

Thereupon defendants offered in evidence letter addressed to the President of the United States, White House, Washington, dated New York, March 8, 1924, signed E. L. Doheny; and counsel for the defendants having stated to the court that it was agreed that the proffer therein made may be considered as binding upon the defendant company, the same was received in evidence as Defendants' Exhibit "J5," and is as follows:

DEFENDANTS' EXHIBIT "J5."

"Dear Mr. President:

The Pan American Petroleum & Transport Company has received from the Government's attorneys, Messrs. Pomerene and Roberts, a letter in which they state that the matter of the legality of the Company's contract with the Government under which the storage facilities for naval fuel oil are being constructed at Pearl Harbor, Hawaii, has been referred to them, and that 'under present conditions we cannot advise the officers of the United States to issue any vouchers under this contract.' The Com-

pany has received no vouchers for work done since November, 1923, although the work has proceeded uninterruptedly and since that date the naval officer in charge at Pearl Harbor has issued certificates stating that work has been done during this period to the value of \$790,000.00, and the Company has made payments to its sub-contractors accordingly.

The primary reason for our company undertaking this work at actual cost without profit was because I personally [736—650] had been apprised of the necessity for this naval fuel supply station in connection with the Navy's plans for defense of our West coast, and I had promised that our Company would submit a bid to do the work and take its pay in crude oil which was then being produced in California Naval Reserves, such oil, although having been set aside for navy use, had theretofore been sold by the Government for cash which was turned into the Treasury without benefit to the Navy.

The necessity of providing for the adequate defense of the Pacific Coast, to aid which was the chief reason for my being willing that our Company should undertake this work exists today as it did then. I venture to assert that there is no question in the minds of naval officers that this fuel station should be completed.

The original project at Pearl Harbor for the storage of 1,500,000 barrels of fuel oil has been completed and the oil is in the tanks.

The additional project comprising nearly 3,000,000 barrels of storage for fuel oil and other naval

fuel is about 7/10ths completed but is useless in its present unfinished state, and to stop work on it would cause irreparable loss and leave the Navy with an uncompleted plant of no benefit whatever to it instead of perhaps the finest fuel station in the world. Approximately \$7,500,000 has already been expended on this naval fuel base and to complete the construction, as at present planned, will cost approximately \$2,000,000 more.

I have arranged that our Company, unless it is otherwise directed by you or by the Navy, shall proceed with the construction of this station to completion irrespective of whether, during the pendency of the suit which I understand is to be brought to test the legality of the contracts, the officers of the United States do or do not issue to the Company vouchers for the work done. The Company has undertaken to do this upon my personal guarantee that it will be saved from any possible loss due to the continuance of this work.

Respectfully,

E. L. DOHENY."

Thereupon, counsel for the defendants stated: "The Pan American Petroleum & Transport Company and the Pan American Petroleum Company, defendants in this action, here and now, at the bar of this court, tender themselves, severally and jointly, as ready, willing and able to perform all the obligations of the contracts and leases which are in issue in this suit."

There was thereupon presented to the court a

subpena duces tecum, issued out of this court on October 9, 1924, to Honorable Curtis D. Wilbur, Secretary of the Navy of the United States, at Washington, District of Columbia, and served on the said Curtis D. Wilbur as shown by the return [737—651] thereon, in the said City of Washington, on the 14th day of October, 1924, summoning the said Curtis D. Wilbur to appear as a witness for the defendants at the trial of this cause, and to bring with him the following documents:

“(1) Letter from the Chief of the Bureau of Engineering to the Secretary of the Navy via Chief of Naval Operations on the subject of storage of reserved fuel oil, signed by J. K. Robison, and undated, but written on or about November 20, 1922. (2) Paper, dated November 21, 1922, and headed first endorsement from Chief of Naval Operations to Chief of Bureau of Engineering upon the subject of reserve storage facilities for petroleum products signed by A. H. Robertson, acting and containing information regarding quantity and location of reserve storage facilities provided for in the approved war plans. (3) Paper headed second endorsement, dated November 21, 1922, from the Secretary of the Navy to the Board for Development of Naval Yard Plans on the subject of fuel oil storage at Pearl Harbor, signed Edwin Denby, and advising that the department of the Navy had approved the change in the amount of the reserve of fuel oil at Pearl Harbor from 250,000 to 625,000 tons. (4) Paper, dated November 22, 1922, headed third en-

dorsement, from the Bureau of Yards and Docks to the Board of Development Navy Yard Plans, signed R. E. Bakenhaus, Assistant, and relating to the same subject as paper referred to in Paragraph (3) *supra*. (5) Paper headed fourth endorsement, dated Headquarters Marine Corps, November 27, 1922, signed John A. Lejeune, relating to the same subject as paper referred to in Paragraph (3), *supra*. (6) Paper headed November 22, 1922, to the Bureau of Yards and Docks, signed J. K. Robison, on the subject of increase in reserve storage facilities at Pearl Harbor. (7) Undated memorandum entitled 'Memorandum for Secretary of the Navy' on subject of fuel oil storage Pearl Harbor contract #4650, and 'Reference (a) Bureau letter #4650, dated October 24, 1922' signed by L. E. Gregory, Chief of the Bureau, together with the Bureau's letter, dated October 24, 1922, referred to in the above quoted reference, and any endorsements on or relating to said letter of said L. E. Gregory of October 24, 1922, which is the subject of the above quoted reference. (8) Letter written on or about September 26, 1922, from the Navy Department to the Interior Department asking for information on the subject of the availability of petroleum products on the Pacific. (9) Reply from the Interior Department to the Navy Department to letter last above mentioned in Paragraph (8), *supra*. (10) Communications, dated on or about September 15, 1920, addressed to the Secretary of the Navy, or to Chief of Operations of the

United States Navy, signed by Albert Gleaves, Rear Admiral U. S. N. (11) Cablegram or wireless message, dated on or about January 26, 1921, or January 27, 1921, addressed to the Secretary of the Navy, or to the Chief of Operations, and signed by said Albert Gleaves. (12) Letter dated on or about January 26, 1921, or January 27, 1921, addressed to the Secretary of the Navy or to the Chief of Operations, and signed by said Albert Gleaves. (13) Report signed L. C. Richardson, Commander, U. S. N. of the 'U. S. Steamship Albany' transmitted with the last mentioned [738—652] letter of said Albert Gleaves. (14) Circular or bulletin issued by the Intelligence Office of the United States Navy some time in June or July, 1921, containing excerpts from the above mentioned letter of said Albert Gleaves dated September 15, 1920. (15) All cablegrams, wireless messages, telegrams, letters, memoranda, reports or other papers or communications addressed to the Secretary of the Navy or the Chief of Operations of the United States Navy, signed by Albert Gleaves, Rear Admiral, U. S. N., between September 15, 1920, and March 31, 1921."

There was then presented to the Court the response made by the said Curtis D. Wilbur to the foregoing *subpena duces tecum*, which said response (omitting name of court and title of the cause thereof) is as follows:

"*In re subpoena (duces tecum)* directed to Curtis D. Wilbur by the Honorable Paul J.

(Testimony of John Keeler Robison.)

McCormick, Judge of the District Court of the United States for the Southern District of California on the 9th day of October, 1924.

Curtis D. Wilbur, Secretary of the Navy, hereby certifies that he has examined the above mentioned *subpoena (duces tecum)* and the papers therein described, and that all of the papers described in Paragraphs Numbered (2), (6), (8), to (14) inclusive of the said *subpoena (duces tecum)*, and certain of the papers described in Paragraph Numbered (15) of the said *subpoena (duces tecum)* consisting of forty-five (45) despatches, fifty-one (51) letters with accompanying endorsements and enclosures; fifty (50) reports and five (5) memoranda addressed to the Secretary of the Navy or the Chief of Naval Operations of the United States Navy by Albert Gleaves, Rear Admiral, United States Navy, between September 15, 1920 and March 31, 1921, all of the aforesaid papers being found among the official files and records of the department of the Navy, are of the confidential nature, containing matters of importance to the nation, the disclosure of which would in his opinion be injurious to the public interests and would prove prejudicial to the government. And the said Curtis D. Wilbur as Secretary of the Navy therefore respectfully represents that he is not at liberty to furnish to the court the aforesaid confidential papers and prays that your Honorable Court will hold him excused from complying with the aforesaid *subpoena (duces tecum)* in respect of the aforesaid papers forming

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part of those described in the said *subpoena (duces tecum)*.

CURTIS D. WILBUR,
Secretary of the Navy."

There was next presented to the Court certificate of the Secretary of State of the United States, annexed to the foregoing response, as follows: [739—653]

"Department of State,
Washington.

November 1, 1924.

This is to certify that I have read the statement of the Honorable Curtis D. Wilbur, Secretary of the Navy, in response to the *subpoena (duces tecum)* directed to him by the Honorable Paul J. McCormick, Judge of the District Court of the United States for the Southern District of California on the 9th day of October, 1924, in the case of United States of America, plaintiff, vs. Pan American Petroleum Company, a corporation, and Pan American Petroleum and Transport Company, a corporation, defendants (Equity No. B 100 M). I have also caused an examination to be made of the papers described in Paragraphs Numbered (2), (6), (8) to (14) inclusive of the said *subpoena (duces tecum)*, and certain of the papers described in Paragraph Number (15) of the said *subpoena (duces tecum)* consisting of forty-five (45) despatches, fifty-one (51) letters with accompanying endorsements and enclosures, fifty (50) reports and five (5) memoranda addressed to the Secretary of the Navy

or the Chief of Naval Operations of the United States Navy, by Albert Gleaves, Rear Admiral, United States Navy, between September 15, 1920, and March 31, 1921. I concur in the view of the Secretary of the Navy that the disclosure of the contents of these papers would be incompatible with the public interest.

CHARLES E. HUGHES,
Secretary of State."

Thereupon, by agreement of counsel for the parties, the Court ordered that the said Curtis D. Wilbur be discharged from further obligation to respond to the aforesaid *subpoena duces tecum*.

The defendants thereupon rested their case in chief. [740—654]

REBUTTAL EVIDENCE OFFERED BY
PLAINTIFF.

Testimony of John McPeak, for Plaintiff (In Rebuttal).

JOHN McPEAK, called as a witness on behalf of the plaintiff, testified that he is, and in January 1922, was, secretary of the Union Oil Company of California; that he is familiar with the records of that Company; that in January, 1922, there were 500,000 shares of its stock outstanding; that not more than a dozen of those shares were in foreign ownership, in the ownership of stockholders not living in the United States; not more than a dozen individuals, and their holdings represented about a couple of thousand out of the 500,000 shares.

(Testimony of John McPeak.)

Cross-examination.

Witness McPeak on cross-examination testified that the Union Oil Company of which he is secretary, is incorporated under the laws of the State of California; that there is a Union Oil Company incorporated under the laws of the State of Delaware that owns 130,859 shares of the 500,000 shares which he referred to on his direct examination; that the stock of the Union Oil Company of Delaware is owned by the Shell Union Oil Corporation which is an American company controlled by foreigners; that that company's holding in the stock of the company of which the witness is secretary is 26 per cent.

Testimony of Charles W. Stevenson, for Plaintiff (In Rebuttal.)

CHARLES W. STEVENSON, a witness on behalf of the plaintiff, testified that he is auditor of the Lacy Manufacturing Company in Los Angeles, California, and that there was exchanged between that company and H. A. Harley, purchasing agent, Pan American Petroleum & Transport Company, the following correspondence which under the exhibit numbers indicated below were offered and received in evidence:

Plaintiffs Exhibit No. 267, telegram dated New York, November 4, 1921, reading:

PLAINTIFF'S EXHIBIT No. 267.

"Lacy Mfg. Co.,
Los Angeles, Calif.

Quote price and best erection delivery Honolulu on twenty five to thirty fifty five thousand barrel steel tanks with all connections stairs and steel roof for Doheny Company. Also price material fabricated F A S ship San Pedro, also quoting separate price for erection only as it may be possible we would prefer buying steel at New York.

H. A. HARLEY,
Purchasing Agent." [741—655]

Plaintiff's Exhibit No. 268, telegram dated Los Angeles, California, November 7, 1921, reading:

PLAINTIFF'S EXHIBIT No. 268.

"H. A. Harley, Purchasing Agent,
Doheny Company,
Equitable Life Insurance Bldg.,
New York.

Will furnish and erect twenty five to thirty fifty five thousand barrel tanks complete standard specifications Honolulu for \$19,000 each, plus cost hauling from dock to tank site. Will furnish tanks knocked down fas San Pedro for \$13,500 each. Will erect only for \$4500 each. Commence delivery about sixty days complete, rate three to four tanks per month.

LACY MANUFACTURING COMPANY."

Plaintiff's Exhibit No. 269, telegram dated Los Angeles, California, November 30, 1921, reading:

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PLAINTIFF'S EXHIBIT No. 269.

"Mr. H. A. Harley, Purchasing Agent,
Doheny Company,
Equitable Life Insurance Bldg.,
New York, N. Y.

Referring your inquiry November 5th our reply November 7th will now furnish and erect twenty five to thirty fifty five thousand barrel steel tanks complete standard specifications Honolulu for \$16,800 each, plus cost hauling dock to tank site. Will furnish tanks knocked down fas San Pedro \$11,500 each. Will erect only \$4000 each. Commence delivery about sixty days complete, rate three to four tanks per month.

LACY MANUFACTURING CO."

Plaintiff's Exhibit No. 270, letter dated New York, December 1, 1921, reading:

PLAINTIFF'S EXHIBIT No. 270.

"Lacy Manufacturing Co.,
Los Angeles, Cal.

Gentlemen:

This will acknowledge your wire of the 30th, wherein you have sent us a new quotation on 55,000 barrel tanks.

We wish to explain that this matter is still in abeyance, but in case a decision is reached in the next few days we will be very glad indeed to take it up with you further.

(Testimony of Charles W. Stevenson.)

Thanking you for the revised quotation, we wish to remain,

Yours truly,

PAN AMERICAN PETROLEUM & TRANSPORT COMPANY.

H. A. HARLEY,
Purchasing Agent."

Thereupon plaintiff offered in evidence as its Exhibit No. 271, letter dated New York, June 19, 1922, reading:

PLAINTIFF'S EXHIBIT No. 271.

"Edward L. Doheny, Esq., President,
Pan American Petroleum & Transport Co.,
120 Broadway, New York. [742—656]

Dear Sir:

In response to your request for the facts on the letting on your behalf of the tank contract for the Pearl Harbor Naval Oil Storage, I attach Navy Department printed specification No. 4650, describing on pages 6 and 7 the requirements to which the tanks contracted for must conform.

The Navy tank is markedly different from the commercial tank, on which we also have bids for comparison. It is 10 per cent less than the commercial tank in capacity and weighs 7 per cent more, making the weight per barrel eighteen per cent greater.

The Navy tanks requires larger rivets at closer center distances in keeping with the greater strength of the tank, which increases the labor cost

(Testimony of Charles W. Stevenson.)

per barrel. The requirements of erection and test are more severe, and the fact that 30 Navy tanks are required to equal the capacity of 27.2 commercial tanks further increases the labor cost per barrel.

We are advised by the Navy that its tank is made heavier and stronger in order safety to hold the oil without leakage or deterioration for many more years than the commercial tank, and in order to offer greater resistance to damage from bomb explosion resulting from aeroplane attack. Its steel roof is an increased safeguard against fire and a number of its minor features make for durability and increased effectiveness in the fighting of fire.

We sum up the design, or intrinsic, differences as accounting for a normal difference in cost per barrel amounting to 20 per cent.

The Pearl Harbor tank contract was let under keen competitive bidding and went to the lowest bidder, who was \$182,190 lower than the highest bidder and \$40,800 lower than the next lowest bidder, all bids being brought to the same basis of comparison. The bids were as follows on thirty tanks of 50,000 barrels each, April 14, 1922, being the date of the bidding:

Western Pipe & Steel Co.....	\$810,000
Petroleum Iron Works Co.....	780,000
*Pittsburgh & Des Moines Steel Co.	675,000
U. S. Steel Products Co.....	668,610
McClintic Marshall Products Co...	627,810

A bid on commercial tanks (after being brought to a basis of comparison with the above) made directly to your company by the Lacey Manufacturing Co. in November, 1921, when steel prices were considerably lower than they were in April, 1922, was for 27 commercial tanks of 55,000 barrels capacity each, as follows:

Lacey Manufacturing Co.....\$467,370

A bid on commercial tanks (after being brought to the same basis of comparison) made to us by the McClintic Marshall Products Co. on the 9th of June, was for 27 commercial tanks of 55,000 barrels capacity:

McClintic Marshall Products Co...\$529,700

You will note that the Lacey November commercial tank bid and the McClintic Marshall June commercial tank bid are 25.5 per cent and 15.6 per cent respectively lower than the figure at which the Navy tanks were let in April. If allowance is made for the rise of steel prices between November and April and between April and June, a rough comparison can be made approximately confirming from actual bidding the intrinsic difference between the cost of the Navy tanks and the cost of commercial tanks, as here pointed out. The papers supporting the above figures are in our possession, if you should wish us to produce them. [743—657]

The statement that the Navy tanks could be

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(Testimony of Charles W. Stevenson.)

delivered and erected at Pearl Harbor for \$400,000 is preposterous.

Very truly yours,

THE J. G. WHITE ENGINEERING CORPORATION,

GANO DUNN,
President.

*This figure was not considered because given after the date of the closure of the bidding."

Plaintiff then offered in evidence as its Exhibit No. 272 letter dated April 13, 1921, to Senator Owen, reading:

PLAINTIFF'S EXHIBIT No. 272.

"My dear Senator Owen:

I have given careful consideration to the subject of drilling wells on Naval Reserve No. 1 in California, and have come to the conclusion that the best interest of the Government and of the Navy will be served by inviting sealed proposals for the privilege of drilling.

I do this reluctantly because I fully appreciate the necessity for haste in the matter, but there are several applicants for the privilege and I do not know any fairer way to settle the matter than to open it to public competition which will, of course, be limited to experienced and responsible operators.

I shall have these proposals submitted both in San Francisco and in Washington which will save considerable time, and shall arrange to have all the transactions between our representatives in San

Francisco and the department carried on by telegraph.

I think you will recognize the wisdom of this decision on my part.

Sincerely yours,
EDWIN DENBY."

Thereupon there was received in evidence as Plaintiff's Exhibit No. 273 the following extract from stenographic notes of minutes of proceedings of Navy Council meeting held October 18, 1921:

PLAINTIFF'S EXHIBIT No. 273.

"9:05 A. M., Tuesday, 18 Oct. 1921.

No. 2. The Secretary stated that unless there was objection he would sign an order transferring all Fuel Oil activities heretofore carried on under the Secretary's office over to the Bureau of Engineering There was also short discussions about our supply of oil on hand, contracted for, etc.

No. 2. From notes—

Fuel Oil Office.

Secretary DENBY.—I am going to transfer (this office) unless there is some objection to it.

Capt. BAKENHUS.—If it comes to developing of oil fields, Yards and [744—658] Docks should have some office under instruction as a fuel oil engineer. That is probably a good thing if you want to create an engineering officer.

Secretary DENBY.—That is a different proposition. This Naval Reserve oil tract in California and Wyoming we have been administering. Re-

serve No. 2 in California is impossible. We can't hold it. We can't prevent granting oil leases. I by executive proclamation had it placed under the Interior Department. We are not in position to organize a new department to dig wells. I want the Interior Department when a tract is to be opened in part or full, I want them to do it for the best interest of the Navy. That matter of leasing is most difficult and dangerous thing to be done. It is full of dynamite. I don't want to have anything to do with it.

Asst. Secy. ROOSEVELT.—Admiral, how are we standing on oil now? The Shipping Board wants to know whether we have any oil.

Admiral COONTZ.—We are all fixed until the 31st of December. I don't know about from the first of January.

Admiral ROBISON.—We have more oil than we can use and it is costing us a little bit more than twice what it costs anybody else.

Asst. Secy. ROOSEVELT.—That is under contracts made about three years ago.

Admiral ROBISON.—We haven't any place to put it.

Admiral COONTZ.—We are cutting down to the bone on it.

Asst. Secy. ROOSEVELT.—Oil is going up very fast. Mexican crude has gone up from fifty to one dollar within the past week. With other contracts, we have more than enough.

Admiral ROBISON.—Our New England contract will run out about March. We have two other postponed contracts.”

Thereupon as Plaintiff's Exhibit No. 274 there were placed in evidence the following two communications dated April 14 and April 20, 1922, respectively:

PLAINTIFF'S EXHIBIT No. 274.

“April 14, 1922.

Hon. Edwin Denby,
Secretary of the Navy,
Washington, D. C.

My dear Sir:

For official purpose I would like to have a transcript of all oil leases executed covering naval reserve lands belonging to the Government since March 4, 1921, giving name of lessee, location of lease, number of acres, and consideration.

Yours very truly,
J. W. HARRELD.”

“THE SECRETARY OF THE NAVY,
Washington.

April 20, 1922.

Hon. J. W. Harreld,
United States Senate.

My dear Senator:

Replying to your inquiry of April 14, wherein you request information concerning the oil leases

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executed with regard to the naval reserve lands belonging to the Government since March 4, 1921, the following data are submitted: [745—659]

The Executive order transferring the care, custody, and operation of the naval reserves to the Department of the Interior was signed May 31, 1921, and since that date the Navy Department is not in a position to give the details of leases that may have been executed. However, between the dates of March 4, 1921, and May 31, 1921, it appears that two leases became effective, as shown below:

Lease No. Visalia 09312.
Delivered: April 19, 1921.
To: Consolidated Mutual Oil Co.
Date of Lease: February 16, 1921.
Located at: S. $\frac{1}{2}$ N. E. $\frac{1}{4}$ and S. $\frac{1}{2}$ N. $\frac{1}{2}$
 NE $\frac{1}{4}$, sec. 28, T. 31 S., R.
 23 E., M. D. M. 120 acres.
Back royalty paid to Government, . . . \$171,664.34.

Lease No. Visalia 09305
Delivered: March 31, 1921.
To: Buena Vist Oil Co.
Date of Lease: August 23, 1920.
Located at: Two wells in N. $\frac{1}{2}$, SE $\frac{1}{4}$, Sec.
 32, T. 31 S., R. 24 E.
Back royalty paid to the Government, .. \$294,606.71.

I trust that this information will serve your purpose. It is quite incomplete, of course, but accurate details as to the leases that have been

(Testimony of D. W. Moran.)

entered into since May 31, 1921, can only be obtained from the Department of the Interior.

Sincerely yours,

EDWIN DENBY."

It was stipulated by the parties that the back royalty referred to in the foregoing letter amounting to \$171,664.38 was applicable to Naval Reserve No. 2.

Testimony of D. W. Moran, for Plaintiff (In Rebuttal).

D. W. MORGAN, called as a witness on behalf of the plaintiff, testified that he is petroleum accountant of the Bureau of Mines, located at Taft, California, and has charge of the accounts of the petroleum that has run from Naval Reserves Nos. 1 and 2 in California. The original records made in the field, known as the run ticket, which agree with the lessee's report submitted at the end of the month, are received by the witness, after which his office submits a statement to the lessee with request to check the same; one copy of such statement is sent to the Associated Oil Company, one copy to the Pan American Company, one to the lessee from whose lease the oil is run; these statements are made in both barrels and dollars; the dollar value is ascertained by the Standard Oil Company posted the lessee owes the Government royalty oil, the market price for oil in the San Joaquin Valley; if quality of which varies up or down, the witness

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(Testimony of D. W. Moran.)

takes the posted field price in order to calculate that indebtedness, the balances are converted into dollars and cents, and therefore the Government [746—660] is not concerned with what gravity it receives so long as it receives the valuation of the oil; that is the way the account is kept and is certified to Washington.

Plaintiff thereupon offered and there were received in evidence the following exhibits:

Plaintiff's Exhibit No. 275, on the letterhead of the Office of the Commissioner of the General Land Office, Washington, dated May 14, 1923, reading: [747—661]

PLAINTIFF'S EXHIBIT No. 275.

May 14, 1923.

"MEMORANDUM FOR SECRETARY FINNEY.

I transmit herewith a letter dated April 28, 1923, from Mr. J. H. Favorite, Chief of Field Division, San Francisco, California, relative to the lease issued to the Pan American Petroleum Company December 11, 1922, in Naval Reserve No. 1, California.

Attached hereto are also Bureau of Mines File 1175 'Pan-American Lease,' and a copy of office letter of May 12, 1923, addressed to Mr. Favorite by this office. Mr. Favorite's letter is of such character I desire to call your attention thereto. As

this lease did not originate in this office and we had no official information with regard thereto until March 12, 1923, and then upon a telephone request to the Bureau of Mines, it will be readily observed what a dilemma we find ourselves in when inquiry is made to this office, the Chief of Field Division or the local land office. Unless closer co-operation is secured in these matters by the Bureau of Mines and this office, our records, the local land office records and the Chief of Field Division's records are not noted, and on inquiry by the public, we would naturally state, as in this instance, that no such lease issued, while at the same time the oil newspapers are publishing accounts of the operations of a company under the lease, and the presumption is therefore raised that this office does not desire to make public such information.

WILLIAM SPRY,
Commissioner."

Plaintiff's Exhibit No. 276, letter dated Department of the Interior, Washington, May 22, 1923, to the Commissioner of the General Land Office, reading:

PLAINTIFF'S EXHIBIT No. 276.

"Dear Mr. Commissioner:

Referring to your note of May 14, 1923, stating that your office was not informed as to the issuance of certain leases in Naval Reserve No. 1, California,

and consequently gave erroneous advice to an inquirer, I have suggested to the Director of the Bureau of Mines that some steps be taken to apprise you of the issuance of any and all leases in naval reserves. However, in view of the fact that lands in naval reserves are subject to lease by the Secretary of the Navy under a special act, and any action taken by this Department is merely as the agent of or in connection with the Navy Department, also of the fact that some of these matters may involve naval secrets, it is not deemed advisable for this Department to place copies of the leases in the files of your office or the local offices without the consent of the Navy Department. It would seem to me that memorandum information advising as to the description of the land, date of the lease, etc., would be sufficient for your purpose.

I suggest that any requests for information as to leases in naval reserves should be referred to the Secretary's office for answer or for the latter to take up with the Navy Department.

The papers transmitted are returned.

Respectfully,

E. C. FINNEY,

First Assistant Secretary." [748—662]

Plaintiff's Exhibit No. 277, letter dated Bakersfield, California, June 26, 1922, addressed to Mr. F. B. Tough, Bureau of Mines, Washington, reading:

PLAINTIFF'S EXHIBIT No. 277.

"Dear Tough:

About three or four months ago Mr. Ambrose sent to me a lease to the Pan American for Naval Reserve No. 1 not already leased. This lease was drawn up in December and gives the Pan-American the right to drill certain wells without the approval of the Government and drill certain other wells as off sets only to patented land. The lease was sent out confidentially and we have held it so.

It is pretty hard to explain the operations of the Pan American on certain of the lands especially in sections 25 and 35, and in these cases we have stated that the Pan-American have certain offset privileges in the reserve.

Representatives of the Pan-American have apparently spread the information that they have a lease to the whole naval reserve No. 1, and it makes it very embarrassing to this office when put under question. Several companies asked the status of the land in order to bring their maps up to date, and I have been able so far to recommend that 'U. S. Government,' be placed on all land not publicly leased. However the Pacific Oil apparently has its information directly from the Pan American and has all of the Government land in the naval reserve marked 'Pan American' on its maps.

As you know, these maps are more or less spread broadcast throughout the fields. Would you inform me how much of the information we can give

out, or if none, what would be a good answer to embarrassing questions?

Very truly,
E. P. CAMPBELL." [749—663]

It was stipulated and agreed between the parties that Secretary Fall left Washington October 8, 1922, and was continuously absent from that city until November 27, 1922, on which last mentioned date he returned thereto. It was further stipulated that since December 11, 1922, the Pacific Oil Company has done no drilling within the boundaries of Naval Petroleum Reserve No. 1.

Testimony of R. P. McLaughlin, for Plaintiff (In Rebuttal).

R. P. McLAUGHLIN, a witness on behalf of the plaintiff, testified that he is a petroleum engineer, having been educated at Stanford University and having been in the oil business about fifteen years; he was geologist for the Associated Oil Company about five years and at the head of the oil department of the State Mining Bureau about six or seven years and has been in consulting practice since. In the common usage of the oil business in California the term published field price of crude oil ordinarily means published price or quotation of the Standard Oil Company of California; when oil is bought at the published field price, it is bought at the wells, and title passes to the buyer when it is gauged or measured by the purchaser on the property where it is produced. Witness has made a

(Testimony of R. P. McLoughlin.)

computation of royalties under the lease between the United States and the Pan American Company dated December 11, 1922, for under 30 degrees Baume and over 30 degrees Baume oil, and has also made a computation under the Interior Department regulation royalties and has made a graph showing where these royalties for oil under 30 degrees Baume meet, which said graph (Plaintiff's Exhibit No. 278) shows, in substance, that for average production per well per day per calendar month up to about 260 barrels the regulation royalties are better; if the well production average per day per calendar month goes over 261 barrels per day, then the lease royalties are better; witness made similar graph for oil of over 30 degrees Baume which (Plaintiff's Exhibit 279) shows that for average production per well per day per calendar month up to approximately 300 barrels a day the regulation royalties are better, and that said royalties for said average production for 261 barrels per day are better at the rates provided in the December 11, 1922, lease.

It was stipulated between the parties that there has been oil of over 30 degrees Baume produced within the borders of Reserve No. 1 from Pacific Oil Company's lands but thus far all Government lands within the reserve that have produced oil have produced oil of under 30 degrees Baume.

[750—664]

Thereupon there were offered in evidence as

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Plaintiff's Exhibit No. 280 three letters, reading as follows:

PLAINTIFF'S EXHIBIT No. 280.

"5 May 1921.

My dear Mr. Attorney General:

On or about 15 April, 1921, I advertised for proposals to lease a strip of land in Section 1-31-24, Naval Petroleum Reserve No. 1. The authority for leasing this land was conferred upon the Secretary of the Navy by a provision in the Naval Appropriation Act for the fiscal year ending 30 June, 1921.

The United Midway Oil Land Company on 20 August, 1920, filed an application for a prospecting permit for three-quarters of this section under Section 19 of the oil land leasing act of 25 February, 1920. A protest by the Department of Justice was filed, on behalf of the Navy Department, against the allowance of this application, and the application was duly rejected by the Commissioner of the General Land Office and by the Secretary of the Interior. In rejecting this application the Secretary of the Interior in a letter to the Commissioner of the General Land Office on 8 November, 1920, stated that 'no sufficient ground appears for favorable consideration' under Section 19 'by its own terms,' or 'under any other provision of the act in question, and accordingly the application is denied, the case closed, and the record returned herewith.'

After the rejection of the claim under Section 19 of the Leasing Act the United Midway Oil Land Company applied for a reconsideration of this action and invoked the provisions of Section 18 (a) of this same Act of 25 February, 1920.

By letter of 24 February, 1921, to the Commissioner of the General Land Office, the Secretary of the Interior at that time declined to submit the matter to the President and stated 'I cannot find that there is any such claim or controversy pending in this Department or in the courts with respect to this piece of land as would warrant my recommending to the President a compromise under Section 18 (a). While as stated, the good faith of claimants is not questioned, they have not a mining claim which could be made the basis of patent, or which really constitutes any valid claim as against the United States, for the reason that while the location was made prior to withdrawal and expenditures made as noted, no discovery of oil or gas was made, nor was work diligently carried on from 1910 to the present time. The petition must therefore be denied.'

Upon receipt of notice of this denial, it appears that the company applied, on 25 February, 1921, directly to the President for consideration of its application and appropriate compromise. The President referred the matter to the Secretary of the Interior for report, and a report thereon was submitted to him on 2 March, 1921. Apparently no further action was taken by the President, and the

matter remained pending at the White House until 19 April, 1921, when the Company called the attention of the President to its claim. On 20 April, 1921, the President referred the matter to the present Secretary of the Interior for report and so far as I am advised the latter is now considering the question.

On 21 April, 1921, the Secretary of the Interior requested me, if not incompatible with public interest, to revoke or suspend the leasing of the land advertised for leasing insofar as it related to the land covered by the United Midway Oil Land Company's application, [751—665] pending further consideration of their claim. While I did not consider it advisable to revoke the proposals for leasing I did decide to suspend the opening of the bids until such time as the question at issue can be settled.

In view of the fact that the original protest against the granting of relief to this company was filed by representatives of the Department of Justice on behalf of the Navy Department and in view of the fact that I am advised by officials of the Navy Department conversant with the record in this case that the claimant is not entitled to any relief under any section of the Leasing Bill or under any other circumstances, I would be pleased to have your opinion as to the legality of their claim.

There is enclosed herewith a copy of a letter written to Lieut. Comdr. I. F. Landis, from Mr.

H. F. May, Special Assistant to the Attorney General, who has handled the oil land cases in California for the past few years, in which Mr. May expresses his opinion relative to the merits of this claim.

It is contended by officials of the Navy Department that the validity of the locations of this land is in question, the locators apparently being known as the 'McMurray locators,' who were held by the recent Secretary of the Interior to be 'dummy' locators; and that the present claimants are not entitled to any relief whatsoever under any section of the Oil Land Leasing Act or any other Act due to the fact that no discoveries of oil or gas were made and to the further fact that they showed lack of due diligence under the law in the prosecution of their development both at the time of withdrawal and subsequent thereto.

From an examination of the record it appears that by far the major portion of the expenditures alleged to have been made by this company were on Section 12-31-24, and not on Section 31-124; furthermore, the well on which practically all of their expenditures were made was drilled on Section 12 and came in as a dry hole. No work appears to have been done after the drill hole came in on Section 12, although something like eleven years have elapsed since that date. The Company claims that they wished to respect the President's withdrawal order of 2 July 1910, but they apparently did not respect the original withdrawal order of 27 Sep-

tember 1909, and they reached this conclusion only after their drilling developed a dry hole. It would seem that, if their contentions are correct, they would have been fully protected in their claim by the Pickett Act of 25 June 1910. It should also be noted that the drilling contract under which operations were conducted required, not diligent prosecution of work on all claims, but merely the drilling of one well at a time—the first and only well drilled was the one on Section 12.

From their own affidavits comparatively little work was done on Section 1, and water pipes were led only part of the way to this section. Apparently very little work of any character was done on Section 1 during all the time that the well was being drilled on Section 12, and the comparatively nominal sum spent by the Company on Section 1 does not entitle them to preferential rights to this now very valuable property. Moreover, the present value of this section is in no way whatsoever due to any development or discoveries on their part.

Owing to the urgent necessity of drilling a number of offset wells on this Section in order to counteract the drilling by outside operators on the adjoining section thirty-six it would be appreciated if an early opinion on the matter in question could be furnished.

Apropos of Section 18 (a) of the Oil Land Leasing Act, I would also be pleased to have an opinion on the construction to be placed on the clause 'the

President is hereby authorized at any time *within twelve months* after the approval of this Act, etc.' That is to [752—666] say, does the Act require the compromise and settlement to be made within twelve months of the approval of the Act, or does it merely require that the request for compromise and settlement be made within the twelve months?

Aside from the legality of the claim of the United Midway Oil Land Company, and assuming that the former Secretary of the Interior was within his rights in denying their application for compromise under Section 18 (a), is it not a fact, under a strict interpretation of this section, that the time limit for making application had expired when they made their applications on 25 February 1921.

Sincerely yours,

EDWIN DENBY.

Hon. H. M. Daugherty,

Attorney General.

Department of Justice,

Washington, D. C."

"5 May, 1921.

Hon. Albert B. Fall,

Secretary of the Interior,

Interior Department,

Washington, D. C.

My dear Mr. Secretary:

I am enclosing herewith for your information a copy of a letter which I am forwarding to the Attorney-General in connection with the United

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Midway Oil Land Company's request for compromise under Section 18 (a) of the Oil Land Leasing Act.

Sincerely yours,

EDWIN DENBY."

"Department of the Interior.
Washington.

May 11, 1921.

Personal

The Honorable

The Attorney General.

Dear Mr. Attorney General:

The Secretary of the Navy has forwarded me a copy of his communication to you of May 5, 1921, with respect to the claim of the United Midway Oil Company for lands in Secs. 1 and 12, T. 31 T. 24, naval petroleum reserve, California. I note that he asks your opinion—

- (1) As to legality of the company's claim.
- (2) As to whether the President has authority to compromise under section 18a of the leasing act of February 25, 1920, an application filed prior to February 25, 1921, but not actually acted on and approved by the President prior to the latter date. [753—667]

It is clear from the record that the United Midway Oil Company has no enforceable legal right for a patent or a lease upon the lands claimed. Its claim is purely an equitable one, the consideration and allowance of which rests solely in the discretion of the President. Any opinion from

you as to the legality of the claim would therefore seem unnecessary. As to the second proposition presented, I have to advise you that the matter was submitted to the President for consideration by this Department in another case some time ago, and the President did determine that he had authority to authorize the settlement of the claim under section 18a of the leasing act where the claim had been filed in the Interior Department prior to February 25, 1921, although it did not actually reach the President until after that date.

Kindly advise me at your early convenience as to whether or not you think it necessary to render any opinion upon the questions presented.

Respectfully,

ALBERT B. FALL,
Secretary." [754—668]

It was stipulated by counsel for the plaintiff that they have been unable to find record of any answer from the Attorney General to the foregoing.

It was stipulated by counsel for the parties that Harry M. Daugherty, if called as a witness, would testify that as Attorney General he was not asked for and did not render any opinion relating to the contracts and/or leases in suit.

Thereupon plaintiff rested in rebuttal.

In surrebuttal offered by defendants it was stipulated and agreed between counsel for plaintiff and defendants that under the lease dated June 5, 1922 (Exhibit "F" to the Amended Bill of Complaint), there had been produced, up to the end of Septem-

ber, 1924, 351,919.70 barrels of oil; there had been rendered and accounted to the Government as royalty of that production 83,940.35 barrels; under the Interior Department regulation royalties, had they prevailed, there would have been accounted to the Government of that production 65,830.55 barrels. Under the lease dated December 11, 1922 (Exhibit "D" to the Amended Bill of Complaint), there had been produced, up to September 30, 1924, 2,857,092.66 barrels, of which the Government had received as royalty, at the schedule of royalties set forth in said lease, 720,065.78 barrels; the Government would have received, had the lease contained the Interior Department regulation royalties, 554,428.19 barrels. Under both leases in issue in this case there had been produced up to the 30th day of September 3,209,012.36 barrels, of which the Government had received as royalties under the lease schedules 804,006.13 barrels, and under the regulation Interior Department royalties the same production would have yielded the Government 620,258.74 barrels.

The authenticity of the documents received in evidence in this case was admitted by the solicitors for all of the parties hereto. It was further stipulated that all signatures appearing on any of said documents were the genuine signatures of the persons whose names appear as signers, made in each instance with his own hand, there being no names signed by, or per, any other persons.

Thereupon the plaintiff by its counsel announced

to the Court that it had no further evidence to offer and the defendants made like announcement.

Thereupon the defendants, jointly and severally, moved that the Court strike out and disregard evidence, oral and documentary, heretofore conditionally received by the Court and received subject to the reserved and allowed right of the defendants to move to strike out same at the close of the evidence. A separate motion was submitted as to the testimony of each witness and to each exhibit which was received over objection of defendants as hereinbefore shown in this statement of evidence, and there was repeated in opposition to said evidence the grounds of the objections stated at the time of the receipt thereof, and there was added the ground, stated to the Court, that the plaintiff had failed to "connect up" with the defendants and with the issues in this case evidence received upon the assurance of its solicitors that said evidence would be so connected up. Each of said motions were separately submitted and considered by the Court and the same are not set forth herein fully as that would constitute repeating what is set forth hereinbefore as aforesaid, and said motions were not submitted as a series; each was addressed to the Court separately without reference to any other. Whereupon the presiding Judge announced that he had no reason to change his opinion on the admissibility of any of the said evidence as indicated by his rulings admitting the same in evidence, and ruled that "the motions will each be respectively

denied." To each of the said rulings of the Court the defendants duly noted an exception.

The trial of this case began October 21, 1924; plaintiff's evidence in chief was introduced on October 22 to October 30, inclusive; defendants' evidence in chief was introduced on October 30 to November 7, inclusive; plaintiff's rebuttal and defendants' surrebuttal evidence was heard by the Court November 12, 1924. The Court heard oral argument November 13 to 18, inclusive.

Thereafter there was filed in the court the respective requests of the parties for findings of fact and conclusions of law (which are elsewhere [755—669] included in the record on appeal) and on May 28, 1921, the District Judge filed 91 findings of fact and 14 conclusions of law and on the same date filed his "Memorandum opinion" in the case (said findings, conclusions, and opinion are included in the record on appeal).

Thereafter, on the 11th day of July, 1921, counsel for the respective parties appeared before the court and counsel for the plaintiff informed the presiding judge that since the said 28th day of May the plaintiff and the defendants have had their accountants working upon the accounting contemplated by the Court's opinion and findings; that the items are very few and the figures thereof not the subject of any dispute; that the defendants have thrown open all of their books and records to the plaintiff and the plaintiff's records have been open to the defendants; that the parties join in requesting that instead of a reference to a Master

for the purpose of stating the accounts in accordance with the Court's above-mentioned opinion, the accounting be taken in open court. Counsel for the defendants having stated that the defendants join in this request, the Court ordered that the procedure so requested be followed. Thereupon, on the 11th day of July, 1921, testimony was offered to the Court tending to prove that the books of account of the defendant Pan American Petroleum Company had been audited by accountants of the public accountant firm of Ernst and Ernst, employed by the plaintiff for this purpose, said auditing being in charge of a certified public accountant; that the books of the defendant Pan American Petroleum & Transport Company containing the accounts relating to the construction done and the oil supplied under the contracts of April 25 and December 11, 1922, have been audited by the accountant of the Bureau of Mines; that all accounts relating to the matters involved in this suit have been properly and accurately kept by defendants and the plaintiff; that all of the construction work covered by the contract of December 11, 1922, had since the trial and before this time been entirely completed and that the officials of the Navy in charge thereof at Pearl Harbor had so certified to the Navy Department at Washington; that vouchers showing all expenditures on account of the construction work done at Pearl Harbor under the contracts of April 25, 1922, and December 11, 1922, and showing the delivery of fuel oil in tanks under the first of said contracts, were all certified by

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[756—670] the naval officers on the job at Pearl Harbor and sent to the Bureau of Yards and Docks in Washington and there certified by Rear-Admiral L. E. Gregory, chief of that Bureau, and thence were sent to the offices of the Pan American Petroleum & Transport Company; that the value of all royalty oil, gas and gasoline delivered or caused to be delivered by plaintiff to the defendant Pan American Petroleum & Transport Company under the provisions of the contracts of April 25, 1922, and December 11, 1922, to and including May 31, 1925, amounted to \$7,889,759.21; that the said defendant had received a profit upon the resale of said royalty oil amounting to \$791,012.03; that interest at 7 per cent per annum upon the first of the above-mentioned sums to May 31, 1925, calculated upon monthly balances, amounts to \$684,625.55; that interest on the second of the above mentioned items at 7 per cent per annum to May 31, 1925, calculated upon monthly balances, amounts to \$94,351.36; that on this basis the total amount to be debited against said defendant is \$9,459,748.15; that the actual cost of the Pan American Petroleum & Transport Company of the storage facilities completed and installed at Pearl Harbor, Hawaii, under the contracts of April 25, 1922, and December 11, 1922, and the construction thereof, amounted to \$7,350,814.11; that interest on said amount at 7 per cent per annum from May 31, 1925, calculated upon monthly balances, amounted to \$820,922.43; that the cost price to said defendant of fuel oil delivered to said tanks so as aforesaid

constructed by said defendant amounted to \$1,986,-142.47, and the interest on said last mentioned sum at the rate of 7 per cent per annum to May 31, 1925, calculated on monthly balances, amounted to \$259,569.11; that the total thus credited to the said defendant is \$10,417,448.12, and that after deducting the total debited as above set forth from the total thus credited, the balance shown to be due Pan American Petroleum & Transport Company on account of all construction work and the supplying and delivering of fuel oil in accordance with the terms of the April 25 and December 11, 1922, contracts which are Exhibits "B" and "C," respectively, to the Amended Bill of Complaint in this case, amounts to \$957,699.97; that the value of the total amount of oil, gas and other petroleum products (other than royalty oil, gas and gasoline belonging to the plaintiff and included in the amounts above testified to) produced, taken and extracted or removed by the defendant Pan American Petroleum Company from the [757—671] lands covered by the lease of June 5, 1922, and the lease of December 11, 1922, which documents are Exhibits "F" and "D," respectively, to plaintiff's Amended Bill of Complaint in this cause, to the date of the appointment and the taking possession of said lands by the Receivers of this Court, amounts to \$1,556,-861.17; that interest on said amount at 7 per cent per annum calculated upon monthly balances to May 31, 1925, amounts to \$170,650.02; that the total of these two last mentioned amounts is \$1,727,-511.19, and that that sum in the audit made as

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aforesaid has been debited to said defendant Pan American Petroleum Company; that the said defendant actually expended in drilling, putting on production, and maintaining and operating production of all wells drilled under said leases of June 5, 1922, and December 11, 1922, and in making other useful improvements to the property covered by said leases, to the date of the appointment of and taking possession of said lands by the Receivers of this Court, the sum of \$1,013,428.75; that the said defendant further actually expended in constructing, maintaining and operating the compressor and absorption plant on the northeast quarter of Section 3-31-24, less the value of the use of same to said defendant in treating products from lands other than those covered by the leases in controversy in this case, and less the gasoline manufactured and sold from gas produced from said lands in controversy, to May 31, 1925, the sum of \$194,991.01; that interest on the two last mentioned sums at the rate of 7 per cent per annum to May 31, 1925, calculated upon monthly balances amounts to \$161,060.43; that the total of the last three mentioned sums constitutes the total amount credited to said defendant in said audit and said total is \$1,369,480.19; that by deducting the amount credited said defendant as aforesaid from the amount debited it as aforesaid shows a balance of \$358,031.00; that all expenditures made and included in the sums aforesaid were properly accounted for and vouchered and that the work for which said sums were expended was done under

proper supervision, in an economic and efficient manner, and the said improvements were all of the full value paid therefor to the lands covered by the aforesaid leases; that the naval officers in charge of the work at Pearl Harbor and the Chief of the Bureau of Yards and Docks of the Navy Department at Washington have certified to the final completion to the satisfaction of the Navy Department of the construction work under contracts of April 25, 1922, [758—672] and December 11, 1922, and of the supplying and delivery of all the fuel oil, of naval specification quality, required under the April 25, 1922, contract, the quantity of such oil delivered by defendant Pan American Petroleum & Transport Company into the tanks constructed under the April, 1922, contract being 1,453,274.94 barrels.

Thereupon, on the said 11th day of July, 1925, the Court made and filed in the cause additional findings of fact, bearing said date, and being numbered 92, 93 and 94 (said findings are set forth elsewhere in the record).

The foregoing statement of evidence, together with exhibits therein included and hereto appended, constitute the substance of all the evidence offered by plaintiff and the defendants, and received by the Court, in this case, and upon which final decree of the District Court of the United States for the Southern District of California was made and entered the 11th day of July, 1925. Where herein there appears omission of exhibits the same represent documents identified, and marked with the

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missing exhibit numbers or letters, but not received in evidence.

CONSENT TO APPROVAL OF STATEMENT OF THE EVIDENCE.

The solicitors for the United States in the above-entitled cause hereby acknowledge service of notice of the lodgment by defendants in the office of the Clerk of the District Court of the United States, in and for the Southern District of California, Northern Division, of the foregoing statement of the evidence in said cause, together with exhibits appended thereto, and also acknowledge the receipt from the solicitors for the said defendants prior to said lodgment of copy of said statement and exhibits; and the plaintiff, having by its solicitors examined the said statement of the evidence and found the same to be true and complete, they hereby waive the ten days' notice of time and place when the defendants will ask the United States District Judge who heard this case to approve the said statement, and hereby consent to the approval thereof forthwith.

Dated at Los Angeles this 15 day of July, 1925.

ATLEE POMERENE,

OWEN J. ROBERTS,

Solicitors for the Plaintiff, the United States of America. [759—673]

CERTIFICATE OF APPROVAL OF STATE- MENT OF EVIDENCE.

BE IT REMEMBERED that the foregoing cause was instituted in this Court by an original

bill of complaint filed by the plaintiff, the United States of America, on the 17th day of March, 1924; that the parties stipulated that the case be heard and all proceedings therein be had at Los Angeles, California, with the same force and effect as if the said hearings and proceedings were had at Fresno, California; that before answers were filed the Court, the defendants consenting, granted plaintiff leave to file an Amended Bill of Complaint which was duly filed pursuant to said leave on the 22d day of April, 1924; that the defendants filed their joint answer to the said Amended Bill of Complaint on the 8th day of May, 1924, and the cause has been heard upon the issues arising from said Amended Bill of Complaint and said answers without reference to the original Bill of Complaint; that the case came on for trial and was heard at the times and in the manner set forth in the foregoing statement of the evidence; that all objections to the admission and exclusion of evidence as set forth in the said foregoing statement were made at the times as therein indicated and said objections and the exceptions reserved to the rulings of the Court thereon were duly entered of record. The foregoing statement of evidence was duly lodged in the office of the Clerk of this Court by the solicitors for the defendants and notice of such lodgment duly given the solicitors for the plaintiff, all as provided by Federal Equity Rule 75 (b); that the solicitors for the plaintiff have formally waived the ten days' notice of time and place when solicitors for defendants will ask the Court to approve

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said statement of the evidence and have consented to said approval forthwith.

WHEREFORE, the Court finding the foregoing statement of the evidence to be true, complete, and properly prepared, the same is hereby approved this — day of July, 1925.

By the Court:

PAUL J. McCORMICK,
United States District Judge, Southern District of
California. [760—674]

vs. United States of America.

1205

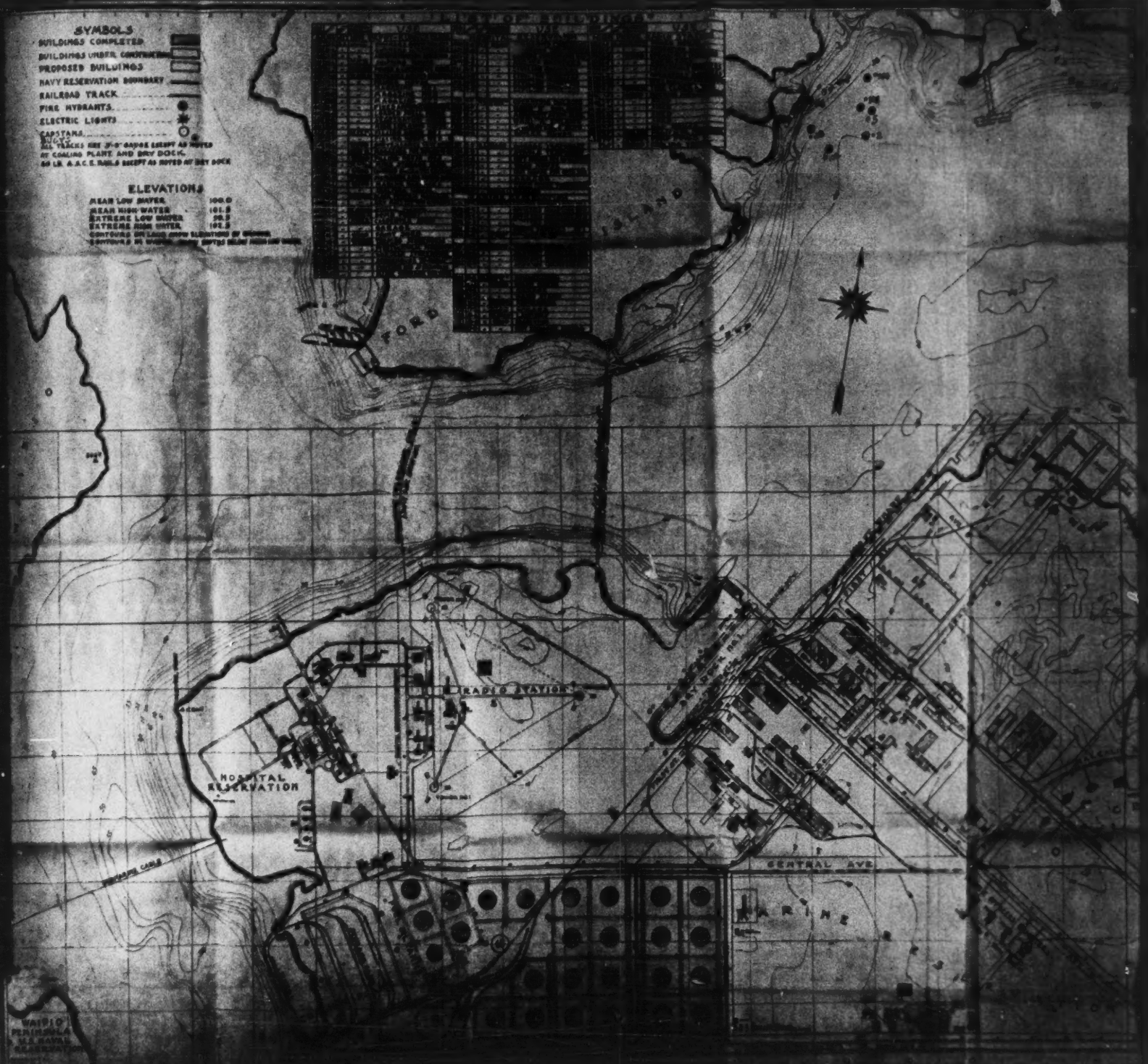
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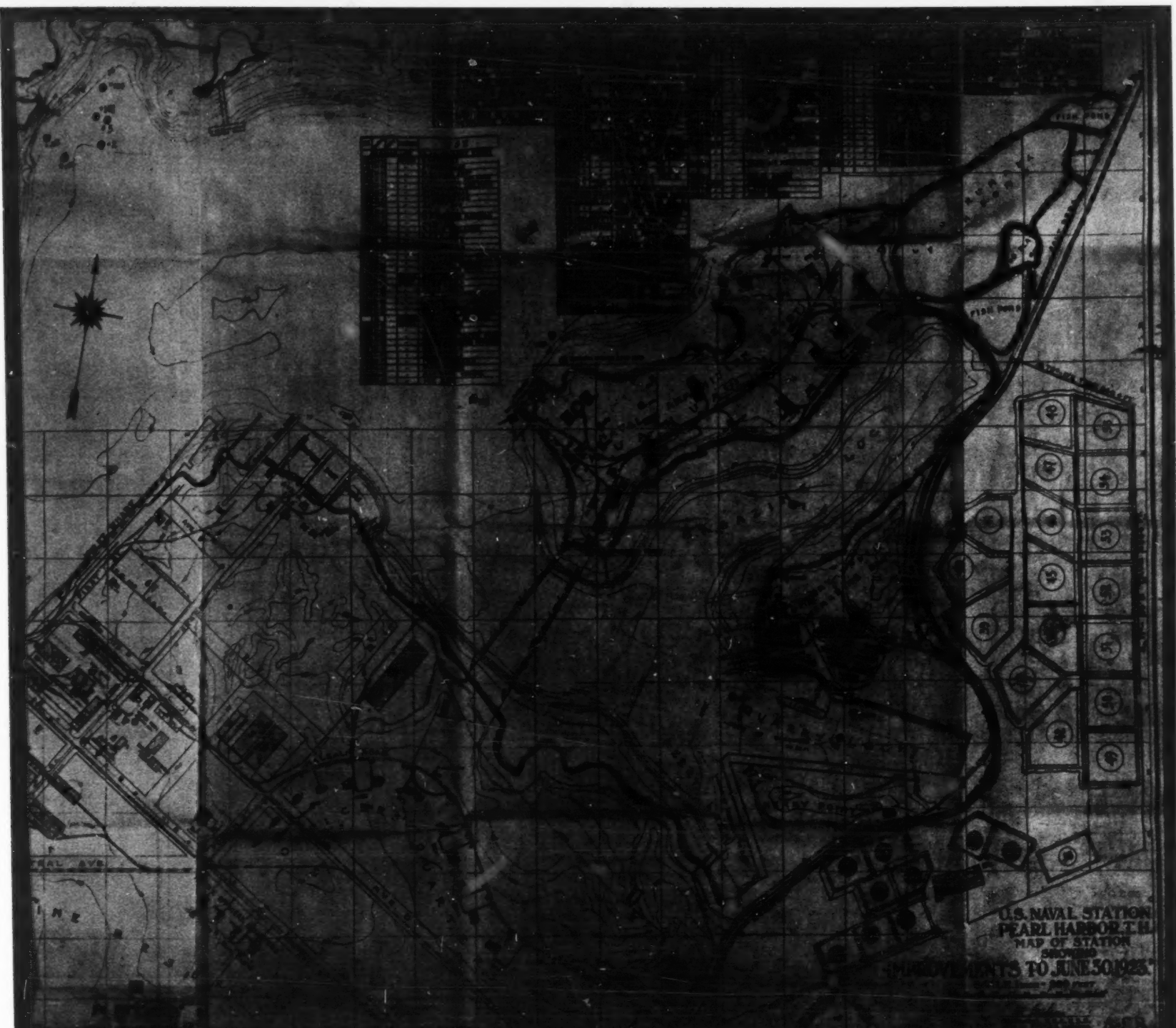
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SYMBOLS
 BUILDINGS COMPLETED
 BUILDINGS UNDER CONSTRUCTION
 PROPOSED BUILDINGS
 NAVY RESERVATION BOUNDARY
 RAILROAD TRACK
 FIRE HYDRANTS
 ELECTRIC LIGHTS
 CAPSTANS
 ALL TRACKS ARE 3'-0" GAUGE EXCEPT AS NOTED
 AT COALING PLANT AND DRY DOCK
 60 LB. A.C.E. RAILS EXCEPT AS NOTED AT DRY DOCK

ELEVATIONS
 MEAN LOW WATER 100.0
 MEAN HIGH WATER 101.8
 EXTREME LOW WATER 99.9
 EXTREME HIGH WATER 102.9
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U.S. NAVAL STATION
PEARL HARBOR, T.H.
MAP OF STATION
JUNE 30, 1923
1:50,000



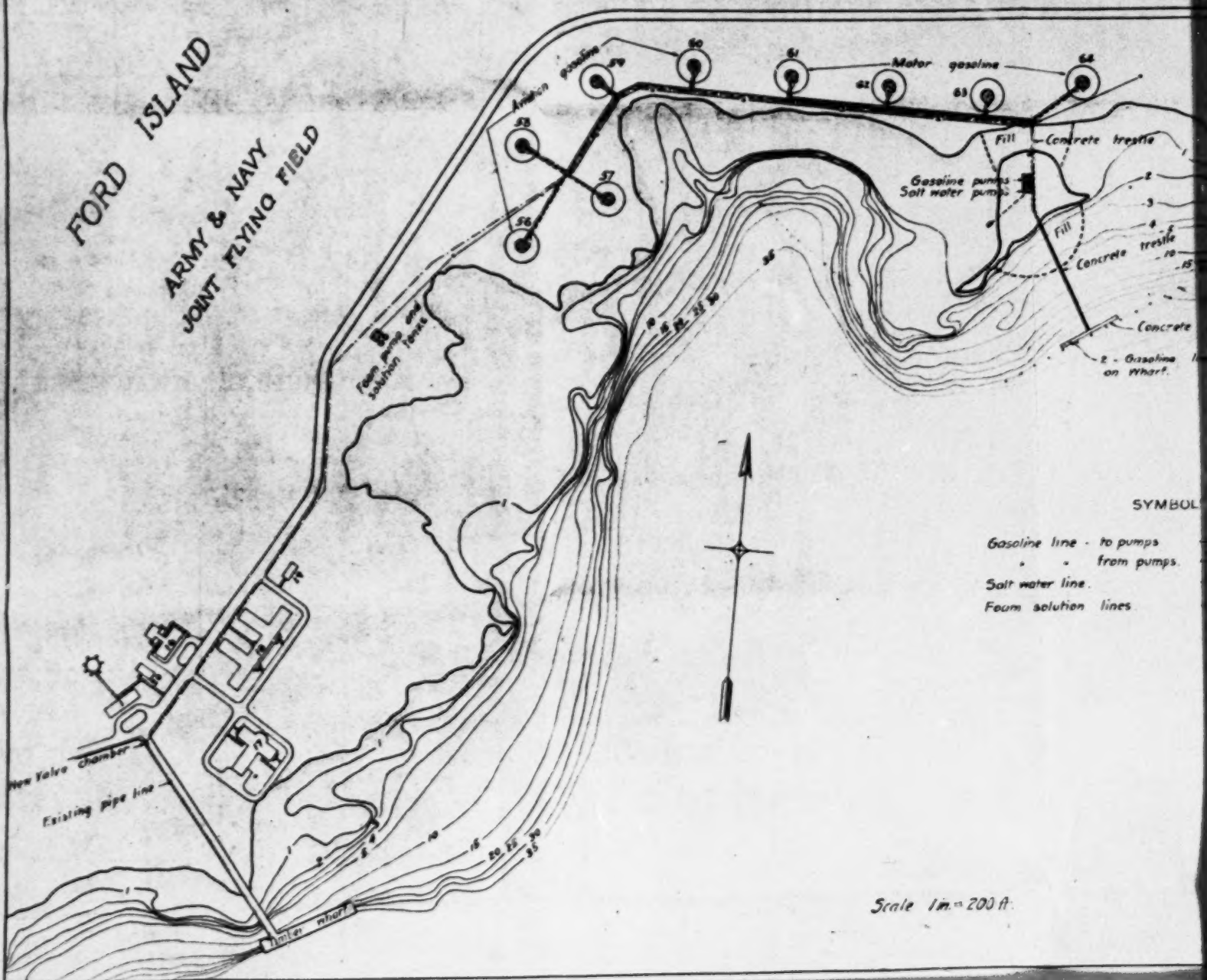
vs. United States of America.

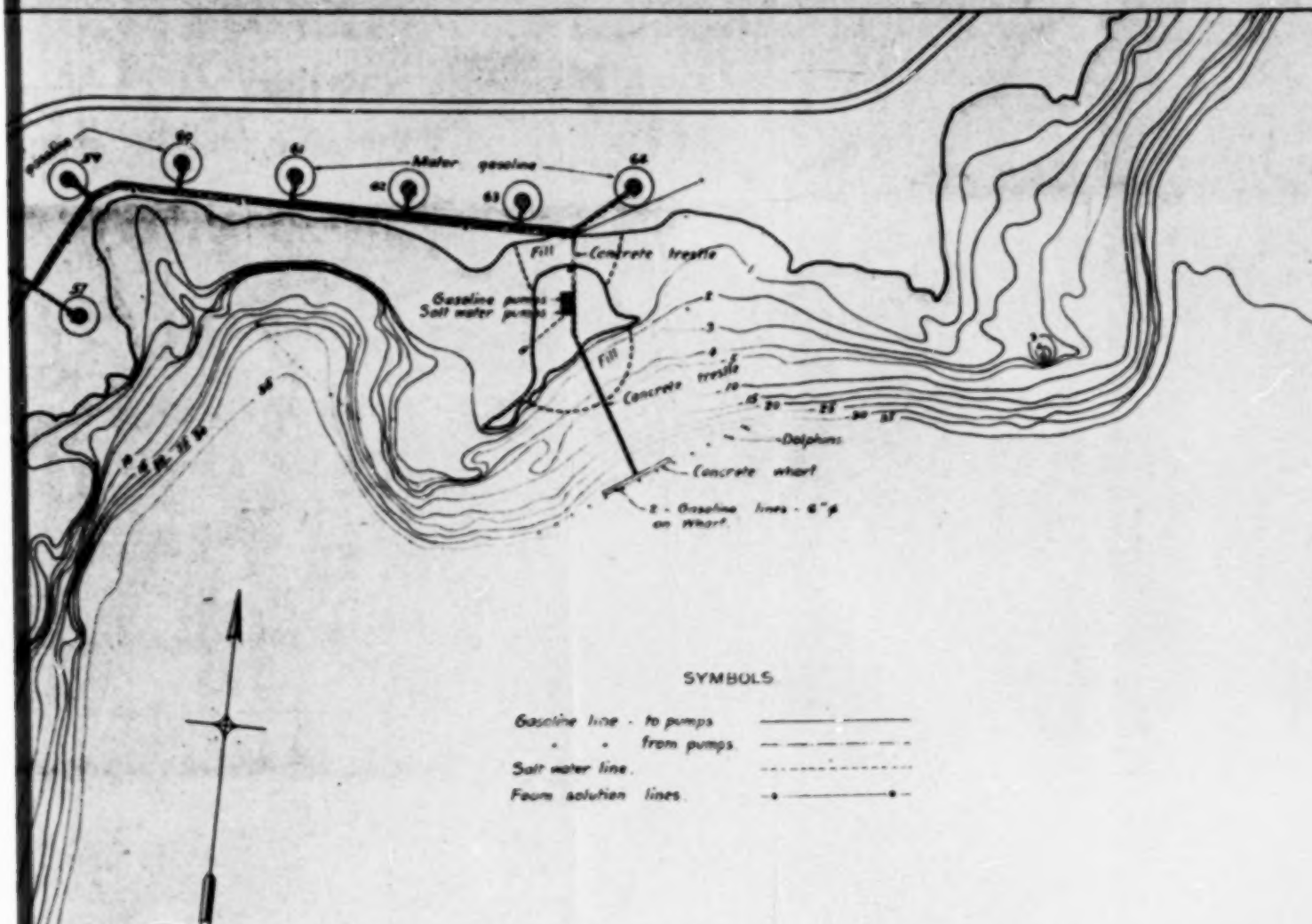
1207

PLAINTIFF'S EXHIBIT No. 132.

FORD ISLAND

ARMY & NAVY
JOINT FLYING FIELD





SYMBOLS

Gasoline line - to pumps —————
 " " from pumps - - - - -
 Salt water line
 Foam solution lines — • — • — • —

Scale 1 in. = 200 ft.

Department of the Navy Bureau of Yards & Docks
 U.S. NAVAL STATION, PEARL HARBOR, TH
 ADDITIONAL GASOLINE STORAGE
 FORD ISLAND
 GENERAL PLAN

Approved Jan. 12 1923

W. L. ...
 Chief of Division
W. L. ...
 Project Manager

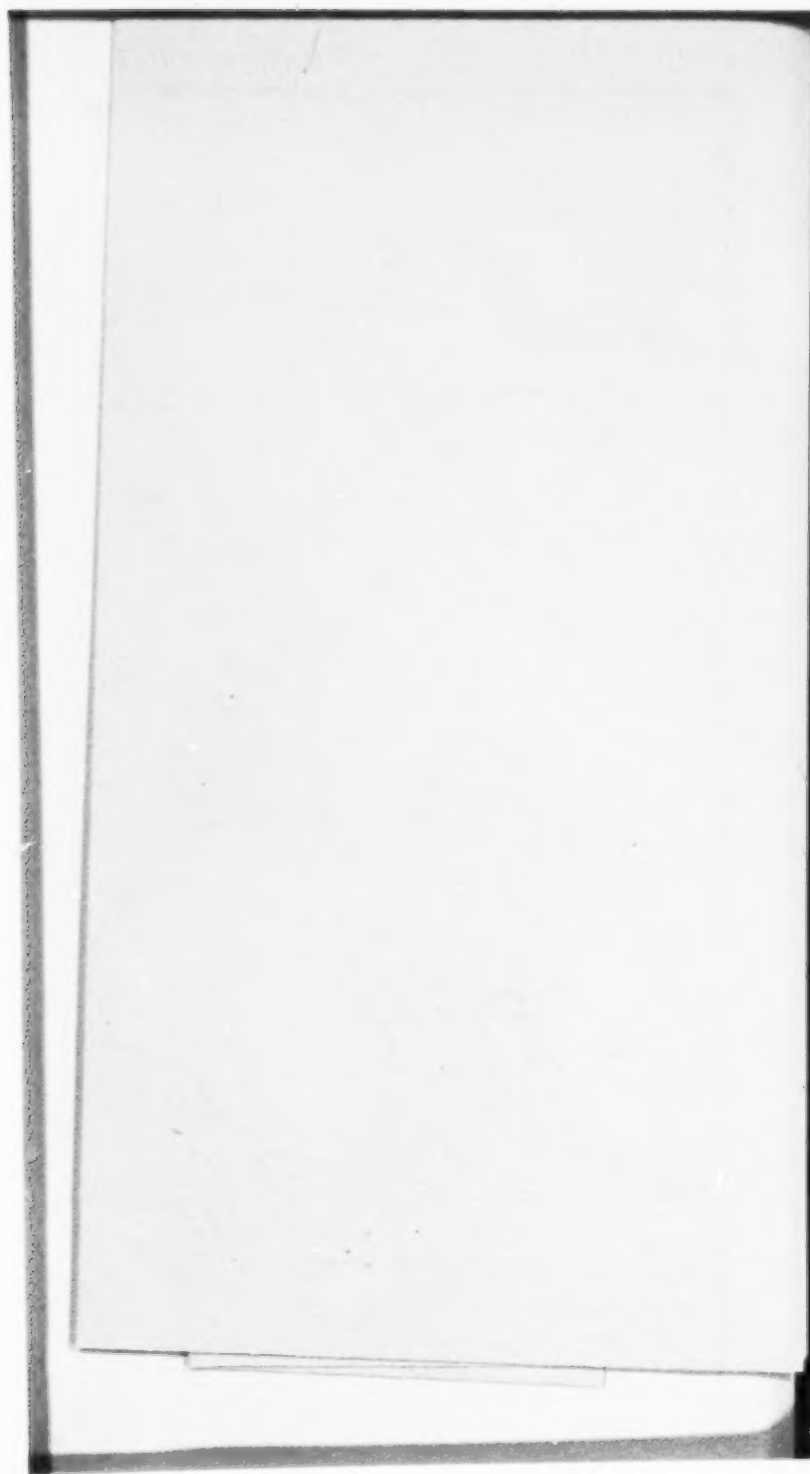
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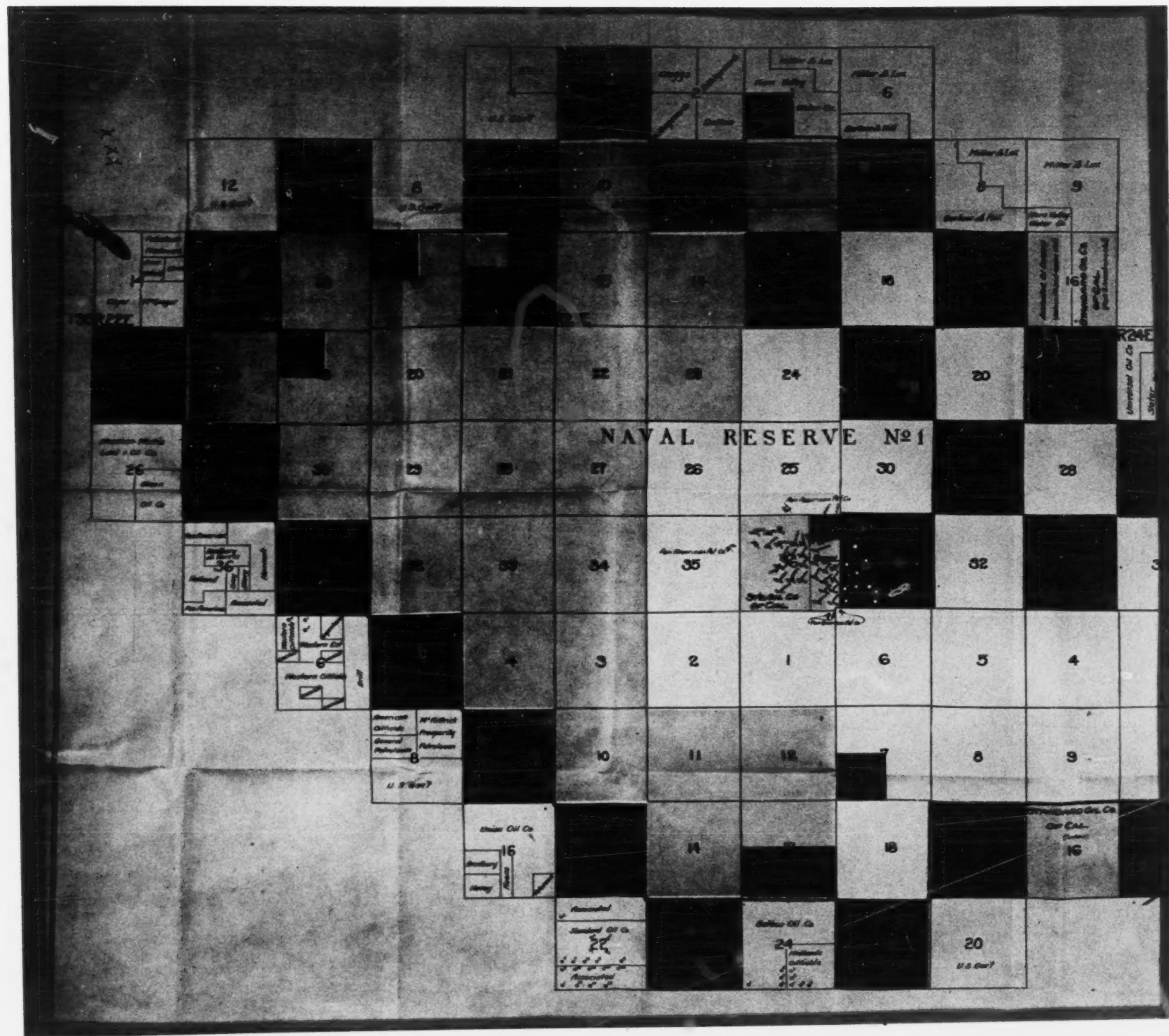
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DEFENDANTS' EXHIBIT "XXX."

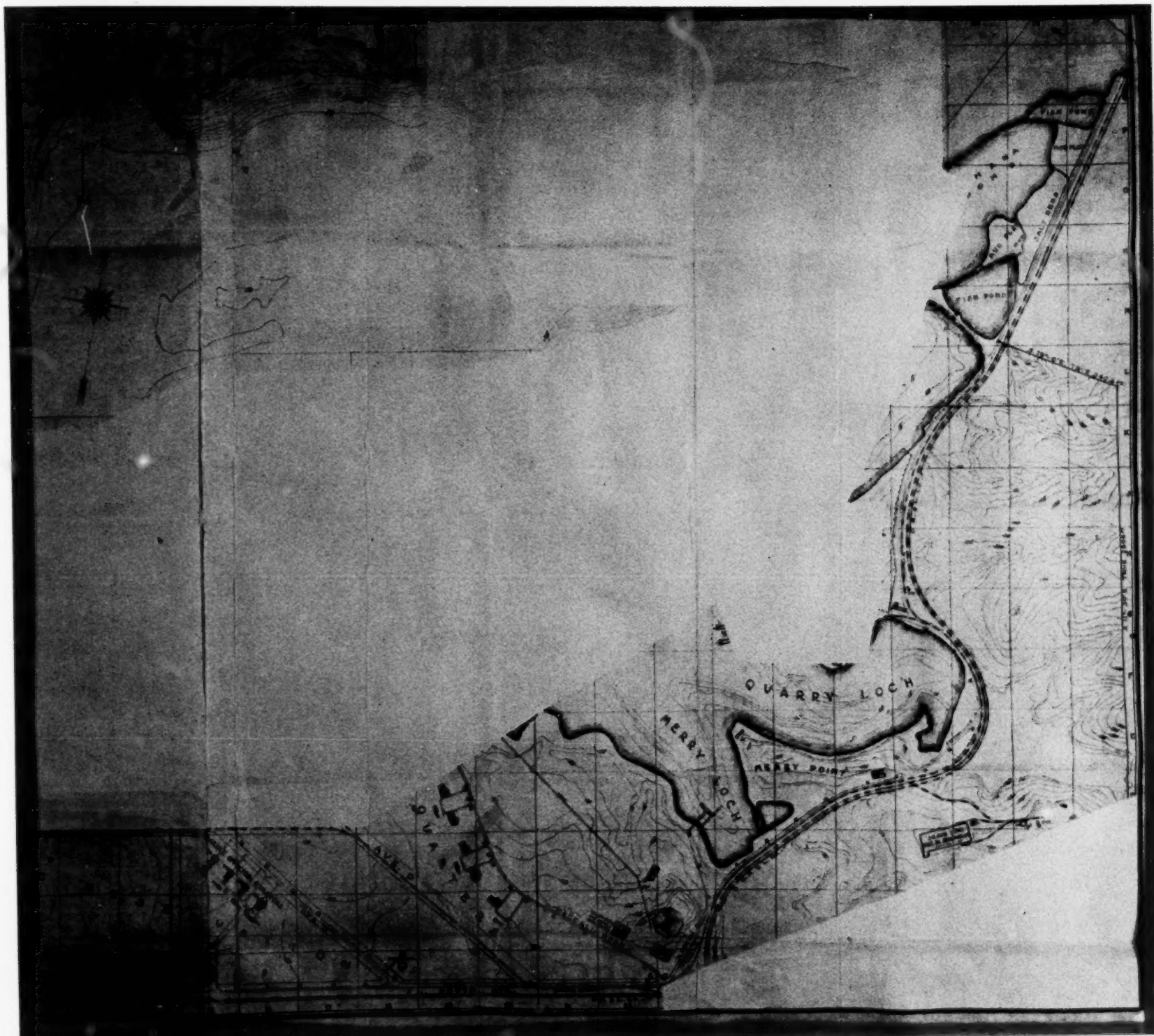


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vs. United States of America.

1211

DEFENDANTS' EXHIBIT "F-4."





vs. United States of America.

1213

DEFENDANTS' EXHIBIT "E-5."

Exhibit "B"

PACIFIC OIL CO

STANDARD OIL CO.
(TU PHAN)

STANDARD OIL CO.

T305-R25E
T315-R25E

PAN AMERICAN PET CO "F"

PAN AMERICAN PETCO
"H"

PAN AMERICAN PET. CO.
D.

PAN AMERICAN PET CO.
"I"

PAN AMERICAN PET CO "G"

PAN AMERICAN PET CO-"E

PREPARED AS OF MARCH 31 1924

SCALE 750' = 1"

Drawn
SWP 9-16-20

APPROVED

192

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FILE

DRAWING NO.

PRINT ISSUED

SEP 16 1924

(Name of Court and Title of Case.)

**PLAINTIFF'S REQUEST FOR FINDINGS OF
FACT.**

The plaintiff requests the learned Chancellor to make the following findings of fact:

1. Defendant Pan American Petroleum Company is, and at all times mentioned in the amended bill of complaint was, a corporation duly organized and existing under and by virtue of the laws of the State of California, and at all of said times was and now is wholly owned and absolutely controlled through the ownership of its entire capital stock by the other defendant, Pan American Petroleum and Transport Company.

2. Pan American Petroleum and Transport Company is now, and was at all times mentioned in the amended bill of complaint, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware.

3. Edward L. Doheny was, up to July 24, 1922, president of each of the defendant corporations. On or about July 24, 1922, he retired as president [766] of the Pan American Petroleum Company and became chairman of its board of directors. He continued as president of defendant Pan American Petroleum and Transport Company up to December 7, 1923, at which time he retired as such president and was duly elected chairman of the board of directors of said corporation.

4. At all times mentioned in the amended bill of complaint, said Edward L. Doheny, directly or indirectly, controlled over fifty per cent of the voting stock of defendant Pan American Petroleum and Transport Company.

5. Albert B. Fall, from March 5, 1921, until March 4, 1923, was the duly appointed, qualified, and acting Secretary of the Interior of the United States of America.

6. Edwin Denby, at all times mentioned in the amended bill of complaint, was the duly appointed, qualified, and acting Secretary of the Navy of the United States of America.

7. At and long prior to the filing of the bill of complaint herein, United States of America, the plaintiff, was and has ever since remained the owner in fee simple of the lands described in paragraph 5 of the amended bill of complaint; all of said lands were a part of the unappropriated public domain of the United States.

8. On, to wit, September 2, 1912, the President of the United States, pursuant to law, made a certain Executive order setting apart the lands described in paragraph 5 of the amended bill of complaint, wherein and whereby he ordered as touching said lands, as follows:

It is hereby ordered that all lands included in the following list and heretofore forming a part of petroleum reserve No. 2, California No. 1, withdrawn on July 2, 1910, from [767] settlement, location, sale, or entry and reserved for classification and in aid of legislation under the authority

of the act of Congress entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases (36 Stat. 847)," shall hereafter, subject to valid existing rights, constitute naval petroleum reserve No. 1, and shall be held for the exclusive use or benefit of the United States Navy until this order is revoked by the President or by act of Congress. To this end and for this public purpose the order of July 2, 1910, is modified and the withdrawal of that date is continued and extended in so far as it affects these lands.

Mount Diablo Meridian

T. 30 S., R. 22 E., sec. 24, all.

T. 30 S., R. 23 E., sec. 10, all; secs. 12 to 30, inclusive; secs. 32 to 36, inclusive.

T. 31 S., R. 23 E., secs. 1 to 4, inclusive; secs. 10 to 14, inclusive.

T. 30 S., R. 24 E., secs. 17 to 20, inclusive; secs. 28 to 34, inclusive.

T. 31 S., R. 24 E., secs. 1 to 12, inclusive; sec. 18, all.

WM. H. TAFT,
President.

September 2, 1912.

9. On May 31, 1921, the President of the United States made and issued a certain writing which is correctly copied as Exhibit "A" of the amended bill of complaint.

10. On July 8, 1921, said Albert B. Fall did communicate in writing to said Edward L. Doheny as follows:

There will be no possibility of any further conflict with Navy officials and this Department, as I have notified Secretary Denby that I should conduct the matter of naval leases under the direction of the President, without calling any of his force in consultation unless I conferred with himself personally upon a matter of policy. He understands the situation and that I shall handle matters exactly as I think best and will not consult with any officials of any bureau in his department, but only with himself, and such consultation will be confined strictly and entirely to matters of general policy. [768]

11. Said Edward L. Doheny, from and after July 8, 1921, understood and acted upon the belief that said Albert B. Fall had authority to make contracts and leases touching royalty oils from lands in the naval reserve and touching said lands themselves.

12. Between July 8, 1921, and October 25, 1921, said Albert B. Fall and said Edward L. Doheny held a personal conference or personal conferences with regard to the royalties reserved to the United States under a certain lease granted to Pan American Petroleum Company for a strip of land in the northeastern portion of Section 1, Township 31 South, Range 24 East, M. D. M., Kern County, California.

13. Between July 8, 1921, and October 25, 1921, said Albert B. Fall and said Edward L. Doheny held a conference or conferences respecting a proposed proposition to be made by and on behalf of

Pan American Petroleum and Transport Company, whereby said Pan American Petroleum and Transport Company should receive from the United States royalty oil accruing to the United States from leases on lands in naval reserves Nos. 1 and 2, California, and in consideration of such receipt should agree to erect certain storage tankage facilities at Pearl Harbor, T. H., and fill the same with fuel oil.

14. At such conference or conferences between said Albert B. Fall and said Edward L. Doheny had between July 8, 1921, and October 25, 1921, the matter of granting further leases in naval reserve No. 1 was discussed between said Fall and said Doheny. [769]

15. At and prior to November 30, 1921, there was pending in the Department of the Interior of the United States for action by the said Albert B. Fall, as Secretary of the Interior, a petition of Pan American Petroleum Company praying a reduction of the royalty of $55\frac{1}{2}$ per cent reserved to the United States in the lease of July 12, 1921, whereby the United States leased to said company certain territory in the northeastern portion of Section 1, Township 31 South, Range 24 East, in naval reserve No. 1.

16. At and prior to November 30, 1921, there was pending before the Department of the Interior of the United States, for action by the said Albert B. Fall as Secretary of the Interior, a proposition or proposal by Pan American Petroleum and Transport Company whereby, in consideration of the re-

ceipt of royalty oils by said company, and in consideration of the granting of further leases of lands in naval reserve No. 1 to said company, said company should agree to erect certain storage tankage facilities at Pearl Harbor, T. H., and fill the same with fuel oil.

17. At and prior to November 30, 1921, said Albert B. Fall and said Edward L. Doheny discussed a proposal that the said Edward L. Doheny should pay and deliver to the said Albert B. Fall the sum of \$100,000 lawful money of the United States for the personal use of said Albert B. Fall; and said Edward L. Doheny agreed if and when said Albert B. Fall should need said sum to pay the same to him.

18. On, to wit, November 30, 1921, said Edward L. Doheny, then being in New York City, New York, did at the request of said Albert B. Fall, [770] transmit to said Albert B. Fall in Washington the sum of \$100,000 lawful money of the United States.

19. Said Edward L. Doheny did not transmit said sum in the usual manner customary in business transactions as he could have done; but on the contrary transmitted the same in currency.

20. The said currency was obtained from Blair & Company, bankers, of New York City, by the use of the check of Edward L. Doheny, Jr., the son of said Edward L. Doheny.

21. The said currency was sent in a satchel by the hands of said Edward L. Doheny, Jr., from New York to Washington, where the said currency was

delivered to said Albert B. Fall. No entry of the withdrawal of said currency appears in the account of said Edward L. Doheny with Blair & Company.

22. No entry of said advance or of said transaction, nor of any personal transaction growing thereout between said Albert B. Fall and said Edward L. Doheny, has ever been made a matter of record or entry in the books of said Edward L. Doheny.

23. Said Albert B. Fall did, on November 30, 1921, hand to said Edward L. Doheny, Jr., who delivered the same to said Edward L. Doheny, a note payable on demand after date and bearing date Washington, D. C., November 30, 1921, in the sum of \$100,000, and payable to said Edward L. Doheny at New York City, or Los Angeles, California, value received with interest.

24. No sum, either on account of principal or interest, has been paid by the said Albert B. Fall to the said Edward L. Doheny on account of said note, or on account of said sum of \$100,000 so advanced or on account of interest thereon. [771]

25. Within a few weeks after the giving of said note the signature of Albert B. Fall thereon was torn from said note by said Edward L. Doheny, and said note remains so torn to this day.

26. The purpose of such tearing was so that said note should not be an enforceable obligation of said Albert B. Fall.

27. On, to wit, November 28, 1921, said Edward L. Doheny, acting for and on behalf of defendant Pan American Petroleum and Transport Company,

submitted to said Albert B. Fall a proposition in writing, a true copy whereof is as follows:

PAN AMERICAN PETROLEUM AND TRANSPORT CO.,

Office of the President,
New York, November 28, 1921.

The Honorable the Secretary of the Interior,
Washington, D. C.

Dear Mr. Secretary: Along the lines of your suggestion, I have made some inquiries regarding the cost of constructing tanks for the storage of one and one-half million barrels of fuel oil at Pearl Harbor. I find that the best price obtainable for these tanks, the Government to stand the cost of transporting the material from the ship's side to the tank site, and the cost of grading and otherwise preparing the tank site, is \$19,960 per tank, or \$0.363 per barrel of storage capacity.

The present price of crude oil in the field in California is \$1.13 per barrel. The present cost of fuel oil delivered at Pearl Harbor is \$1.90 per barrel.

The cost of 1,485,000 barrels of fuel oil delivered at Pearl Harbor at present rates would be \$2,821,500, which, added to the cost of constructing the 27 tanks necessary to store this amount of oil, which is \$538,920, makes a total of \$3,360,420.

Therefore, were we to construct the tanks and furnish the oil on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserve and to be

leased to us, it would require a return to us in royalty crude valued at \$3,360,420, or 2,973,823 barrels, figured at to-day's price. Of course, interest on the money invested should also be figured until final adjustment is made through the payment of royalty oil. [772]

I suppose you will turn this matter over to First Assistant Secretary Finney, who, with Rear Admiral Robison, may arrange the details of it during your absence, and as I also expect to be absent, I am confidentially furnishing Mr. Cotter with the information so that he can intelligently discuss the matter with Mr. Finney.

Cordially yours,

E. L. DOHENY.

28. On, to wit, November 29, 1921, said Albert B. Fall wrote, signed, and forwarded to Admiral J. K. Robison, Chief of the Bureau of Engineering of the United States Navy, a letter which is as follows:

My Dear Admiral: Mr. Cotter will wait upon you with data, etc., with relation to oil tanks and royalty oils in connection with Pearl Harbor demands.

I have asked him also to hand you, for your inspection, the original of a letter from Colonel Doheny addressed to myself, containing a *résumé* of the data.

Should you think best to accept this proposition then of course it would be necessary, in my judgment, to turn over to Colonel Doheny, if we can do so, leases upon further wells or area in the

naval reserve in which he is now drilling. If this is done it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan American.

The gas pressure is lessening to such a degree that the output of the wells of the two latter companies, as well as of other companies drilling in this neighborhood, is decreasing and is very disappointing. The two companies named are pumping their wells and of course they are not making any money but will experience a loss in the payment of the fifty-five per cent royalty to the Government.

If you approve the proposition, will you kindly indicate to me such approval by simple endorsement upon Col. Doheny's letter to myself, signed by yourself. Your simple O. K. will be sufficient.

Very sincerely yours,

ALBERT B. FALL.

Rear Admiral JOHN K. ROBISON,
Engineer in Chief, Navy Department.

29. On, to wit, November 30, 1921, said Albert B. Fall was willing, ready, and desirous to enter into a contract with Pan American Petroleum and Transport Company along the lines outlined in said [773] letter of November 28, 1921, and said letter of November 29, 1921.

30. On or before December 1, 1921, said Albert B. Fall issued instructions to his subordinates in the Department of the Interior, that the petition of Pan American Petroleum Company for reduction of royalties under the lease of July 12, 1921, should

be refused, but that said Company should, as relief, be granted a lease at regulation Interior Department royalties in section 1, T. 30 S., R. 24 E., in naval reserve No. 1.

31. Said Albert B. Fall, from, to wit, January 27, 1922, to April 15, 1922, knew and understood that Pan American Petroleum and Transport Company would make a bid to construct storage tankage facilities at Pearl Harbor, T. H., and fill the same with fuel oil, in consideration of the delivery to it of royalty oil of the United States, and in consideration that it should be assured further leases in naval reserve No. 1, Kern County, California. Said Albert B. Fall from, to wit, January 27, 1922, to April 25, 1922, was informed that the bid to be made by Pan American Petroleum and Transport Company would, so far as construction of storage tankage facilities and the filling of the same with fuel oil, be a bid at cost, and he further knew that said bid would involve the granting or assuring to Pan American Petroleum and Transport Company of further oil and gas leases of lands lying within naval petroleum reserve No. 1 in California.

32. No other person or corporation, except certain officers and agents of the United States, and except those operating with Pan American Petroleum and Transport Company in the matter, was advised that Pan American Petroleum and [774] Transport Company would bid at cost for the construction and filling of said storage tankage facilities at Pearl Harbor, T. H.

33. No other person or corporation was informed by said Albert B. Fall, or by any person acting on behalf of the United States in the premises, that the United States would consider a bid conditioned upon the assurance to the bidder of the granting of further leases in naval petroleum reserve No. 1, California, or preferential right to leases therein if and when made.

34. Due to the interest of said Albert B. Fall in forwarding a contract with the Pan American Petroleum and Transport Company touching the construction and filling of storage tankage facilities at Pearl Harbor, T. H., and the granting of further leases to Pan American Petroleum and Transport Company in naval petroleum reserve No. 1, California, Pan American Petroleum and Transport Company and its engineering representative, J. G. White Engineering Corporation, were, beginning in December, 1921, and continuing until April 15, 1922, kept in close touch with the development of the plans for said construction and for the making of a contract touching the same, and had opportunities for conference and advice from the officers and employees of the United States which no other bidder was afforded.

35. The only oil companies with whose officers or representatives officers or employees of the United States conferred touching a proposed contract for delivery of royalty oils of the United States in consideration of the construction of storage tankage facilities at Pearl Harbor, T. H., and the filling of the same with fuel oil, were Pan

[775] American Petroleum and Transport Company, Standard Oil Company of California, General Petroleum Company, Associated Oil Company, and Union Oil Company of California.

36. Said Albert B. Fall knew prior to April 15, 1922, that counsel for General Petroleum Corporation considered the proposed contract illegal and that said company would not submit a bid.

37. No invitations for proposals for the Pearl Harbor project were sent to General Petroleum Corporation.

38. Said Albert B. Fall knew prior to April 15, 1922, that counsel for Standard Oil Company of California was of opinion that the proposed contract was illegal and had written an opinion to that effect, and that Standard Oil Company of California would not bid upon the construction of tankage facilities in consideration of delivery of Government royalty oils.

39. It was or could have been known to said Albert B. Fall prior to April 15, 1922, that Union Oil Company of California had not been asked to submit a bid and would not bid in response to the invitation for proposals issued by the Interior Department for bids for the construction of tankage facilities and the filling of the same with fuel oil at Pearl Harbor, T. H.

40. No invitations for proposals for the Pearl Harbor project were sent to Union Oil Company of California.

41. It was known to said Albert B. Fall prior to April 15, 1922, that Associated Oil Company

would not submit a bid for the construction of storage facilities at Pearl Harbor and the filling of the same with fuel oil except upon the condition [776] that authority should be obtained from Congress for the making of such a contract as was proposed.

42. Said Albert B. Fall, prior to April 15, 1922, knew that invitations had been furnished to two construction companies, but he was of the opinion, and so stated, that it was impossible for construction companies to make bids on the proposed work of construction at Pearl Harbor, T. H., because the same would have to be paid for by delivery of royalty oils belonging to the United States.

43. An invitation for proposals was issued calling for bids to be made to the Secretary of the Interior which bore date March 7, 1922. The proposals submitted thereunder were opened April 15, 1922. The only proposals received were as follows:

A proposal from Associated Oil Company which was conditioned upon congressional action approving the form of contract intended to be made.

A proposal from Associated Oil Company which furnished which did not cover the proposed construction work mentioned in the invitation, but applied only to the furnishing of fuel oil.

Two proposals from Pan American Petroleum and Transport Company, one called Proposal A, which was in accordance with the invitation, and another called Proposal B, which was not in accordance with the invitation.

44. Said proposal B named a smaller lump sum

in barrels of crude royalty oil than did Proposal A; agreed that if the contractor's actual cost of the doing of the work of construction were less than a stipulated sum mentioned in the proposal, any savings effected below said stipulated sum should be credited to the Government, and was conditioned upon the granting by the United States of a preferential right to the Pan American Petroleum and Transport Company to become the lessee in all leases which might thereafter be granted by the [777] United States for recovery of oil and gas in naval petroleum reserve No. 1, California.

45. No other bidder was invited to compete for a contract upon the terms mentioned in Proposal B of Pan American Petroleum and Transport Company, nor was any bidder invited to bid upon any terms involving the granting of preferential rights to leases by the United States.

46. No person or corporation was advised by the officers or employees of the United States that it was expected any bid would be received for the doing of the construction work at Pearl Harbor at cost.

47. Said Albert B. Fall was not in Washington when the proposals were opened and scheduled on April 15, 1922. He left Washington for Three Rivers, New Mexico, on April 13, 1922.

48. Before said Albert B. Fall left Washington on April 13, 1922, he gave instructions to his subordinates that no bid should be accepted and no contract should be awarded without his first being

informed and without his consent thereto being given.

49. On April 18, 1922, the Acting Secretary of the Interior, Edward C. Finney, communicated by telegraph with said Albert B. Fall, advising that certain officers and employees of the United States named in said telegram recommended the acceptance of Proposal B; on the same date said Albert B. Fall gave his consent by telegram to the acceptance of Proposal B.

50. On April 18, 1922, pursuant to the consent and direction of said Albert B. Fall, Edward C. Finney, then Acting Secretary of the Interior, as [778] such, purported to make an award to Pan American Petroleum and Transport Company by transmitting to said company a letter in the words following:

Department of the Interior, Washington,
April 18, 1922.

Pan American Petroleum & Transport Co.,
120 Broadway, New York City, N. Y.

Gentlemen: Your bid filed April 15, 1922, for the exchange of Government royalty oils from naval reserves Nos. 1 and 2, California, for fuel oil and storage for naval purposes at Pearl Harbor, Hawaii, has been examined in connection with other bids submitted, and your alternative bid B found to be the lowest and best bid received. Accordingly award is hereby made to you of said contract, per

your alternative bid B. Formal contract is being prepared for execution.

Respectfully,

E. C. FINNEY,

Acting Secretary.

51. Subsequent to the forwarding of the letter mentioned in the last preceding request, J. J. Cotter, vice president of Pan American Petroleum and Transport Company, averred that that company did not desire to proceed with the making of the contract pursuant to said letter unless the United States would agree that within twelve months from the date of the contract it would grant to the Pan American Petroleum and Transport Company a lease or leases on some portion of the lands lying within the boundaries of naval reserve No. 1.

52. On April 20, 1922, Arthur W. Ambrose, chief petroleum technologist of the Bureau of Mines of the Department of the Interior of the United States, was sent with all documents and papers relative to the same to Three Rivers, New Mexico, to consult with the said Albert B. Fall concerning [779] the same. It is not clear whether said Ambrose took with him a draft of the letter of April 25, 1922, Exhibit "E" of the amended bill of complaint, in order to show the same to the said Albert B. Fall. It is, however, true that he was instructed to consult the said Fall concerning same.

53. Pending said Ambrose's arrival at Three Rivers, New Mexico, for consultation with said Albert B. Fall, certain officers and employees of

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the United States were at work in drafting the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint.

54. On April 23, 1922, said Albert B. Fall, by telegram, advised Edward C. Finney, Acting Secretary of the Interior, that he should go ahead with the contract and should execute the same on behalf of the Department of the Interior.

55. Amongst other matters as to which said Ambrose was instructed to consult said Albert B. Fall on the arrival of said Ambrose at Three Rivers, New Mexico, on or about April 23, 1922, was the question whether said Edwin Denby, as Secretary of the Navy, should be made a party to the proposed agreement to be made with the Pan American Petroleum and Transport Company.

56. By telegram dated April 23, 1922, said Albert B. Fall consented and agreed that said Edwin Denby should be so made a party.

57. The question whether said Edwin Denby should not be made a party to the agreement and whether the Executive order of May 31, 1921, Exhibit "A" of the amended bill of complaint, had any legal force and effect, was originally raised [780] by J. J. Cotter, vice-president of and attorney for Pan American Petroleum and Transport Company.

58. Said Cotter absolutely refused to permit Pan American Petroleum and Transport Company to enter into said contract unless said Edwin Denby should be made a party to and sign said contract as Secretary of the Navy of the United States.

59. From the inception of negotiations with Pan American Petroleum and Transport Company touching a proposed contract for the erection of storage facilities and filling the same with fuel oil at Pearl Harbor, T. H., Albert B. Fall kept in touch with the matter and no matter of policy or action of importance was determined without his consent first had and obtained.

60. The condition inserted in Proposal B by Pan American Petroleum and Transport Company touching a preferential right to leases in naval petroleum reserve No. 1 was so inserted with the express purpose on the part of the officers and employees of said company that no other company should have an opportunity to obtain leases in said naval petroleum reserve, and so that said Pan American Petroleum and Transport Company should be able to eliminate competition for such leases as the United States might thereafter decide to make.

61. The guarantee of certain specific leases in the letter of April 25, 1922, Exhibit "E" of the amended bill of complaint, was not necessary, nor was it necessary to make the lease of June 5, 1922, Exhibit "F" of the amended bill of complaint when the same was made, to prevent drainage. [781]

62. The purpose of the guarantee of certain leases in the letter of April 25, 1922, Exhibit "E" of the amended bill of complaint, was to assure the production of additional royalty oil to be used by the United States as consideration for the construction of storage tankage facilities at Pearl

Harbor, T. H., and the filling of the same with fuel oil.

63. The posted field price of crude oil in California declined rapidly after the making of the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint.

64. In the autumn of 1922 Pan American Petroleum and Transport Company, and said Edward L. Doheny, were in correspondence and consultation with said Albert B. Fall concerning a proposal that the Pan American Petroleum and Transport Company should at once become lessee of certain areas in naval petroleum reserve No. 1, and in consideration thereof should agree to do the things mentioned in said written proposition for the United States. The proposition of Pan American Petroleum and Transport Company to become lessee of certain area in naval petroleum reserve No. 1 and to give certain considerations to the United States in consideration of becoming such lessee, was by said Edward L. Doheny reduced to writing and delivered to said Albert B. Fall.

65. Said proposition so reduced to writing was delivered by said Albert B. Fall to certain other officers and employees of the United States with his favorable recommendation.

66. As a result of said proposition said Edward L. Doheny subsequently enlarged the same by a [782] proposition in writing bearing date November 6, 1922, made certain further suggestions with regard to the areas to be leased to Pan American Petroleum and Transport Company, and with re-

gard to the considerations which the Pan American Petroleum and Transport Company would give to the United States for such lease or leases.

67. As a result of said second proposition of said Edward L. Doheny negotiations were had between certain officers of Pan American Petroleum and Transport Company, or its nominee, Pan American Petroleum Company and certain officers and employees of the United States, concerning a proposed lease to be granted on lands in naval petroleum reserve No. 1, California.

68. Said Albert B. Fall and said Edward L. Doheny conferred together concerning a schedule of royalties to be inserted in the proposed lease to Pan American Petroleum and Transport Company, or its nominee, Pan American Petroleum Company, with the result that said Albert B. Fall and said Edward L. Doheny agreed upon a schedule of royalties which was the schedule of royalties recommended by said Albert B. Fall and which became the schedule of royalties in the lease to Pan American Petroleum Company, Exhibit "D" of the amended bill of complaint.

69. Said lease of December 11, 1922, Exhibit "D" of the amended bill of complaint, was arranged by private negotiation and no competition of any kind was had in the making thereof. No other oil company was invited to submit a proposal for such lease, although at least one other oil company would have been interested in the matter. [783]

70. For some time prior to the making of the lease of December 11, 1922, Exhibit "D" of the

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amended bill of complaint, and down to October 25, 1922, said Albert B. Fall and other officers and employees of the United States who were in close touch with him in connection with the administration of the naval petroleum reserves, stated to persons making inquiry for leases in naval petroleum reserve No. 1 in effect that it was not the intention of the Department of the Interior or of the United States to make any leases or to drill in naval reserve No. 1 except for purely defensive purposes, and that there was no immediate leasing or drilling in contemplation.

71. The representations mentioned in the previous paragraph, at least so far as said Albert B. Fall was concerned, were false and untrue and known by him so to be.

72. In February, 1922, an agreement was made by the United States with Pacific Oil Company, which is still in force, whereby no drilling should be done by either party to the agreement, except on six months notice to the other party. This agreement covered the following described lands:

T. 30 S., R. 24 E., SW. $\frac{1}{2}$ Sec. 27, S. $\frac{1}{2}$ Sec. 28, S. $\frac{1}{2}$ Sec. 29, SE. $\frac{1}{2}$ Sec. 30, E. $\frac{1}{2}$ Sec. 31. All of Sections 32 and 33, W. $\frac{1}{2}$ Sec. 34.

T. 31 S., R. 24 E., NW. $\frac{1}{2}$ Sec. 3, N. $\frac{1}{2}$ Sec. 4, N. $\frac{1}{2}$ Sec. 5, NE. $\frac{1}{2}$ Sec. 6.

73. In October, 1922, an agreement was made whereby no drilling was to be done in section 31, T. 30 S., R. 24 E., and 36, T. 30 S., R. 23 E., in naval reserve No. 1. Said agreement is still in force.

74. There was no necessity, on account of

threatened drainage, to make the lease of December [784] 11, 1922, Exhibit "D" of the amended bill of complaint, at the time it was made.

75. At the time of making the agreement and lease of December 11, 1922, Exhibits "C" and "D" of the amended bill of complaint, the plans for the further construction work at Pearl Harbor had not been prepared. Said plans were not forwarded by the Navy Department until January 7, 1923.

76. Fuel oil is a supply used by the United States Navy; gasoline is a supply used by the United States Navy; Diesel oil is a supply used by the United States Navy; lubricating oil is a supply used by the United States Navy.

77. The project embodied in the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint, was and is a project complete in itself, and constitutes a reserve fuel depot for the United States Navy.

78. The two projects embodied in the contract of December 11, 1922, Exhibit "C" of the amended bill of complaint, are concrete, definite, and complete projects in and of themselves. The one constitutes a fuel depot for reserve oils and the other constitutes a complete, separate, and independent gasoline fuel depot located on what is known as Ford Island, in the Pearl Harbor Naval Station, T. H.

79. The contract of April 25, 1922, Exhibit "B" of the amended bill of complaint, is a contract for

the construction of a fuel depot at Pearl Harbor, T. H., and the filling of the same with fuel oil.

80. The contract of December 11, 1922, Exhibit "C" of the amended bill of complaint, constitutes, *inter alia*, a contract for the erection of two fuel [785] depots for the United States Navy at Pearl Harbor, T. H., and the filling of the same with certain petroleum products.

81. The proper and duly authorized officials of the United States Navy, on February 25, 1920, made a request of the Naval Committee of the House of Representatives, for the insertion in the annual appropriation bill for the Navy for the fiscal year beginning July 1, 1920, and ending June 30, 1921, which became the act of June 4, 1920, of an appropriation of \$1,000,000 for the construction of storage for reserve fuel oil at Pearl Harbor, T. H. No such appropriation was made in said bill.

82. From 1913 to 1922, inclusive, appropriations by the Congress of the United States, except emergency appropriations during the war with Germany, were made in specific sums for specific projects, and not otherwise; in the case of deficiency appropriations made during the emergency of war, where the practice above mentioned was not followed, special explanation was made to Congress of the reasons for not following it when lump appropriations were made for fuel depots generally.

83. The payment of \$100,000 by said Edward L. Doheny to said Albert B. Fall was intended by the said Edward L. Doheny to influence the said Albert B. Fall in his official actions in connection with

leases and contracts touching the United States naval reserves and royalty oil accruing to the United States from said reserves to be made with Pan American Petroleum and Transport Company and its subsidiary, Pan American Petroleum Company. [786]

84. At the time when said Edward L. Doheny paid said sum of \$100,000 to said Albert B. Fall, said Edward L. Doheny knew and understood that such payment would influence said Albert B. Fall in his official conduct as Secretary of the Interior in connection with leases and contracts to be made to Pan American Petroleum and Transport Company and its subsidiary, Pan American Petroleum Company, in connection with United States Naval Petroleum Reserves in California.

85. At the time said Edward L. Doheny made said payment of \$100,000 to said Albert B. Fall, it was understood by said Edward L. Doheny and said Albert B. Fall that said Albert B. Fall need not repay the same or any part thereof to said Edward L. Doheny.

86. At the time said Edward L. Doheny made said payment of \$100,000 to said Albert B. Fall, said Edward L. Doheny expected that if said Albert B. Fall did not sell or turn over certain ranch land owned by said Albert B. Fall, or to be acquired by him in New Mexico, said Edward L. Doheny would cause Pan American Petroleum and Transport Company to employ said Albert B. Fall at a salary sufficiently large to enable said Albert B. Fall out

of one half thereof to pay off said amount in five or six years.

87. At the time said Edward L. Doheny made said payment of \$100,000 to said Albert B. Fall, said Edward L. Doheny knew that said Albert B. Fall expected to leave the Government's employ and to obtain employment with Pan American Petroleum and Transport Company, or Pan American Petroleum Company, or both, through the procurement and good offices of said Edward L. Doheny. [787]

88. Said Edward L. Doheny, at all times mentioned in the amended bill of complaint, purported to be and was in fact in effective control of the policies and actions of Pan American Petroleum and Transport Company and its subsidiary, Pan American Petroleum Company.

89. Subsequent to October 25, 1921, and prior to March 7, 1922, said Albert B. Fall and John K. Robison, personal representative of said Edwin Denby in naval reserve matters, agreed that the proposed contract for the construction of tankage facilities and filling the same should be kept secret.

90. The reason and purpose of said agreement for secrecy was in order that Congress and the public should not know what was being done, and was not military reasons.

91. Pursuant to said agreement the proposed contract was concealed and kept secret until after the award was made on April 18, 1922, to Pan American Petroleum and Transport Company.

92. Said Edward L. Doheny and said Albert B. Fall did act in co-operation and collusion with respect to the royalties being paid and to be paid on subsequent leases by Pan American Petroleum and Transport Company, and its subsidiary, Pan American Petroleum Company, and with regard to all other matters and things touching the proposed contract which was ultimately made April 25, 1922, between the United States, acting through Edwin Denby and Albert B. Fall, and Pan American Petroleum and Transport Company, and also with regard to the agreement and lease of December 11, 1922, Exhibits "C" and "D" of the amended bill of complaint. [788]

PLAINTIFF'S REQUESTS FOR CONCLUSIONS OF LAW.

The learned Chancellor is requested to make the following conclusions of law:

1. The payment of \$100,000 by Edward L. Doheny to Albert B. Fall, under the circumstances under which said payment was made in this case, was *contra bonos mores* and against public policy.

2. The question whether the directors and stockholders of Pan American Petroleum and Transport Company knew of said payment is immaterial.

3. The making of said payment constitutes a fraud upon the United States and renders voidable all contracts and transactions made between Pan American Petroleum and Transport Company, or its subsidiary, Pan American Petroleum Company, and the United States subsequent thereto.

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4. Edward L. Doheny and Albert B. Fall did conspire and confederate for the making of certain contracts and agreements of great benefit and advantage to the Pan American Petroleum and Transport Company, and pursuant to said confederation and conspiracy there were made the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint; the alleged contract of April 25, 1922, Exhibit "E" of the amended bill of complaint; the lease of June 5, 1922, Exhibit "F" of the amended bill of complaint; the agreement of December 11, 1922, Exhibit "C" of the amended bill of complaint; and the lease of December 11, 1922, Exhibit "D" of the amended bill of complaint.

5. The contract of April 25, 1922, Exhibit "B" of the amended bill of complaint, was not let upon competitive bidding. [789]

6. The contract of April 25, 1922, Exhibit "B" of the amended bill of complaint, the lease of June 5, 1922, Exhibit "F" of the amended bill of complaint, the contract of December 11, 1922, Exhibit "C" of the amended bill of complaint, and the lease of December 11, 1922, Exhibit "D" of the amended bill of complaint, are voidable at the option of the United States and should be delivered up to be cancelled.

7. The contract of April 25, 1922, Exhibit "B" of the amended bill of complaint, and the contract of December 11, 1922, Exhibit "C" of the amended bill of complaint, are null, void, and of none effect, and the same should be surrendered up by defendant

Pan American Petroleum and Transport Company to plaintiff for cancellation.

8. The lease of June 5, 1922, Exhibit "F" of the amended bill of complaint, was made without authority of law, was part of the consideration of an illegal contract, to wit, the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint, and the same should be delivered up by defendant Pan American Petroleum and Transport Company to be cancelled.

9. The lease of December 11, 1922, Exhibit "D" of the amended bill of complaint, constituted part of the consideration given by the United States for the contract of December 11, 1922, Exhibit "C" of the amended bill of complaint, said contract being wholly void and illegal, said lease is likewise void and illegal and should be delivered up for cancellation by the defendant Pan American Petroleum Company.

10. The defendants Pan American Petroleum and Transport Company and Pan American Petroleum [790] Company should cease to trespass upon the lands of the United States and should forthwith surrender possession of the lands mentioned in the bill of complaint, and all of them, to the United States.

11. The contracts and leases mentioned in the bill of complaint were and are wholly unauthorized by law or any statute and should be delivered up to plaintiff for cancellation.

12. An account should be stated and taken between the United States and Pan American Pe-

troleum and Transport Company, and its subsidiary, Pan American Petroleum Company, whereby said defendants should account to the plaintiff for all oil delivered by the United States to Pan American Petroleum and Transport Company under the contracts of April 25, 1922, Exhibit "B" of the amended bill of complaint, and December 11, 1922, Exhibit "C" of the amended bill of complaint, for all oil recovered by either of said defendants under the leases of June 5, 1922, Exhibit "F" of the amended bill of complaint, and December 11, 1922, Exhibit "D" of the amended bill of complaint, and the sum or sums found due upon such accounting should be paid by the defendants, or either of them, to the plaintiff.

13. That the costs of this proceeding should be paid by the defendant Pan American Petroleum and Transport Company. [791]

(Name of Court and Title of Case.)

DEFENDANTS' REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

DEFENDANTS' REQUESTS FOR FINDINGS OF FACT.

Defendants respectfully request the Court to make the following findings of fact:

1. That the Executive Order, dated May 31, 1921, which was signed by Warren G. Harding, President of the United States, was not obtained, or caused to be issued by Albert B. Fall.

2. That the said Albert B. Fall did not make any false, fraudulent or untrue representations of

fact to the said Warren G. Harding for the purpose of inducing the making of or in any way in connection with the Executive Order of May 31, 1921.

3. That on or about November 30, 1921, Edward L. Doheny loaned to Albert B. Fall the sum of One Hundred Thousand Dollars, which [792] said loan was evidenced by the promissory note of the said Albert B. Fall to the order of the said Edward L. Doheny, bearing said date, for the said sum, with interest, and payable on demand.

4. That the said loan was a personal transaction between the said Edward L. Doheny and Albert B. Fall, and that the same was not made either in consideration of, in contemplation of, or in any way connected with any of the instruments, of which copies are annexed to the amended complaint herein.

5. That the said Edward L. Doheny and the said Albert B. Fall did not combine, confederate, collude or conspire at any time to defraud the United States of America, by bringing about the execution and delivery of the instruments, of which copies are annexed to said amended bill of complaint or any of them.

6. That the contract, dated April 25th, 1922, being Exhibit "B" annexed to said amended bill of complaint, and the letter of the same date, being Exhibit "E" annexed thereto, and the lease dated June 5th, 1922, being Exhibit "F" annexed to said amended bill of complaint, and the contract and lease dated December 11th, 1922, being Ex-

hibits "C" and "D" annexed to said amended bill of complaint, and each of them, were thus executed and delivered by direction of and with the approval of Edwin Denby, Secretary of the Navy of the United States.

7. That the said Edwin Denby, in executing and delivering, and causing to be executed and delivered, each and every of the instruments, of which copies are annexed to said amended bill of complaint, did so of his own free will, volition and discretion, acting in good faith as Secretary of the Navy, as aforesaid.

8. That the said Albert B. Fall did not procure, or cause or induce the said Edwin Denby, as Secretary of the Navy, as aforesaid, to execute or deliver any of the said instruments of which copies are annexed to the said amended bill of complaint. [793]

9. That the execution and delivery by Edwin Denby, as Secretary of the Navy of the United States of America, of each and every of the said instruments of which copies are annexed to the said amended bill of complaint, was not procured or influenced, directly or indirectly, or intended to be procured or influenced, by the loan made on November 30, 1921, by Edward L. Doheny to Albert B. Fall.

10. That the action of Edward C. Finney, Assistant Secretary of the Interior, in signing the contract and letter, dated April 25, 1922, being Exhibits "B" and "E" annexed to the amended bill of complaint, was not procured or influenced

or intended to be procured or influenced by the loan made to Albert B. Fall by Edward L. Doheny on or about November 30, 1921.

11. That none of the said instruments of which copies are annexed to said amended bill of complaint, were, or are, detrimental to the interests of the United States of America.

12. That each and every of the said instruments, of which copies are annexed to the said amended bill of complaint, was, and is, fair, reasonable, and advantageous to the interests of the United States of America.

13. That defendants herein, and each of them, had, prior to the commencement of this action, duly and fully performed each and every obligation upon them, or either of them imposed by all of the said instruments, of which copies are annexed to said amended bill of complaint.

That the said defendants, and each of them, have been, and are, ready, able and willing to perform each and every of the obligations upon them imposed by the said instruments and each of them, except as restrained therefrom by the temporary injunction issued herein by this Court. [794]

14. That the defendant, Pan-American Petroleum & Transport Company, had, prior to the commencement of this action, expended, in good faith, in the performance of the contracts dated April 25th, 1922, and December 11th, 1922, large sums of money belonging to it.

That subsequent to the commencement of this action, the said defendant has expended additional

sums of money in the further performance of the said contracts.

That all of the said sums, thus expended, have been thus expended upon the property of the United States of America and under the supervision and control of the duly appointed officers of the United States of America.

That each and every of the said expenditures have been of value to the United States of America, and have enriched the United States of America; and that the United States of America has received, by reason of the said advances and expenditures by the said defendant, actual value of not less than \$1.10 for each \$1.00 thus expended by the said defendant.

15. That the defendant, Pan-American Petroleum Company, had, prior to the commencement of this action, expended large sums of money in the exploration, exploitation and development of the lands situated in Naval Reserve No. 1, and included in the leases dated June 5th, 1922, and December 11, 1922, copies of which said leases are attached to the amended bill of complaint and are marked Exhibits "F" and "D" respectively.

That all of the said advances and expenditures have been made in good faith, under advice of counsel and pursuant to the terms of the said leases, and are of value to plaintiff herein.

16. That all of the acts of Albert B. Fall and of all employees of the Department of the Interior in connection with any of the instruments of which copies are annexed to the amended bill of

complaint, were performed at the request of the Secretary of the Navy of the United States, and for the purpose of aiding in carrying out the wishes and decisions of the said Secretary of the Navy in the discharge of his duties. [795]

DEFENDANTS' REQUEST FOR CONCLUSIONS OF LAW.

1. That each and every of the instruments, of which copies are annexed to the amended bill of complaint herein, is legal, valid and binding upon the parties thereto.

2. That none of the said instruments is tainted by fraud.

3. That none of the said instruments was executed pursuant to any conspiracy between Albert B. Fall and Edward L. Doheny.

4. That the execution of none of the said instruments was procured by bribery.

5. That all of the said instruments were executed in all respects, in accordance with the laws of the United States of America.

6. That the Secretary of the Navy, in executing, approving and delivering each and every of the said instruments on behalf of the United States of America, acted by virtue of, and within and pursuant to the power and discretion lawfully vested in him by the Congressional Enactment passed June 4th, 1920.

7. That a decree should be entered in all respects dismissing the amended bill of complaint herein vacating the injunction and receivership order,

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dated March 17, 1924, heretofore made herein, and directing that the receivers appointed therein be discharged and directed to account for and pay to the defendants all sums of money which [796] may have come into their hands in the discharge of their duties, less their lawful reasonable costs and expenses. [797]

(Name of Court and Title of Case.)

MEMORANDUM OPINION.

Filed May 28, 1925. Chas. N. Williams, Clerk.
By R. S. Zimmerman, Deputy.

This is a suit in equity wherein the United States of America seeks to have declared null, void, and of no effect two contracts dated April 25, 1922, and December 11, 1922, respectively, and two oil and gas leases to lands in the Naval Petroleum Reserves in California dated June 5, 1922, and December 11, 1922, respectively. The prayer of the bill is that these agreements and leases be cancelled, for an accounting, and for general relief. The relief is sought upon two grounds: First, fraud in the making of the contracts and leases; and second, lack of legal authority for their making.

The case has received the careful consideration that its importance demands, but existing circumstances due to pressure and volume of work in the court do not admit of the preparation of a detailed opinion upon every issue. The formal decision upon all issues consists of the Findings of Fact

and Conclusions of Law filed herewith. I feel impelled however to amplify such decision by this statement. [798]

I will first consider the charge of fraud and official misconduct in the making of the contracts and leases in suit, and secondly, whether the agreements were made pursuant to any legal authorization. The first involves mixed questions of law and fact while the latter is solely a legal question.

The contracts and leases in suit may be epitomized as follows:

The agreement of April 25, 1922, is between the Pan American Petroleum and Transport Company, a corporation, called the "contractor," and the United States of America, by the Acting Secretary of the Interior and the Secretary of the Navy, thereof, denominated the "Government."

It recites: "that by virtue of authority contained in and the policy expressed by applicable Acts of Congress and in accordance with 'Proposal B' of the contractor, dated April 14, 1922, the parties hereto have mutually covenanted and agreed with each other as follows":

ARTICLE I. The contractor, for the consideration mentioned in the contract, and under the penalty of a bond of \$250,000, agrees to faithfully and fully furnish 1,500,000 barrels of fuel oil and storage facilities for said fuel oil which the contractor also agrees to construct at Pearl Harbor Territory of Hawaii, in accordance with "Proposal B" and plans and specifications to be furnished by the Government.

ARTICLE II. Declares the intention of the parties is to effect an exchange of crude oil unsuitable for Navy use for fuel oil, the crude oil being produced from Naval Petroleum Reserves Nos. 1 and 2, in California, and being property of the Government, and the fuel oil to be delivered by the contractor at the Naval Station at Pearl Harbor, Territory of Hawaii.

ARTICLE III. The contractor covenants to furnish the 1,500,000 barrels of fuel oil and to deliver such oil into storage facilities to be constructed and erected by the contractor for a lump sum of 5,878,905 barrels of crude oil from Naval Petroleum Reserves Nos. 1 and 2 "of from 14 to 17.9 degrees (Baume) gravity, or crude oil in such other quantity and quality as shall be of equal value, which lump sum is termed the 'proposal sum.'" Article Three further provides: "It is hereby mutually understood and agreed that said 'proposal sum' is based upon the November-December, 1921, published field price of [799] California crude oil of from 14 to 17.9 degrees (Baume) gravity (\$1.10 per barrel), which for the purposes of this agreement shall be termed the 'reference price of basic crude oil,' and upon the November-December, 1921, market price of fuel oil at Bay Point, California (\$1.50 per barrel), which for the purposes of this agreement shall be termed the 'reference price of fuel oil.'" Then follows a clause that deals with this change of gravity of oils in which computations and allowances are made under the contract dependent upon the variations

in the market prices of crude and fuel oil during the life of the contract and provision is made for the acceptance of "basic crude oil" of other gravity which is termed "particular crude oil." It is provided that if delivery of "particular crude oil" is made under the contract certain debits and credits will be extended at the ratio which the "published field price" of such "particular crude" on the date of delivery *bears* to the "reference price of basic crude." It is further agreed that any difference in debits and credits under the contract shall bear interest at the rate of 5% per annum the interest to be allowed in barrels of basic crude oil.

ARTICLE IV. The Government agrees to deliver to the contractor at the place of production each month "all the royalty oil that may be furnished by its lessees in reserves Nos. 1 and 2, until all claims of the contractor under the contract are satisfied."

ARTICLE V. Vests the Secretary of the Interior with exclusive discretion to grant additional leases on any lands he may designate in reserve No. 1 so as to maintain total deliveries of royalty oil under the contract at the approximate rate of 500,000 barrels per annum.

ARTICLE VI. Requires the Government to deliver to the contractor on account of the "proposel sum" all royalty oil from reserves Nos. 1 and 2 which has been accumulated and was in storage at the time the contract was made.

ARTICLE VII. Requires the contractor to take the crude oil at the wells and bear every expense

incident to its movement, and further requires the contractor to deliver the fuel oil in storage at Pearl Harbor, T. H., and to pay for the transportation of the fuel oil to storage and permits the contractor to supply the fuel oil in storage in any amount it may elect providing that the [800] required contract amount be entirely furnished and delivered in storage within the time that the Government has furnished sufficient royalty oil to pay for the contracted fuel oil and storage facilities.

ARTICLE VIII. Specifies how and where the fuel oil is to be gauged.

ARTICLE IX. Concerns the payment of demurrage in the event that the contractor's tankers are delayed in discharging fuel oil at Pearl Harbor, the calculation of demurrage being made in barrels of oil and added to the "proposal sum."

ARTICLE X. Relates to increasing or diminishing the "proposal sum" to meet the contingency of more or less or different concrete piles being required to provide the storage facilities at Pearl Harbor than are shown by the drawings and specifications.

ARTICLE XI. Confers the preferential right on the contractor and covenants that;

"if during the life of this contract future leases shall be granted"—within a certain portion of reserve No. 1—"the contractor shall first be called upon by the Secretary of the Interior to meet such drilling conditions and to pay such royalties as the Secretary may deem just and proper, and in the event of his acceptance of such conditions and of his agreement to pay

such royalties, the contractor shall be granted by the Government a preferential lease on such tracts as the Secretary of the Interior may decide to lease. In the event of the failure of the contractor to agree to the conditions and royalties as proposed by the Secretary of the Interior, then said lease or leases may be offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in said bidding."

ARTICLE XII. Provides for the giving to the Government of any saving in the cost of the construction of the storage facilities should said cost be less than 3,197,086 barrels of "basic crude oil" at "reference price" thereof, such saving to be determined by agreement between the Secretary of the Interior and the contractor and to be expressed by crediting such saving in barrels of "basic crude oil" on account of the "proposal sum."

The lease of June 5, 1922, was incidental to and in pursuance of the April 25, 1922, contract. It was granted at the request of the defendants and to enable the contractor to more speedily perform the said contract. It was given without competitive bidding and solely to effectuate the preferential right of Article XI of the April 25th contract. The parties were the United States of [801] America, acting through the Secretary of the Interior, and the Pan American Petroleum and Transport Company, a corporation. It recites, *inter alia*, that it is made pursuant to authority of an Act of Congress approved June 4, 1920 (41 Stat. 812), making

appropriations for naval service and other purposes. It granted the exclusive right to drill for, extract, remove, and dispose of all oil and gas deposits in the Northeast quarter (NE.1/4) of Section Three (3), Township Thirty-one (31) South, Range Twenty-four (24) East, of the Mount Diablo Meridian, California, for a period of twenty years with a certain preferential right of ten years additional. Certain drilling requirements are stated, and the royalties to be paid the Government under the lease range from twelve and one-half per cent (12½%) for twenty (20) barrels or less per day to forty-five per cent (45%) for four hundred (400) barrels or more per day for oil produced of thirty (30) degrees or over (Baume) and from twelve and one-half per cent (12½%) to thirty-five per cent (35%) for oil of less than thirty (30) degrees (Baume). The lease also provides for payment of certain royalties for gas and casing-head gasoline produced from wells under the lease. There are other provisions which are of no particular consequence in the present inquiry.

The contract of December 11, 1922, was made between the same parties as the April 25, 1922, agreement, but was signed on behalf of the Government by Albert B. Fall, Secretary of the Interior, in person. Its preamble recites the making of the contract of April 25, 1922, and the purposes and intent thereof, i. e., to effect an exchange of royalty crude oil from naval reserves for fuel oil in storage at Pearl Harbor, T. H., including tanks and incidental facilities, and that,

"It is now desired to fill said tanks as promptly as they are individually completed and also to procure for the Navy additional amounts of fuel oil and other petroleum products in storage at Pearl Harbor, T. H., and elsewhere, and the Secretary of the Navy in his letter of November 29, 1922—has requested the Secretary of the Interior as administrator of the naval petroleum reserves to arrange for such additional fuel oil and other petroleum products in storage through exchange therefor of additional royalty crude oil belonging to the Government in said California naval reserves, the probable cost of the additional products and storage immediately planned for being estimated at fifteen million dollars, more or less." [802]

It states the willingness of the contractor to do the work and furnish the oil, and then continues; "and whereas the furnishing of such additional amounts of fuel oil and other products in storage on the basis of exchange for the Government royalty crude oils cannot be accomplished from the present leases in the California naval reserves."

Mention is then made of the preferential right of the Pan American Petroleum and Transport Company to leases in naval reserve No. 1, as provided in the April 25, 1922, contract, the agreement reciting that the contractor

"is planning to provide refinery facilities at Los Angeles, California, for 10,000 barrels per

day, to be increased to 20,000 per day as soon as the situation justifies, together with the pipe lines connecting the leases in the field and the refinery and docks, and to erect storage to the amount of 2,000,000 barrels or more."

Then follows:

ARTICLE I. Providing for a bond of \$250,000 to insure compliance with the agreement, specifying E. L. Doheny as Guarantor on said bond. Said article of the agreement continues in paragraphs substantially as follows:

1. Makes provision for the contractor to furnish the fuel oil required under the April 25, 1922, contract, and to fill the storage tanks called for by said earlier contract when and as directed by the Secretary of the Interior.

2. Provides for the construction at Pearl Harbor, T. H., of additional storage facilities up to 2,700,000 barrels at cost and without profit to contractor.

3. Provides for the furnishing of fuel oil to fill the new construction and for charging the Government for such fuel oil delivered at Pearl Harbor, T. H., at the Bay Point, California, market price plus the cost of transportation by tankers to the place of storage.

4. Provides for the furnishing of other petroleum products than fuel oil and for filling the facilities to be constructed at Pearl Harbor, T. H., for such products under this contract at the Contractor's current sales price. In no case, however, is the cost to the Government for such products to

exceed the then current prices under Navy contracts for similar products.

5. Provides for furnishing without charge during the life of this contract storage for 1,000,000 barrels of fuel oil at Los Angeles, California, and for the filling of such storage with fuel oil to be exchanged for crude oil and [803] placing the same in custody of the Government, the said storage to be filled with fuel oil for the Navy as soon as the Government royalty oil from the California naval reserves shall have paid for all work done and crude oil products furnished at Pearl Harbor, T. H. Contractor also agrees to bunker Government ships from said 1,000,000 barrels of fuel oil at cost, and further, to carry during the life of this contract all royalty oils derived from leases in naval petroleum reserves in California to the refinery or tidewater at Los Angeles, California, free from any pipe-line charge.

6. Contractor further agrees for a period of fifteen years from the date of this contract and subject to the Navy demands to maintain 3,000,000 barrels of contractor's C Grade fuel oil in certain storage depots of contractor on the Atlantic Coast, and provides further that any part of said fuel oil will be allocated to the Navy on thirty days' written notice and held for not more than six months in storage for the Navy at one cent per barrel per month storage charges until and unless such oil is purchased or released by the Navy, such allocation, however, shall not be maintained more than six months, and provides further,

“that if and when such oil is purchased by the Navy, contractor shall be paid therefor at market prices from current available Navy funds, and no charge shall be made against the Government under this section except for and on account of oil so set aside.”

7. Contractor agrees to furnish at such points as the Government shall designate a reasonable amount of crude oil products and storage facilities therefor similar to those agreed by this contract to be furnished at Pearl Harbor, T. H., when the royalty oils delivered by the Government to the contractor shall have been sufficient to pay for the Pearl Harbor project pursuant to the contract of April 25, 1922, and also for the additional work and crude oil products in this contract agreed to be furnished.

8. Gives the Navy the privilege of purchasing at 10% less than market price at tidewater any additional available fuel oil produced from Government lands in California Naval reserves which it might require above the amount which it is entitled to in exchange for its royalties, and provides further,

“said market price to be determined from time to time in such manner as may hereafter be agreed upon by the parties hereto, payment therefor to be made from current available Navy funds.” [804]

9. Agrees to sell to the Navy certain manufactured petroleum products from the California re-

finery on the same terms as those specified in subdivision 8 hereof.

ARTICLE II. Recites,

“for the considerations herein mentioned and contained, to wit, the furnishing of oils in storage and facilities and opinions as specified above, the Government agrees”:

A. To sell and deliver all its royalty oil from Numbers 1 and 2 reserves, subject to its obligation to deliver enough thereof to pay out the contract of April 25, 1922,

“until the Government’s obligations under this instant contract are discharged, and in any event for a period of 15 years from the date of the expiration of said contract of April 25, 1922, the Government to be given credit by contractor for such crude oil delivered by the Government at the published field price thereof on date of delivery and for such gas and casing-head gasoline at the prices and under the conditions fixed in the various leases, any surplus of Government credits thus accruing are to be satisfied by delivery of fuel oil or other petroleum products, by construction of additional storage facilities, or to be payable in cash, as the Government may at that time elect.”

B. To lease, and does lease, pursuant to the formal written lease dated December 11, 1922, to the Pan American Petroleum Company, a corporation, lands in naval petroleum reserve No. 1 described in the accompanying lease of said date and consisting of approximately 32,000 acres.

ARTICLE III. Provides for the gauging of the oils, and further, that any difference in debits and credits between the parties on account of crude oil received by the contractor on the one hand and expenditures made by contractor for storage facilities and crude oil products delivered by him on the other shall bear interest at the rate of five per cent per annum, determined on monthly balances, and also provides that the interest provisions contained in the contract of April 25, 1922, shall cover fuel oil as well as construction.

The lease of December 11, 1922, is practically a lease to exhaustion of production of oil and gas on all of the then unleased portions of naval reserve No. 1, the term of said lease being expressed as,

“for a period of 20 years from the date hereof and so long thereafter as oil or gas is produced in paying quantities from said lands,” [805] at sliding scales of royalties ranging from $12\frac{1}{2}\%$ to 35% for oil of 30 degrees Baume or over, to from $12\frac{1}{2}\%$ to 30% for oil of less than 30 degrees Baume, the royalties increasing with the amount of oil produced per well.

This lease gives the Pan American Petroleum Company the unrestricted right to drill and develop except in the land within naval reserve No. 1 West of the range line dividing Range 24 East and Range 23 East, M.D.M., but includes the right to drill and develop immediately the following sections West of said range line, to-wit, Sections 24, 25, 26, and 35 in Township 20 South, Range 23 East, M. D. M.

It recognizes a certain agreement between the Secretary of the Interior and the Pacific Oil Company restricting drilling upon certain portions of the leased area, but provides that upon request of the Pan American Petroleum Company the Secretary of the Interior will give to the Pacific Oil Company the six months' notice provided for in said agreement and provides that upon the expiration of such six months' notice the Pan American Petroleum Company shall have the same rights with respect to drilling, etc., upon said lands as upon all other lands covered by the lease lying East of the range line dividing ranges 22 and 23, as aforesaid.

The amended bill of complaint avers material matters that are either admitted by the parties to this suit or have been so thoroughly proven by the evidence that there can be no question concerning them. Among these are the following:

That from March 5, 1921, until March 4, 1923, Albert B. Fall was the duly appointed, acting, and qualified Secretary of the Interior of the United States of America.

That during all times material to this controversy Edwin Denby was the duly appointed, qualified and acting Secretary of the Navy of the United States of America.

That during all times concerned in this controversy and during all of the negotiations between officers of the Government and the defendant corporations Edward L. Doheny was the dominant and managing executive officer of the defendant corporations and during such times was either the

There is no evidence in the case that Mr. Doheny or the defendant companies had anything to do with the making or procuring of the Executive Order.

No effort was made by the plaintiff to establish the charge of false representations by Secretary Fall to the President relative to the promulgation of said Executive Order by direct evidence but it is contended that the circumstances of the situation sustain the charge. Mr. Fall was not called as a witness in this case by either party to the action. Mr. Doheny was called by the plaintiff but when interrogated by counsel for plaintiff asserted and claimed his constitutional right and refused to testify because of the pendency of an indictment against him in the District of Columbia involving matters material to this case, and, counsel for plaintiff having conceded that such indictment was pending and undetermined, this court thereupon recognized Mr. Doheny's constitutional right to remain silent and he did not testify further as a witness in this case. The only oral testimony concerning the obtaining of the Executive Order from President Harding was produced through a statement from Theodore Roosevelt, who during Secretary Denby's administration was Assistant Secretary of the Navy, and whose testimony will be noted later.

The rule of law as to the degree of proof required to establish false representations or pretenses, whether by direct or circumstantial evidence, is that it must be established by clear and convincing proof.

The original text of the Executive Order was prepared in the Interior Department. As early as the first part of May, 1921, and probably some time in the preceding month Secretary Fall had spoken to Assistant Secretary of the Interior Finney of a plan he had in mind by which the Interior Department would undertake to administer some of the lands in the naval oil reserves and at such time had asked Finney to give him a brief statement as to the applicable law. Mr. Finney prepared such a statement and expressed the opinion therein that under Section 18 of the Oil Leasing Act of February 25, 1920 (41 Stat. 437), and [808] the Act of June 4, 1920 (41 Stat. 812),

“the President may commit to the Secretary of the Interior the matter of authorizing additional wells or leases under Section 18 of the Leasing Act and the Secretary of the Navy may, under authority of the naval appropriation act cited (Act of June 4, 1920), request the Secretary of the Interior to handle for the Navy the conservation, development, and operation of other lands in naval reserves. The royalties from existing leases and such other royalties as may be derived from future leases in naval reserves may be turned over to the Navy Department directly or may be exchanged by the Secretary of the Interior, to the end that the Navy may have its equivalent in fuel oil.”

After submitting this statement to Secretary Fall there was prepared in the Interior Department,

probably by Mr. Finney, a letter which was signed by Secretary Fall and sent to the Secretary of the Navy, as follows:

Personal.

"Department of the Interior,

Washington, May 11, 1921.

The Honorable,

The Secretary of the Navy.

Dear Mr. Secretary:

Referring to our conversation yesterday, and to your suggestion to the President that the Secretary of the Interior be placed in charge of administration of the laws relating to naval reserves, I am submitting herewith for your consideration a brief memorandum stating the facts and law with respect to naval reserves, a tentative form of letter for your signature if it meets with your approval, and a form of Executive Order for the President's signature, if it meets your suggestions of yesterday. Please consider the same and give me any criticisms or suggestions which may occur to you. If they meet with your approval, and no changes occur to you, kindly return them, with your approval, in order that the matter may be taken up with the President.

Respectfully,

(Signed) ALBERT B. FALL,

Secretary.

Inclosure 19756.

(Initials EOF.)"

With this letter there was enclosed, (1) the draft of a proposed letter from the Secretary of the Navy to the President, as follows:

“My Dear Mr. President:

The Act of February 25, 1920 (41 Stat. 437), authorizes the Secretary of the Interior to lease producing wells in naval petroleum reserves, and authorizes the President to permit the drilling of additional wells or to lease the remainder or any part of any claim in such reserves, with preference right to the claimant or his successor. A clause in the appropriation act for the year ending June 30, 1921 (41 Stat. 812), authorized the Secretary of the Navy to take possession of unappropriated lands within naval reserves, and to conserve, develop, use and operate the same ‘directly or by contract, lease, or otherwise.’ [809]

To avoid conflict, delay, and duplication, it occurs to me that the matter may be best administered through one agency, and I have suggested that the Secretary of the Interior be directed, under your supervision, to administer all of the various provisions of law cited relating to naval petroleum reserves heretofore created by Executive Order, the oil and gas accruing to the United States from the operation of any wells in said reserves to be utilized by and for the Navy, in accordance with the provisions of existing law.

Under the authority vested in me by said appropriation act, I request and recommend that you take the necessary steps to impose this duty upon the Secretary of the Interior. The details incident to this transfer of authority and to the disposition of the oil and gas produced will be arranged co-ope-

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ratively between the Interior Department and this Department.

Sincerely,

Secretary.

The President,

The White House."

and (2), the draft of a proposed Executive Order, as follows:

"EXECUTIVE ORDER.

Under the provisions of the Act of Congress approved February 25, 1920 (41 Stat. 437), authorizing the Secretary of the Interior to lease producing oil wells within any naval petroleum reserve; authorizing the President to permit the drilling of additional wells or to lease the remainder or any part of a claim upon which such wells have been drilled, and under authority of the Act of Congress approved June 4, 1920 (41 Stat. 812), authorizing the Secretary of the Navy to conserve, develop, use, and operate, directly or by contract, lease, or otherwise, unappropriated lands in naval reserves; the conservation, development, use, and operation of oil and gas bearing lands in Naval Reserves Nos. 1 and 2, California, Naval Reserve No. 3, Wyoming, and Naval Oil Shale Reserves in Colorado and Utah, is hereby committed to the Secretary of the Interior, under supervision of the President, and he is authorized and directed to perform any and all acts necessary for the protection, administration, and development of the resources of said reserves, subject to the conditions and limitations of existing

laws or such laws as may be hereafter enacted by Congress pertaining thereto.

The White House,

May —, 1921."

The enclosed proposed letter from the Secretary of the Navy to the President was never signed by Denby and was never transmitted to the President. The Interior and Navy Departments later conferred and agreed upon the text of an Executive Order and the revised form was personally taken [810] and presented to President Harding by Theodore Roosevelt, Assistant Secretary of the Navy, and upon Roosevelt's statement to the President that the order in its then form was satisfactory to the Interior and Navy Departments it was signed by the President. There is no evidence in this case as to any further conversation or representation by Secretary Fall to President Harding relative to this Executive Order. Mr. Denby, although present throughout the trial, was not called as a witness.

While the plaintiff failed to substantiate the allegations in the bill of false representations by Secretary Fall to President Harding there can be no doubt from the evidence that Secretary Fall was very active in the movement which eventuated in the transfer of the administration and control of the Navy oil reserves from the Navy to the Interior Department and he appears to have at all times dominated the situation relative thereto, the record in this case indicating that Secretary Denby

was passive and even complacent in the matter. In one of his early conferences with the Navy Council Mr. Denby stated that he was going to transfer control of the reserves to Secretary Fall because he considered the reserves "dynamite." This was his attitude throughout all of the transactions involved in this case. His participation in the making and executing of the agreements in suit was perfunctory, passive, and formal. Secretary Fall and Admiral Robison were the real, active, and efficient agents of the Government in the negotiations which resulted in the contracts and leases in controversy.

I am persuaded by an impartial consideration of evidence to believe that Secretary Fall effectuated the idea of transferring the control of the naval oil reserves from that branch of the Government to which they had been committed by Congress into his own hands.

The Executive order as prepared by Finney and as sent to the Navy Department did bodily and wholly transfer the reserves to Secretary Fall for administration, protection, and development. When the draft was submitted to the Navy Department it was objected to by Assistant Secretary Roosevelt, Admiral Griffin, and Commander Stuart, who felt very strongly that the transfer would be a mistake. Roosevelt communicated his and the naval officers' objections to Secretary Denby and urged that the land be not transferred to the Interior [811] Department. But Denby informed him that their protest was too late as the transfer had been agreed

to by the President, Secretary Fall, and himself. Roosevelt, after consultations with Admiral Griffin who at that time was in charge of the naval oil reserves as Chief of the Bureau of Engineering of the Navy Department, suggested to Secretary Denby a modification of the proposed order. Secretary Denby told Roosevelt that if he could obtain Secretary Fall's approval to the change it would be satisfactory to him. Roosevelt personally took the matter up with Secretary Fall and Fall immediately assented to his suggestion. This action by Secretary Fall seems to negative bad faith, but I believe that Secretary Fall considered Secretary Denby's passivity tantamount to relinquishment. The concurrent and subsequent events in this matter confirm this belief.

The change suggested by Roosevelt was the insertion in the order of the following language:

"but no general policy as to drilling or reserving lands located in a naval reserve shall be changed or adopted except upon consultation and in cooperation with the Secretary or Acting Secretary of the Navy."

Although Roosevelt was at first entirely opposed to the transfer he was convinced later that on account of the Interior Department being better equipped and organized to undertake the contemplated development of the naval oil reserves it was proper and advisable to effect the transfer subject to the vital reservation which was inserted in the Executive order at his suggestion. It is clear that it was not the intention of the Navy to relinquish

the control of its reserves to the Interior Department, and it is apparent that Secretary Fall's original intention contemplated unrestricted and unqualified transfer of the reserves from the Navy to the Interior Department.

The foregoing and other circumstances and events concurrent with and relative to the promulgation of the Executive order cast doubt upon the motives of Secretary Fall in furthering this transfer. And when viewed in the light of subsequent events and transactions with Mr. Doheny and others irresistibly lead me to conclude that Secretary Fall had conceived plans at the time the Executive order was obtained to carry on negotiations relative to the naval oil reserves [812] at least partially for his personal gain and benefit. That he did later personally profit financially by the transfer is in my opinion clearly shown by the evidence and circumstances in proof in this case.

The essential allegations of the amended bill of complaint relative to the first ground of attack may be summarized as follows:

That subsequent to May 31, 1921, Fall and Doheny agreed to bring about and to make oil leases on the naval oil reserves of the United States fraudulently, not in the public interests or in the Nation's welfare, but secretly, by noncompetitive methods, and for the unlawful purpose of personal gain and profit to themselves;

That in order to accomplish such unlawful purpose they also agreed to arrange and execute the contract of April 25, 1922, the lease of June 5, 1922,

and the agreements of December 11, 1922, by secret, fraudulent and discriminatory methods;

That in furtherance of such purposes and during the course of the negotiations concerning the said contracts and leases in controversy Doheny secretly delivered to Fall \$100,000 in lawful money of the United States;

That the delivery of this said money was not only for the purpose of influencing Fall respecting the said contracts and leases in suit, and in furtherance of the alleged conspiracy, but that Fall's official action in the premises was influenced by such payment;

And further that regardless of such alleged conspiracy such payment of money was of and in itself an act of such flagrancy and wrongfulness by Fall and Doheny as to vitiate and annul all of the contracts and leases in suit upon the ground of sound public policy.

The defendants' answer denies generally and specifically any fraud or conspiracy in the making of the contracts or leases in suit and avers that they were lawfully made and constitute binding agreements.

A conspiracy is a combination of two or more persons to effect an illegal object as an end or means. It is not necessary that the joint purpose or intent of the actors be to commit a criminal or even an unlawful act. It is sufficient if their intent is to do or accomplish a lawful act by surreptitious or unlawful means. This is especially true when the object of the joint purpose of the actors

[813] is the formation or making of a public contract with an officer of the Government.

The conspiracy alleged in the amended bill, while not charged as a crime, contains the elements of a criminal conspiracy. This case however is a civil action and not a criminal prosecution. It is not necessary that the conspiracy be proven to the same degree of certainty as would justify a conviction of Fall and Doheny if they were on trial for criminal conspiracy. The conspiracy in this case has been sufficiently established to require cancellation of the contracts in suit if and when after a fair and complete comparison and consideration of all the evidence and circumstances in proof the greater probability is in favor of the existence of the conspiracy alleged. If the issue of fraud or conspiracy in a civil suit is dependent upon circumstantial evidence the inference of fraud or conspiracy must be reasonable, probable, and unstrained. In such event the conspiracy has been clearly proven.

To conspire to defraud the United States means primarily to cheat the Government out of property or money but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching or those charged with carrying out the Govern-

mental intention. *Hammerschmidt vs. United States*, 265 U. S. 182.

The Supreme Court of the United States has uniformly enunciated the principal that in cases of conspiracy or agreement to defraud the United States the ultimate question is not whether the fraud practiced must have inflicted upon the Government pecuniary loss but that the injury is complete as far as the grievous wrong is concerned when the purpose and effect of the agreement or transaction is to defeat a lawful function of the Government. *Haas vs. Henkle*, 216 U. S. 462.

It is true that no civil action lies for a conspiracy unless there be an overt act that results in damage to plaintiff but the rule announced by the Supreme Court of the United States in the above cited and other cases shows that in cases similar to the one at bar the damages referred to are not necessarily [814] pecuniary loss. If the cases cited by defendants similar to *United States vs. San Jacinto Tin Company*, 125 U. S. 273, can be considered to be in point here there is nothing said by the courts in any of them that would deprive the United States in this suit from obtaining cancellation of the contracts in question if fraud, official misconduct, or conspiracy, as alleged, has been proven, because by the contracts in suit the Nation has been deprived of its control of its naval oil reserve and if such loss is attributable to official corruption then the wrong done to the Nation requires the surrender by the defendants of the governmental property so wrongfully obtained.

In many of the cases cited by defendants the real party in interest was not the United States. Private parties were seeking to enforce essentially private rights in the name of the United States. The United States as a suitor either in its governmental or proprietary capacity was not interested in so far as its property right was concerned in the result of the suits, and hence in such cases was held to have suffered no injury. But all of these decisions establish the rule, which is peculiarly applicable in the case at bar, that the right to the remedy sought by the amended bill in this case exists when the Government has an interest in the remedy sought by reason of the interest in the land, or when the fraud has been practiced on the Government and operates to its prejudice, or when the duty of the Government requires such action.

There has been no decision of the Supreme Court extending the rule of such cases as *Hyde vs. Shine*, 199 U. S. 62, or *United States vs. San Jacinto Tin Company* (*supra*), to suits in equity brought under a law similar to the Act of June 4, 1920, and it is very doubtful in my mind whether the rule of these cases can be applied here because the Act under which these contracts and leases were made is not a part of the public land laws of the United States all of which were designed for the primary purpose of seeing that the lands which were open to settlement might be distributed among individuals, and might be availed of primarily for the benefit of individuals, and incidentally of course for the benefit of the United States by distributing

the population and by offering inducements for citizens to go to various localities where but scant population existed. The naval reserves were never intended to be administered [815] or controlled in the same manner or for the same purpose as other public lands. They were intended primarily and solely for the use and benefit of the United States Navy, and the law which guides the administration of the naval reserves stands alone without any other statutes, and is the sole measure of the legislative intent with regard to the subject matter thereof.

However, it cannot be said that the United States has not suffered injury or loss of a pecuniary nature by the fraud shown in this case. It has parted with, for a period of 15 years at least, all of the oil and petroleum products of its naval oil reserves. It has relinquished its right to make more favorable contracts and leases than those with the defendants. It has been prevented from obtaining more advantageous terms by competition for the leases. It has enabled the defendants to obtain royalty oil from other Government leases that the defendants have been selling to another oil company at a premium above market prices. But I do not base the right of the United States to cancellation and rescission of the contracts in suit as much upon the pecuniary or money nature of the injury shown as upon the right of the United States to be restored to the use and possession of its naval oil reserves where it has relinquished them to private

enterprise because of fraud, undue favoritism, and misconduct of its officers.

The charge in this case does not concern so much pecuniary loss to the United States as it does the right of the United States to annul contracts by which the Nation's naval oil reserves, set apart by Congress exclusively for governmental and national purposes, have been fraudulently and wrongfully obtained by private persons or bodies through wrongful acts of Governmental officers acting conjointly with such private persons or agents of private bodies.

Any corrupt or unlawful arrangement or agreement in which an official of the Government intentionally functions concerning public matters for his private and mercenary gain is an injury and damage to the Government regardless of whether pecuniary loss is sustained by the Government. The Nation in leasing its naval oil reserves does not assume the attitude of a mere bargainer of oil bearing lands for a money value. These lands are held in trust for the United States, and the trustees, that is, the public officers, who administer [816] and control them can do so only for the public welfare and in a manner designed to preserve the integrity of Government. Secretary Fall was a trustee of the highest order in his transactions relative to the naval oil reserves. If a trustee is prompted to act, and does in fact act, because of personal and clandestine motives, and if by so acting he acquires private financial benefit his beneficiary has sustained pecuniary loss. For it is only

because of his fiduciary relationship that he is enabled to deal with the public property at all and his sole emolument for doing so is his salary. Whatever the \$100,000 that was transferred to Secretary Fall by Mr. Doheny, the principal officer of the defendant corporations, may be called, and regardless of the question whether Mr. Fall would have obtained it if he had not been Secretary of the Interior of the United States and at the time transacting public business as such with Mr. Doheny, the fact is that Secretary Fall did obtain it when he was Secretary of the Interior of the United States and a trustee of the public lands of the United States and when as such he was negotiating with Mr. Doheny concerning such lands. And the effect of such transaction in and of itself constitutes a serious injury and damage to the beneficiary, the United States of America.

Moreover, assuming that the right to cancellation and rescission does not ordinarily exist in a suit in equity upon the mere proof of conspiracy or moral wrong or breach of ethics without further showing resultant pecuniary loss, it is questionable whether such doctrine applies in this particular suit. This action is *sui generis*. It is not brought under the ordinary existent processes of the law. It is specially brought. The Joint Resolution of Congress (Vol. 1, U. S. Stat. 68, Cong. Secs. 1-6) declares that—

“the leases and contracts are against the public interests and that the lands embraced therein

should be recovered and held for the purposes to which they were dedicated,"

and not merely authorizes but directs that suit be instituted for the cancellation and annulment of the specific contracts and leases in suit. It would seem, therefore, that the law-making power, with respect to these particular public contracts and leases, intended to and did consider their effect as so injurious and pernicious to public welfare and governmental integrity and so inimical to the purposes for which the naval petroleum reserves were segregated from the public domain as to single them out for special and extraordinary consideration by a court of equity. It appears that Congress has said that if the fraud and misconduct is sufficiently legally proven then regardless of the ordinary rule of showing mere money damage [816½] these contracts and leases should be annulled.

Considering the evidence in this case under the foregoing principles of law the allegations of fraud and resultant damage contained in the amended bill have been in general sustained. In my opinion it has been clearly shown that Secretary Fall and Mr. Doheny had secretly agreed that portions of the naval oil reserves were to be leased to companies controlled by Mr. Doheny by privileged, unfair, and discriminatory means, and that the contracts and leases in suit were and are the result of such secret understandings and agreement.

Before Mr. Fall became Secretary of the Interior the naval oil reserves had been controlled by the Navy Department under the authority of the Act

of Congress of June 4, 1920 (41 Stat. 812). It was only in compromise and settlement of claims concerning rights to public lands under pre-existing laws that the Interior Department had any powers or concern with such reserves. Under the leasing act of February 25, 1920 (41 Stat. 437), the Secretary of the Interior did exercise certain rights with respect to royalty oils coming to the Government from leases in the naval oil reserves but neither that act nor any other law gave the Secretary of the Interior any power whatever to lease or otherwise develop naval reserve lands except in cases of compromise of pre-existing placer mining claims.

The President of the United States under the leasing act (*supra*) had a limited further power over naval reserve lands but no general power. There was no general power or discretion vested by Congress in any officer or Department to make such disposition or use of naval reserve lands or of royalty oil accruing under leases of these lands as might be best for the interests of either the Navy or of the United States except under the authority of the Act of June 4, 1920 (*supra*). Congress by this law intrusted to the Secretary of the Navy the conservation, development, use, and operation of these valuable and important public and governmental lands.

The legal aspect of this measure will be considered in another portion of this opinion dealing with the second general contention of the plaintiff in this case. In the present consideration it is only

necessary to advert to the Act of June 4, 1920, as manifesting a clear and unmistakable intention by [817] Congress to repose exclusive control over the naval oil reserves in the Secretary of the Navy pursuant to the terms of the Act.

In line with the policy of the Government, as expressed in said act, and in April, 1920, Secretary of the Navy Daniels had established in the Navy Department the Oil Fuel Office and had detailed Commander H. A. Stuart thereto. This office was under direct and immediate control of the Secretary of the Navy and continued to be so throughout the administration of Secretary Daniels, being carried over and continued under Secretary Denby until he by an order dated October 18, 1921, transferred it to the Bureau of Engineering of the Navy Department and made it immediately subordinate to and under the direct supervision of that Bureau.

Friction and discord was manifested between Secretary Fall and the naval officers in charge of the reserves shortly after Secretary Fall assumed charge of the Interior Department and this condition prevailed until, as I have stated, the Oil Fuel Office in the Navy was abolished and all matters pertaining to the reserves were assigned by Secretary Denby to the Engineering Bureau of the Navy. The Chief of this Bureau at the time was Admiral J. K. Robison, who had been detailed as such about October 1, 1921. Admiral Robison was a friend of Edward L. Doheny, and during the World War his son, Edward L. Doheny, Jr., had been a naval officer on a ship commanded by Admiral Robison

and a friendship and attachment thus formed had grown and increased between the Admiral and the Dohenys until their relations at the time of Admiral Robison's detail as Chief of the Engineering Bureau of the Navy are best shown by the following letter written by the Admiral when he assumed his new command:

"6 October, 1921.

My Dear Mr. Doheny:

I have wanted to write to tell you of the good fortune that has come to me. Because of the many ways in which you have indicated your friendship for me, I am sure that you will be glad. The President has nominated, I have been confirmed, and am now serving as Engineer-in-Chief of the Navy.

It is a pretty good billet. As you know, it gives me control of large activities, rank while holding the office of Rear Admiral, and in particular it gives me responsibilities and authority in connection with the maintenance and upbuilding of our Navy that I am glad to assume. To have been selected from my fellows for this position is grateful,—the principal joy that I get, of course, comes from the satisfaction of my family and [818] friends.

With best wishes for your future and with affectionate remembrance of Mrs. Robison and myself to your family, I am

Most cordially yours,

J. K. ROBISON,
Engineer-in-Chief, U. S. Navy.

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Mr. E. L. Doheny,

President, Mexican Petroleum Company,

120 Broadway, New York, N. Y."

In 1917, on an occasion when Mr. Doheny visited his son on board a warship commanded by Admiral Robison, the Admiral and Mr. Doheny had discussed casually the naval oil reserves and Mr. Doheny had told Admiral Robison that on account of drilling near the reserves by outside private parties the oil was being drained off the reserve and that it would not be long until there would be no oil left in the reserves. This was the only conversation or dealing between Admiral Robison and Mr. Doheny until after Admiral Robison was placed in charge of the reserves by Secretary Denby in October, 1921.

On October 9, 1921, Admiral Robison had a conference with Secretary Fall regarding the naval petroleum reserves. At this conference he learned of a letter concerning the reserves that Secretary Fall had written to Secretary Denby in July which will presently be referred to. This was his first connection with the reserves. He had not at that time discussed the reserves with his chief, Secretary Denby. As the result of his conference with Secretary Fall and others in the Interior Department he found the opinion that the reserves were being rapidly depleted by drainage and he then remembered the talk he had with Mr. Doheny in 1917. In conjunction with Secretary Fall he then set out to formulate and to execute some plan to

exchange the crude oil in the reserves for fuel oil to be stored at different points.

Admiral Robison, when acting as aide to Secretary Denby in March, 1921, and later upon being detailed to the Engineering Bureau, manifested an ardent and patriotic desire to construct and supply a reserve oil fuel station at Pearl Harbor, Hawaii, and in general to adopt a program for the establishment and construction of reserve oil fuel stations for the Navy in order to strengthen the national defense. After his conferences with Secretary Fall his desire became more intense and he then concluded if possible to use the royalty oil from naval [819] reserves to build such stations and to supply and store them with fuel oil for future naval use. The testimony of Admiral Robison and the circumstances in proof convince me that Admiral Robison had no ulterior motive or mercenary purpose in any of the transactions involved in this case.

This was an entirely new activity and was one of doubtful legal authority. There was a serious question at that time in the minds of Secretary Fall, Admiral Robison, Mr. Doheny, and every other person who discussed or contemplated the subject as to whether the right to establish reserve oil fuel stations existed without further legislation. It was then doubtful in the minds of all whether the Act of June 4, 1920, was broad enough to authorize the program. Up to this time the royalty oil due the United States from leases in the reserves had been either sold outright and the

money deposited in the Treasury or this oil had supplied merely current naval needs. It was Admiral Robison's fervent purpose to carry out this new project if possible and to do so without going to the Congress for further legislative authorization.

Admiral Robison and the Dohenys visited socially and discussed the naval oil reserves and the proposed Pearl Harbor project as early as December, 1921, and Mr. Doheny told Admiral Robison during this time that his company would bid on the Pearl Harbor project and that its bid would be one that would not involve one cent of profit to him or to his company. Admiral Robison in his enthusiasm over the possibility of accomplishing his desire to strengthen the national defense told Secretary Fall of Mr. Doheny's promise. Secretary Fall however had previously seen and talked with Mr. Doheny regarding the plan of using royalty oil for tankage and it is clear that Mr. Doheny was already favorable to the plan and had told Secretary Fall that he would make a bid thereon and that his bid would be at cost.

That Secretary Fall conceived the plan of exchanging the royalty oil due to the United States from leases on the naval petroleum reserves for fuel oil in storage tanks, and had suggested to Secretary Denby, long before Admiral Robison became connected with the plan, that he, Fall, would undertake to effectuate the idea if Denby was willing, is positively shown by these two letters: [820]

“Department of the Interior,
Washington.

July 23, 1921.

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13668-84: 278

Hon. Edwin Denby,

Secretary of the Navy.

Dear Mr. Secretary:

In connection with the recent authorization to the Pan American Petroleum Company and the United Midway Oil Company to drill 22 offset wells in naval petroleum reserve No. 1, California, I would like to be advised, as promptly as possible, what arrangements the Navy desires to be made for the handling and disposition of its royalty oil from said wells as well as from any other wells in naval reserves too, which the Navy is entitled to royalty in kind.

As the lease provides that purchasers will take care of the oil only for a limited period, it is important that provision be made to dispose of same promptly. I suggest the desirability of effecting an exchange of the crude oil received as royalty for an equivalent value of fuel oil, to be stored without expense to the United States by the other party to the exchange. Preferably the exchange should be not only of crude oil for fuel oil in storage but for the tanks containing the Navy's stored oil. In other words, my suggestion is that the crude oil be exchanged for tanks and fuel oil, the title to both to be vested in the Navy as a result of the exchange.

1290 *Pan American Petroleum Company et al.*

If this plan meets with your approval, and you desire me to undertake to consummate the arrangement, I shall be glad to do so. In any event, I should like to hear from you on the subject as soon as possible.

Sincerely,

ALBERT B. FALL,
Secretary."

"Washington, July 29, 1921.

My dear Mr. Secretary:

Replying to your letter of the 23d of July, I am glad to acquiesce in the suggestion made by you.

It will be of great benefit to the Navy to have the royalty crude oil from wells on the naval reserves (both those already in operation and those to be drilled by the Pan American Petroleum Company and the United Midway Oil Company) exchanged for fuel oil at tidewater to be stored if practicable without expense to the Government, and if possible, for tanks in which such fuel oil can be stored. As the Navy has no appropriation to pay for the cost of construction of tank storage, the acquisition of tanks by exchange for crude oil from Naval Reserve Wells will be most acceptable.

While these tanks could be readily utilized at any point at tidewater, the usefulness to the Navy would be increased if they could be located at any one of the following points: San Diego, San Pedro, San Francisco Bay, Puget Sound, Honolulu or Pearl Harbor, Hawaii.

In view of the greatly reduced amount available under the appropriation 'Fuel and transportation' for the present fiscal year, it would be of special benefit to the Navy to obtain royalty fuel oil at this time as such oil would not involve as charge against this appropriation.

EDWIN DENBY."

This correspondence comes with significant swiftness after a notable letter written by Secretary Fall to Mr. Doheny on July 8, 1921, which will be referred to presently, and which is indicative of conferences and negotiations [821] between Secretary Fall and Mr. Doheny wherein plans for future drilling of the reserves were discussed between the two men. And it is a fair inference from this correspondence that they had at such times discussed the precise matter that is the central feature of the contracts and leases in suit, to wit, the leasing of the naval oil reserves and exchanging the oil therefrom for fuel oil in storage tanks.

The contention of defendants that the leasing of naval reserve No. 1, which was accomplished through the contracts and leases in suit, was not the act of the Interior Department but was done by the Secretary of the Navy has little merit when viewed by the light of the evidence. Not only is it shown that Secretary Fall initiated the idea and suggested its accomplishment to Secretary Denby, but Secretary Denby, as I have previously stated, showed early in the negotiations and throughout a disinclination and an unwillingness

to participate in the negotiations in any active way. There is no doubt in my mind that he intended to and did relinquish real control of further leases in the reserves to Secretary Fall. At a meeting of the General Council of the Navy, which has been previously adverted to, held October 18, 1921, Secretary Denby stated that unless there was objection he would transfer all of the fuel oil activities theretofore carried on under his office over to the Bureau of Engineering, and that he wanted the Interior Department to handle the leases for the best interests of the Navy, saying:

“that matter of leasing is most difficult and dangerous thing to be done. It is full of dynamite. I don't want to have anything to do with it.”

The evidence in this case shows that by October 25, 1921, both Secretary Fall and Admiral Robison had agreed upon the adoption of a policy whereby royalty oil should be bargained for tankage and its contents of fuel oil at Pearl Harbor, and that they had further agreed at that time that any negotiations relative to the carrying into effect of such policy were to be kept secret so that their intentions could not be thwarted by congressional interference or become generally known to the public. The contention of defendants that the secrecy which attended all of the negotiations leading up to the contract of April 25, 1922, and of December, 11, 1922, were because of Navy war plans is in my opinion not sustained. Even if the Pearl Harbor construction was such as to require secrecy the oil

leases in the naval reserves demanded no such safeguard. The secretive manner in which these leases were made cannot be justified by any war emergency plan.

Admiral Robison presented the matter of his negotiations and conferences with Secretary Fall to Secretary Denby and procured from him a letter to Secretary Fall, as follows: [822]

“October 25, 1921.

“My dear Mr. Secretary:

Rear Admiral Robison reported to me that as a result of his interview with you on Saturday, October 22, the following general agreement in connection with the naval petroleum reserves was reached:

1. That arrangements will be made by the Interior Department to have naval petroleum reserves Nos. 1 and 2 drilled with offset wells in every case where adjacent property is drilled.

2. That the amount of drilling with consequent exhaustion of the reserves shall be kept as low as practicable without risking the depletion of the reserves by other parties.

3. That the equivalent of all royalty oil shall be delivered to the Navy in the form of fuel oil at such points on the Pacific Coast as may be found necessary for naval use, and that this exchange of crude oil for fuel oil will be effected on as favorable terms as it is possible to obtain. It is presumed that under favorable circumstances and terms arrangements may be made for including points on

the Atlantic Coast for the delivery of an equivalent supply of fuel oil to the Navy.

4. That the equivalent of so much of the royalty oil as is not used by the Navy is to be devoted to the construction of oil storage at Pearl Harbor, Hawaii, and at other points to be hereafter designated by the Navy Department, the cost of the tanks to be credited to the royalty due the Navy.

5. That the Interior Department will exercise its best efforts to obtain for the Navy as large royalties and as favorable terms as practicable by public competition or otherwise.

6. That the terms for conversion of the crude oil at the well to fuel oil at tidewater or in tanks to be provided by the lessor will be submitted to the Navy Department for approval of the qualities, deliveries, engineering, and other features involved.

7. That all leases and contracts, except as provided in paragraph 6, will be arranged and consummated by the Interior Department, copies of same being furnished to the Navy Department as a matter of information and record only.

8. That every effort will be made by the Interior Department to expedite the solution of this problem so that fuel oil at Pacific tidewater in exchange for royalty crude oil may be delivered as soon as possible to naval vessels and so that the erection of suitable storage facilities for 1,500,000 barrels of fuel oil at Pearl Harbor may be undertaken and expedited.

9. That the development of naval petroleum reserve No. 3 is not to be undertaken except to pro-

tect the Government against depletion of the reserve by other parties.

10. The general intent of this agreement is to transform royalty oil into either (a) fuel oil for current naval use, or (b) fuel oil stored where required by the Navy as a reserve, the storage, of course to be naval property and to accord with naval requirements.

In accordance with the foregoing understanding there is returned herewith letter from the Interior Department concerning leases that it is proposed to enter into with certain parties in naval petroleum reserve No. 1. Such details are, under the foregoing announced policies, to be left entirely to the Department of the Interior.

Information is requested as to whether the foregoing policies are in all respects agreeable to the Department of the Interior, and also when it may be expected that the Navy Department will begin to receive fuel oil as part of its royalties.

EDWIN DENBY." [823]

This letter was prepared by Admiral Robison in collaboration with Secretary Fall. It contains no direct reference to an intention to grant further additional leases in the reserves to provide more royalty oil with which to build tankage at Pearl Harbor although at about the time that it was written Secretary Fall and Mr. Doheny had discussed the granting of additional leases as a consideration for the Pan American Petroleum and Transport Company taking the Pearl Harbor contract. It seems apparent that Admiral Robison

was not then aware of that vital and valuable part of the understanding and arrangement that had been developed by Secretary Fall and Mr. Doheny regarding the naval oil reserves.

I am satisfied that Secretary Denby in sending this letter did so believing that it was necessary in order to prevent present drainage from the naval oil reserves. The tenor of the letter so indicates. And I am also convinced that there was no present or threatening danger of such drainage, because the Government had made sufficient offset and defensive leases to protect the reserves from drainage at that time. In my opinion the contracts and leases involved in this suit were not made or intended by Secretary Fall, Admiral Robison, or Mr. Doheny as necessary imminent relief measures for the naval oil reserves.

Secretary Fall answered the letter on October 30, 1921, by stating that he would carry out the suggestions and intentions of the Navy Department. The October 25th letter gives much power and wide discretion to the Interior Department regarding oil leases in the reserves, and really confers the powers on that department which Secretary Fall had intended to acquire by the Executive order of May 31st before Roosevelt's amendment. The aspect of the project covered by the October 25th letter that specially interested Secretary Fall was the leasing of the naval oil reserves. The paramount interest of Admiral Robison was the building and equipping of the Pearl Harbor reserve fuel station. By this coalescence of interest the two men worked to at-

tain the same end, but through entirely different motives.

Secretary Fall and Mr. Doheny had been friends for thirty years. They had been associates in mining ventures in New Mexico in early days. An attachment [824] had grown up between them that is experienced only by men who pioneered and prospected together in quest of fortune in the fastness of the mountains and deserts of the great West. They had been separated for some time. Fall had remained in New Mexico and had entered public life. Doheny had gone to California and had engaged in the oil industry. Fall had been unsuccessful in accumulating money. He was a prominent but a poor man. Doheny on the other hand had been prosperous and had become wealthy. While the strong friendship of the early days in New Mexico had extended over the years that had intervened the two men had seen little of each other until Fall became Secretary of the Interior. The record in this case is silent as to any business or money transactions between these two men until Fall assumed the Cabinet office. In this official position, having much to do with oil bearing public lands, naturally the early intimacy was revived and renewed so that Secretary Fall and Mr. Doheny and their families saw much of one another during the summer and fall of 1921, frequently visiting at Washington, New York, and elsewhere. It is not only unnatural and unreasonable to infer that at these meetings they had no discussions concerning the nation's oil lands but, as previously

stated, there is positive evidence in this case that they had discussed using royalty oil for tankage and also the proposed Pearl Harbor project during the months of October and November, 1921, and they probably had discussed the matter much earlier in that year.

In July, 1921, a lease to drill offset wells along the North and East lines of Section 1, Township 31 South, Range 24 East, Mount Diablo Meridian, being part of naval oil reserve No. 1 in California, was given by the Interior Department to the Pan American Petroleum Company. This lease was essentially defensive, being necessitated by drilling activities of private owners of adjacent oil lands outside of the reserves, and was granted in conformity with the established policy that existed and was pursued until Secretary Fall obtained control of the naval oil reserves. I have adverted to this old policy of the Navy that its oil reserves should be kept under ground and that no leases to drill in the reserves should be given unless such were or appeared to be imperative to prevent drainage. Such was not only the policy of all previous administrations but was also Secretary Denby's personal attitude throughout all of these transactions in which he took part. This lease of July, 1921, was awarded to the Pan American Petroleum Company after competition [825] and the royalty thereof was fifty-five and one-half per cent.

After the lease had been in operation some time it developed that the production thereunder was insufficient to justify the high royalty thereof and

the Pan American Petroleum Company applied for a reduction. Its petition for relief was filed November 22, 1921, and although it was denied any reduction of royalty nevertheless it was given other leases in reserve No. 1 at reduced royalties, to wit, from 12½% to 25%. This transaction in my opinion had no direct relation to the Pearl Harbor matter or the granting of additional leases in the naval oil reserves with which to pay for the Pearl Harbor project. It was solely a compromise arrangement arising out of the lease of July 12, 1921. The transaction however was handled and concluded under the personal direction of Secretary Fall.

When this lease of July 12, 1921, was signed by Secretary Fall he wrote a letter to Mr. Doheny in which he showed in no uncertain terms his determination to handle the naval reserves as he desired. This letter reads:

“July 8, 1921.

My dear Colonel:

I desire to express to you my very sincere appreciation of your generosity and patriotism in surrendering a portion of your lease-bid in naval reserve No. 1.

I have settled the matter to-day and have signed your leases, sending them over to you by Mr. Cotter.

I filed with the President a letter explaining this entire situation and the conclusions reached and action which I have taken. In this letter to the President among other things I said:

“Thus my position is that of a trustee for the reclamation fund and for the State in one in-

stance, and a trustee for the Navy for the public lands upon which there is no private claim within the naval reserve.

‘Holding the view which I did hold, as to the Midway Co. having some equity, but being desirous of adjudicating the matter if possible, to the end that the Navy might have no possible objection, I called upon Colonel Doheny, head of the Pan American Petroleum Company, by telegram, stating the facts to him and that he was entitled to his lease and would have it executed under one of his bids, but asking if it were possible for him to assist me in an adjustment of the Midway claims, by agreeing to surrender 8 wells out of the 22 which were advertised by the Navy and allotted to him under his bid; he retaining the lease upon the other 14.

‘I thought that I was imposing upon Mr. Doheny and even at the insistance of the Navy officials was not justified in doing so except through a personal appeal based upon our long time acquaintance and my knowledge of the patriotism and sense of justice.

‘I received an immediate and favorable response and I have had the leases drawn to himself for the 14 wells, and to the Midway Co. for 8 wells which he surrenders.’

I desire the President’s file to show my appreciation of your action in this matter, which, however, I had explained to him verbally. [826]

I shall not forget your assistance in this case.

There will be no possibility of any further conflict with Navy officials and this Department, as I have notified Secretary Denby that I should conduct the matter of naval leases under the direction of the President, without calling any of his forces in consultation unless I conferred with himself personally upon a matter of policy. He understands the situation and that I shall handle matters exactly as I think best and will not consult with any officials of any bureau in his department, but only with himself and such consultation will be confined strictly and entirely to matters of general policy.

Very sincerely yours,

ALBERT B. FALL.

Col. E. L. Doheny,

Suite 2805, 120 Broadway, New York City."

The contention of defendants that the leases in suit were the work of Secretary Denby and that Secretary Fall acted merely as his agent is utterly devoid of merit when considered in the light of his ultimatum in this letter and his attitude and conduct throughout all of the negotiations that resulted in the making of the contracts and leases in controversy in this case.

The formal lease effecting the compromise concerning the royalties of the July 12th lease is dated December 14, 1921. It was signed by Assistant Secretary Finney, as Secretary Fall was absent from Washington at that time. As I have said, at the time the relief from the July 12th lease was ordered by Secretary Fall he and Mr. Doheny were

and had been in consultation over the exchange of royalty oil from the naval reserves for fuel oil and tankage. They had been discussing and negotiating specifically concerning the Pearl Harbor project and the leasing of more lands to Mr. Doheny's Companies in the naval oil reserves to pay for the same. They had reached a definite understanding and agreement concerning the making of the contract which was later formally executed on April 25, 1922, wherein there is contained the valuable preferential right to lease practically the entire naval oil reserve. The record also clearly established that simultaneously Secretary Fall had told Mr. Doheny of his misfortune and of his desire to secure more land near his ranch in New Mexico but of his inability to do so on account of financial embarrassment. Mr. Doheny had told Secretary Fall during this time that he would loan him the money to make the desired purchase and on November 30, 1921, at the very time that the contract of date April 25, 1922, and the granting of further leases in the naval oil reserves was being discussed by Secretary Fall and [827] Mr. Doheny orally and by correspondence Mr. Doheny advanced and caused to be delivered to Secretary Fall \$100,000 pursuant to his promise.

It is claimed that this was a personal transaction between these two old friends and had no connection with and was entirely independent of the public business dealings that were then in progress by Mr. Doheny as the principal officer of the Pan American Petroleum and Transport Company with Secretary Fall as the trustee of the naval petro-

leum reserves and Secretary of the Interior of the United States. It is impossible for the court to so conclude.

It is this powerful, ineffaceable, and unexplained circumstance which impells me to cancel the leases which gave to the companies controlled by Mr. Doheny a property right of immeasurable value. This incident is the central, insurmountable, and decisive fact in this case. The injury that it has done the Nation as well as the distrust of public officers that it has caused cannot be overestimated. This colossal infamy regardless of whether it was a bribe, a gift, or a loan, requires this court in conscience to strike down the deals which are inextricably connected with it and to restore to the Nation its naval oil reserve. Neither of the men who participated in this extraordinary transfer of money have given this court an opportunity to hear his version of this incident from the witness-stand and the record which they have written elsewhere concerning it, and its correlated events, spell conspiracy.

If the incident is to be viewed and judged in the light of human experience and reason, and is to be determined according to the usual, ordinary, and natural probabilities in such situations it cannot be said with any degree of certainty that the delivery and payment of this large amount of money at such a time had nothing to do with Secretary Fall's official action and conduct whereby he actively participated in awarding to companies controlled by Mr. Doheny rights and leases in the naval oil reserves of great value. The circumstance itself

is so indicative of improper influence and official misconduct and was so conducive to favoritism as to require a court of equity to conclude that any advantage or benefit obtained from the Government by Mr. Doheny's companies through the agency or official act of Secretary Fall was influenced, at least, by the payment. It is possible that it did not affect or influence Secretary Fall in doing what he did relative to these contracts and leases. It is not probable. It has not been satisfactorily or sufficiently [828] explained in this case.

The case, however, does not require the Court to predicate its finding on this telling and decisive incident solely upon the time and amount of the money transfer. The manner in which it occurred and the conduct of the two men relative thereto arouse further suspicion and indicate a consciousness of wrongdoing by them.

On November 28, 1921, Mr. Doheny wrote Secretary Fall a letter which in my opinion substantiates the charge of the conspiracy alleged in the amended bill and which undeniably discloses that the two men had been conferring and negotiating regarding the Pearl Harbor Contract of April, 25, 1922, and that further leasing of the reserves was also then under consideration by them. This letter is as follows:

**"PAN AMERICAN PETROLEUM AND TRANS-
PORT CO.**

Office of the President.

New York, November 28, 1921.

The Honorable the Secretary of the Interior,
Washington, D. C.

Dear Mr. Secretary:

Along the lines of your suggestion, I have made some inquiries regarding the cost of constructing tanks for the storage of one and one-half million barrels of fuel oil at Pearl Harbor. I find that the best price obtainable for these tanks, the Government to stand the cost of transporting the material from the ship's side to the tank site, and the cost of grading and otherwise preparing the tank site, is \$19,960 per tank, or \$0.363 per barrel of storage capacity.

The present price of crude oil in the field in California is \$1.13 per barrel. The present cost of fuel oil delivered at Pearl Harbor is \$1.90 per barrel.

The cost of 1,485,000 barrels of fuel oil delivered at Pearl Harbor at present rates would be \$2,821,500, which added to the cost of constructing the 27 tanks necessary to store this amount of oil, which is \$538,920, makes a total of \$3,360,420.

Therefore, were we to construct the tanks and furnish the oil on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserves and to

be leased to us, it would require a return to us in royalty crude valued at 3,360,420, or 2,973,823 barrels, figured at today's price. Of course interest on the money invested should also be figured until final adjustment is made through the payment of royalty oil.

I suppose you will turn this matter over to First Assistant Secretary Finney, who, with Rear Admiral Robison, may arrange the details of it during your absence, and as I also expect to be absent, I am confidentially furnishing Mr. Cotter with the information so that he can intelligently discuss the matter with Mr. Finney.

Cordially yours,

E. L. DOHENY." [829]

It is also argued by counsel for defendants that this letter was a mere estimate, of the probable cost of the tankage at Pearl Harbor. Its language connotes something more. But if it requires interpretation it should be considered in its entirety and construed in the light of known surrounding circumstances.

Early in November, 1921, the Pan American Petroleum and Transport Company by letters and telegrams had requested bids from the Lacy Manufacturing Company of Los Angeles, California, for the construction of tanks at Pearl Harbor, Hawaii, and the figures given in the November 28th letter were those obtained from the Lacy Company.

After Mr. Doheny's letter of November 28, 1921, was received by Secretary Fall it was delivered to Dr. H. Foster Bain, who at that time was Director

of the Bureau of Mines of the Department of the Interior. Sometime before Secretary Fall handed this letter to Dr. Bain he had told Bain either that he had asked Mr. Doheny or Mr. Doheny had volunteered to have an estimate made of the cost of putting up storage to the extent of one and one-half million barrels of oil. Dr. Bain testified that the first time that he heard of Secretary Fall's plan to use royalty oil from the reserves as a consideration for tankage and fuel oil was at a conference with Secretary Fall when Admiral Robison was present subsequent to October 23, 1921, and no mention whatever was made by Secretary Fall or any person at such conference that it would be necessary or that it was contemplated to grant further and additional leases in the naval oil reserves to Dr. Doheny. At such conference, however, Secretary Fall told Dr. Bain that he was expecting a communication from Mr. Doheny on the subject of the construction of the Pearl Harbor project of providing storage for 1,500,000 barrels of fuel oil in consideration of Government royalty oil from the reserves and that he expected Mr. Doheny to bid on the proposition. Although he said nothing to Dr. Bain on the subject of further leases to Dr. Doheny the letter which he said he was expecting besides containing the information he told Bain he expected also contained language indicating that there had been an understanding and agreement to grant further leases.

This letter of November 28th Dr. Bain brought to Assistant Secretary Finney about the middle of

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December, 1921, and requested that Finney write to Mr. J. J. Cotter, a vice-president of the Pan American Petroleum and Transport Company, and request Mr. Cotter to call upon Dr. Bain relative to Mr. Doheny's letter. Mr. Finney complied with this request and wrote the following letter: [830]

"DEPARTMENT OF THE INTERIOR,
Washington.

December 16, 1921.

Mr. J. J. Cotter,

Pan American Petroleum and Transport Com-
pany,

120 Broadway, New York, N. Y.

Dear Cotter:

Will you be in Washington any time between now and December 27? If so, please call on Director Bain of the Bureau of Mines who wishes some information from you with respect to the matter discussed in Mr. Doheny's letter of November 28, 1921.

Please let me know when you will be here.

Sincerely,

(Signed) E. C. FINNEY,

Acting Secretary."

Upon the office copy of said letter in the files of the Interior Department there appears a notation in the handwriting of Dr. Bain, reading:

"I asked Mr. Finney to send this since Doheny's bid will be considered through the New York office and I thought we might get it outlined before we go West.

BAIN."

Here is a definite statement showing that it was understood by Dr. Bain that the November 28th letter was more than a mere estimate.

Admiral Robison surely regarded the November 28th letter from Mr. Doheny as a definite proposition, because at a meeting of the General Council of the Navy on November 29, 1921, after he had seen and read the letter, he told the Council that he had with him at that time a definite proposition to supply the 1,500,000 barrels of storage at Pearl Harbor and to complete it within the next calendar year. He did not at that time regard the letter as a mere tentative incomplete prospective suggestion, for at that time he further said to the Council: "All I have got to do is to say on this letter is we can get the tanks built." The letter of November 28, 1921, was not a mere estimate as counsel for defendants contend.

The words in the letter "lands within the naval reserve and to be leased to us" imply nothing if they do not indicate an understanding previously had, and when read in connection with the final paragraph of the letter show that it was contemplated and agreed between the two men that a contract would be arranged [831] along the lines of the letter and that the only matters remaining undetermined were the "details" of the plan. This was unquestionably Mr. Doheny's mind when he wrote the letter and undoubtedly Secretary Fall's when he received it because he immediately sent it to Admiral Robison with a covering letter, as follows:

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"November 29th, 1921.

My Dear Admiral:

Mr. Cotter will wait upon you with data, etc. with relation to oil tanks and royalty oil in connection with Pearl Harbor demands.

I have asked him also to hand you, for your inspection the original of a letter from Colonel Doheny addressed to myself, containing a resume of the data.

Should you think best to accept this proposition then of course it would be necessary, in my judgment, to turn over to Colonel Doheny, if we can do so, leases upon further wells or area in the naval reserve in which he is now drilling. If this is done it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan American.

The gas pressure is lessened to such a degree that the out-put of the wells of the two latter companies, as well as of other companies drilling in this neighborhood, is decreasing and is very disappointing. The two companies named are pumping their wells and of course they are not making any money but will experience a loss in the payment of the fifty-five per cent royalty to the Government.

If you approve the proposition, will you kindly indicate to me such approval by simple endorsement upon Co. Doheny's letter to myself, signed by yourself. Your simple O. K. will be sufficient.

Very sincerely yours,

ALBERT B. FALL.

Rear Admiral John K. R. Robison,
Engineer-in-Chief, Navy Department."

The matter is not referred to as an estimate but as a proposition which needs only the simple O. K. of Admiral Robison and the deal will be carried out. There is no doubt expressed of Secretary Fall's intention to give Mr. Doheny further leases. The doubt Secretary Fall entertained was the legal right to do so, and he never sought legal advice in the matter but later accepted and acted upon an opinion which Admiral Robison obtained from the Judge Advocate-General of the Navy which held that the right existed. This opinion was requested by Admiral Robison on November 30, 1921, and was given on December 3, 1921.

The messenger who took the above letter from Secretary Fall to Admiral Robison was Mr. J. J. Cotter, Vice-president of the Pan American Petroleum and Transport Company. What Mr. Cotter was doing in Secretary Fall's office, and what conversation he had with Secretary Fall on this eventful day, has not been disclosed in this case. [832] Admiral Robison returned the letter of November 28th to Secretary Fall and Secretary Fall, as before stated, handed it to Dr. Bain with instructions that Bain work out a contract to carry out the Pearl Harbor project. This letter of November 28th, was not placed in the general file of the Interior Department. It was kept in a safe in Dr. Bain's private office with other documents of a confidential character.

There is no evidence that any other individual

or concern was asked by Secretary Fall to estimate on this project, although Admiral Robison testified that Secretary Fall told him that he was going to request estimates from several oil concerns.

Another notable circumstance in connection with the November 28th letter is the fact that at the time of its receipt, which was months before any invitations to bid were sent to others, the Pan American Petroleum and Transport Company had not only been permitted by Secretary Fall to negotiate with a view of bidding but it had actually submitted a bid to Secretary Fall on the Pearl Harbor project. This was privilege and discrimination that was unwarranted and improper, and in view of the personal transactions between Secretary Fall and Mr. Doheny at the time, was significantly suspicious.

On November 29, 1921, whether before or after he received Mr. Doheny's letter we do not know, Secretary Fall in Washington, D. C., telephoned to Mr. Doheny in New York that "he was prepared now to receive that loan, to make the loan" if Mr. Doheny was willing to make it. Mr. Doheny immediately arranged to procure and transmit the money to Secretary Fall. He did so in a peculiar, suspicious and irregular way. He knew that Secretary Fall wanted the money to make settlement in New Mexico for property in New Mexico. He also knew that Secretary Fall was leaving immediately for New Mexico. He did not send the money to New Mexico and he did not transmit it by the customary

commercial mediums. Although he was a man of great wealth and financial power, instead of drawing the money himself or from his bank account, he had his son obtain it from a bank with his son's check, and he had him obtain the \$100,000 in currency. He then had his son wrap the currency in paper and place it in a handsatchel and personally convey it from New York to Washington and personally deliver it to Secretary Fall in Washington. Fall immediately left Washington [833] and carried the \$100,000 in currency on the train across the continent and deposited it in different banks in Texas and New Mexico and later by checks thereon applied it on the purchase price of the lands.

There is no record of any kind made of this transaction in the personal or business books or records of Mr. Doheny or of any of his companies or enterprises. No one but Secretary Fall, Mr. Doheny and his son knew of the transaction until long after the contracts and leases in question were made. The utmost secrecy concerning the event prevailed and was maintained by everyone until it was revealed by Mr. Doheny in January, 1924, in an investigation of leases upon naval oil reserves by the Committee on Public Lands and Surveys of the United States Senate.

When the \$100,000 was delivered to Secretary Fall on November 30, 1921, he executed, signed, and delivered his promissory note, payable on demand, after date, to Edward L. Doheny, or order, in the sum of \$100,000 with interest at no suffi-

cient rate. He handed this note to E. L. Doheny, Jr., who took it to New York and gave it to his father within a day or two after it was made. No security of any kind was given. No payment of principal or interest has ever been demanded or made. The note is a complete enforceable evidence of indebtedness was never deposited in any receptacle other than the pocketbook carried by Mr. Doheny on his person.

About two weeks after receiving the note and on the eve of his departure from New York for his home in California Mr. Doheny mutilated the note by tearing the signature therefrom. He gave the portion containing Fall's signature to his wife and retained in his personal possession the other part of the note. He told Mrs. Doheny that he had made Mr. Fall this loan of \$100,000 and that if on their journey homeward anything should happen that he and Mrs. Doheny should be killed in a wreck and their executors found the note and would present it and press Mr. Fall for it, Fall would then be worse off than he was before the money was loaned. And he did not wish Mr. Fall to be pressed for payment of the note.

Before the Senate Committee Mr. Doheny similarly explained this peculiar act by saying that he was about to entrain for a long journey he wished to avoid the possibility of the note as an enforceable obligation of Mr. Fall's coming into the hands of others. He said that if he was killed en route he did not wish Mr. Fall [834] pressed for payment by his executors for if the note in its entirety

fell into the hands of his executors it would be their duty to enforce its payment. And if both he and his wife were killed in the same accident part of the evidence of Fall's obligation would be found on his body and part thereof on Mrs. Doheny's body and no one would know the connection of the two fragments except his son who was familiar with the circumstances of the delivery of the money and who would not press Mr. Fall for payment on account of his financial condition.

If this peculiar money transaction was a pure, private and personal affair in which these two old friends innocently participated, if it were a pure and unadulterated loan, as defendants contend, it is peculiar and unnatural that it should have been accomplished and attended with so many suspicious circumstances. To sustain the contention of the defendants with respect to this money transaction the court must lay aside every natural, human and probable construction and accept an unusual, extraordinary and improbable explanation. The contention of the defendants with respect thereto cannot be sustained upon any other hypothesis. This court cannot give its judicial sanction to any such unnatural and unreasonable explanation.

The safest, salutary and correct rule concerning the validity of a public contract made by a governmental officer with a private citizen or concern where simultaneously and concurrently with negotiations for the public contract the officer clandestinely received and accepts a substantial amount of money from the person or concern with whom

he is negotiating, and who later receives the public contract containing valuable rights to him or to his principal, is to abrogate, annul and set aside the contract as *contra bonos mores* and against public policy. This rule should be applied in all such cases regardless of whether the money transaction is a loan, a gift, or a bribe. In such a situation the whole contract and all official conduct relating thereto are tainted and it is impossible to say to what extent the contract and official acts were influenced by the concurrent clandestine money transaction.

See: *Graham vs. United States*, 34 Ct. Claims, 237.

Crocker vs. United States, 240 U. S. 74.

Washington Irr. Co. vs. Krutz, 119 Fed. 279.

The natural and irresistible inference of fraud in such cases is present, and can be overcome only by clear and convincing proof that it did not exist. No such proof has been offered in this case. [835]

Mr. Doheny himself recognized the significance of this money transaction in the dealings with Secretary Fall that eventuated in his companies obtaining leases on the naval oil reserves from which he expected his companies to make a profit of \$100,000,000. In his testimony before the Senate Committee the following appears:

“Senator WALSH of Montana.—I can appreciate that on your side, but looking at it from Senator Fall’s side it was quite a loan.

“MR. DOHENY.—It was, indeed: there is no

question about that. And I am perfectly willing to admit that it probably caused him to have such a feeling that he would have been willing to favor me. He did not carry on these negotiations. That is the point I would like for you to understand; that Senator Fall, in my opinion, was not influenced in any way by this loan, because the negotiations were carried on by men who were not under his control."

.
"The CHAIRMAN.—I am not asking you about the question of collusion: I am examining you concerning your own statement, that by reason of your accommodation to Mr. Fall you think that had he a discretion to exercise he might have been more likely to exercise it in your favor."

"Mr. DOHENY.—Why, I admit that.

"The CHAIRMAN.—Very well.

"Mr. DOHENY.—I don't think he is more than human.

Mr. Doheny based his belief that Secretary Fall was not influenced by the money on the ground that Secretary Fall took no part in the making of the contracts and leases, "that the negotiations were carried on by men who were not under his control." Secretary Fall's activity has already been shown and it appears throughout all of the negotiations and until the entire naval reserve No. 1, except one small area, was leased to the Pan American Petroleum and Transport Company and its subsidiary. He was the final and decisive factor in the transactions and especially in settling the royalties

which the defendants would be required to pay, and it is the magnitude of the leases and the amount of the royalties exacted that determine the value of the leases to Mr. Doheny and the defendants.

The plan to exchange royalty oil due to the United States from the naval reserves for fuel oil and storage therefor involved two main ideas; one of special and essentially naval concern, i. e., constructing and [836] equipping reserve fuel oil stations at strategic points; and the other, leasing to private parties valuable oil lands in the naval reserves. This last element, while correlated to the other, was what made the project of commercial interest to oil producers and companies. It was this last element that was secretly arranged between Secretary Fall and Mr. Doheny. It was this element that was sedulously concealed from all other oil companies and prospective bidders.

Admiral Robison, for the Navy Department, was the dominant factor in accomplishing the first idea; while Secretary Fall exercised control of the second. The contracts not only show this to be true but the evidence proves that it was the case. All the important and decisive questions relative to leases and royalties are reposed by the contracts of April 25th and December 11th in the Secretary of the Interior. The proof in the case demonstrates that Secretary Fall was the person to finally settle the question of what leases should be given and what royalties should be exacted.

Admiral Robison in trying to strengthen the national defense by utilizing the naval oil reserve

was less vigilant than he intended to be. I feel confident that if, at the time the award of the April 25th contract was made, he had known or appreciated the real value and significance of the preferential right to further oil leases that was vested in the Pan American Petroleum and Transport Company by the contract of April 25, 1922, and which was later by the contract of December 11, 1922, and the lease of June 5, 1922, and the lease of December 11, 1922, ripened into control of nearly all of naval reserve No. 1, that he never would have consented to that contract being made and never would have advised Secretary Denby to sign it. This is borne out by his testimony relative to the matter. He was detailing what occurred when the December 11th contracts were finally agreed to, and when he was trying to get higher royalties for the Government than Mr. Doheny would agree to pay. He testified:

“Q. You knew, though, that before you threw it upon to public bidding you had to submit it to Mr. Doheny’s concern? A. Yes.

Q. And you also knew that he was to have equal rights with any bidder if it was thrown open? [837] A. Yes.

Q. You therefore knew, in effect, that you would destroy competition, did you not?

A. I did not know it then.

Q. But you do now?

A. The preferential right had a great deal more value than I suspected at the time.”

“Q. Admiral, you were very anxious to get better royalties there, weren’t you? A. Why, yes.

Q. Did you discuss with Secretary Fall the question that you could say to Mr. Doheny that you would lay down to him certain royalties under his preferential right and if he refused then you could turn around and advertise? A. No, I did not.

Q. Why?

A. Because that is the time when that preferential right got its value to the Pan American Company. I didn't realize that it would be possible to do other than—we could break off negotiations with these people and then advertise, but I didn't believe it would be possible to obtain from any other concern royalties that would compare with those that we could get from the concern that already was in the area."

• • • • •
"Q. And it was determined that advertising should not be done?

A. Yes. As I say, that is where the value came to the Pan American Company in bid 'B.' I think at that time I made a mistake in the value to them of that preferential right. It was of real value to them, though, then."

There is another reason, in my opinion, why the contracts and leases should be voided because of personal and private transactions and relations between Secretary Fall and Mr. Doheny during the course of the negotiations for such contracts and leases. It appears that there was an understanding that Secretary Fall would later enter the employ of Mr. Doheny or of his companies and that he might repay and liquidate his indebtedness on ac-

count of the \$100,000 transaction out of the salary which he would then receive for such anticipated and future services. That such an understanding was contemplated and existed is shown by Mr. Doheny's testimony before the Senate investigating committee, in part as follows:

"Mr. DOHENY.—Well, I will tell you frankly now—I don't know whether this has any connection whatever with the investigation—but I expected that if the Senator did not sell or turn over that land that later on I might employ him in connection [838] with our affairs in Mexico, with which he is very conversant, and I would pay him a salary large enough of which he could pay about one-half to apply on the note, and pay it off in five or six years. And that was my expectation.

"The CHAIRMAN.—You had that in mind at that time?

"Mr. DOHENY.—Yes, sir.

"The CHAIRMAN.—If Mr. Fall does not enter your employ do you ever expect to press him for payment of the note?

"Mr. DOHENY.—Well, I don't know. If Mr. Fall is well enough and in good health I expect he will enter my employ.

"The CHAIRMAN.—You do expect that?

"Mr. DOHENY.—Yes, sir."

• • • • •
"Senator PITTMAN.—You did not expect him to go into your employ while he was Secretary of the Interior, did you?

"Mr. DOHENY.—No, sir.

"Senator PITTMAN.—You were to employ him after he ceased to be Secretary?

"Mr. DOHENY.—After he ceased to be Secretary of the Interior.

"Senator PITTMAN.—Was there anything said with regard to him resigning as Secretary of the Interior before his term was up?

"Mr. DOHENY.—Yes, sir; he often spoke of that. He often said he was not going to remain very long.

"Senator PITTMAN.—Well, you had in mind employing him and his repaying this note out of his employment?

"Mr. DOHENY.—Yes, sir.

"Senator PITTMAN.—And he had talked to you about resigning from the job of Secretary of the Interior?

"Mr. DOHENY.—Yes, sir; but I did not know how soon he would retire, whether he would stay his term out or not. We never discussed the length of time that he would remain in the Interior Department."

This is another incident so indicative of improper influence as to characterize the public contracts in controversy as tainted with fraud regardless of the intentions of Fall and Doheny with respect to this anticipated and contemplated future employment. The fact that it occurred during the negotiations of the contracts involved in this suit, when considered in connection with the other facts and circumstances in proof, and particularly the \$100,000 transaction,

so taints and contaminates such contracts as to require a court of equity to set them aside.

The actual effect of the contract of April 25th and the valuable preferential [839] right which it conferred upon the Pan American Petroleum and Transport Company was to utterly destroy competition for any oil leases in naval reserve No. 1. It is true that for this concession to the Pan American Petroleum and Transport Company the Government saved approximately \$500,000 in the Pearl Harbor project. But the destruction and prevention of competition in a public matter of such gigantic proportions as leases to more than 30,000 acres of proven oil bearing land which represent a potential profit to a lessee of \$100,000,000 cannot be justified under the facts and circumstances shown by the evidence in this case. It is contended by defendants that the contracts and leases in controversy were fairly obtained by competitive bidding. The evidence does not sustain this claim.

Aside and apart from the question as to whether the contracts and leases in question could be lawfully made without competitive bidding, the manner in which the bidding upon the April 25th contract was conducted as well as the way in which the agreements were negotiated and executed manifests in my opinion a determined purpose on the part of Secretary Fall to favor the companies controlled by Mr. Doheny to the prejudice of other prospective, available and actual bidders. There is official conduct and correspondence of Secretary Fall which indicates that in making the contracts for the con-

struction of the Pearl Harbor project and in leasing the naval oil reserves to the defendants he never intended that these matters should be effected by genuine competition. It is neither improbable nor unreasonable to infer that Secretary Fall, when the letter of November 28, 1921, was received, had concluded to lease the entire unleased areas in reserve No. 1 to Mr. Doheny's enterprises.

After Secretary Fall and Mr. Doheny had tacitly agreed upon the Pearl Harbor contract, as shown by the November 28, 1921, letter, a form of competitive bidding was inaugurated and pursued by the Interior Department relative to said contract. But it had no substance. It was feigned and illusory. It was discriminatory, deceptive and unequal. Responsible concerns that desired to bid were without good reason not permitted to do so. Public officers and citizens who sought information relative to matters in contemplation by the Interior Department were designedly misinformed. Secrecy was observed and maintained throughout the negotiations [840] under a pretense of emergency war plans. Information, opportunities and advantages were given to officers of the Pan American Petroleum and Transport Company that were not accorded to any other bidder.

The interior and Navy Departments considered competitive bidding to be necessary in order to make the contract of April 25, and having so concluded they were required to invite real competition. It should have been invited upon common ground. There is no competition unless the bidding is done

upon the same basis. The bidders must each and all be given the same information. There must be no discrimination or partiality. And wherever in invitations to bidders it is stated that the bidders may propose alternative bids the alternatives that will be considered should be defined so that the bidders may understand them and so that upon the submission of several alternative bids by different bidders a comparison of their relative merits and values can be made. If the form of the alternatives suggested to the bidders is such that alternative bids submitted under the invitation are incapable of a fair comparison the bidding is noncompetitive.

United States vs. Ellicott, 223 U. S. 524;

Inge vs. Mobile, 135 Alabama, 187;

Shaw vs. Trenton, 49 N. J. L. 339;

Tice vs. Longbranch, 119 Atlantic, 25.

Invitations to bid on the original Pearl Harbor project were sent out by the Interior Department in February, 1922, to five principal oil companies operating on the Pacific Coast. After they were sent out certain high naval officers objected to them on the ground that they called for the doing of the work at Pearl Harbor by the contractor on a cost-plus percentage or fixed fee basis. The Interior Department recognized the force of their objection and modified the invitations so as to call for bids wherein the contractor agreed to do the work on a lump sum basis and the first invitations were recalled. On March 7, 1922, second invitations were sent to the same five companies inviting alternative bids on two propositions. The bidders were invited

to submit on the construction feature of the proposed contract either a lump sum bid for the whole or a bid based on firm lump sum subcontracts for at least two-thirds of the work and some other supplementary bid for the remainder. These invitations permitted the bidder to submit on the fuel oil feature of the proposed contract either a bid stated in a ratio of barrels of fuel oil for barrels of royalty crude oil, or to state the relation in other terms. These permitted alternatives implied nothing concerning proposed leases or preferential rights to lease. [841] They concerned only construction features or exchange of oil relative thereto. There was no suggestion, intimation or inference deducible from the invitations to bid that the Government would consider or intended to grant additional oil leases in the naval reserves or a preferential right to any additional oil leases therein which the Government might thereafter determine to grant.

Before any of the invitations to bid were sent out and in January, 1922, Dr. Bain made a tour of California to consult and confer with officials of the oil companies that were to be invited to bid on the proposed contract for the Pearl Harbor project. Before he left Washington he knew that the Pan American Petroleum and Transport Company would bid on the project and there is strong reason to infer from the evidence that before reaching California he knew what its bid would be. It is certain that at such time he had been apprised of Mr. Doheny's early promise to bid on the construction without profit to his company.

On the train across the continent Dr. Bain was accompanied by Mr. Cotter, whom the evidence in this case shows was an attorney at law and the officer of the Pan American Petroleum and Transport Company who had more to do with the negotiations and making of the contracts in question than any other agent of the defendants with the exception of Mr. Doheny. Mr. Cotter had been employed in the Department of the Interior prior to his association with the defendant companies. He and Dr. Bain were friends and had been former associates in the Interior Department. Mr. Cotter was private secretary to Secretary of the Interior Lane and Dr. Bain during Secretary Lane's administration was Assistant Director of the Bureau of Mines in the Interior Department. Dr. Bain and Mr. Cotter were both westward bound on the same train and concerning the same enterprise. En route Dr. Bain stopped off at Three Rivers, New Mexico. He was met at the depot by Secretary Fall. Mr. Cotter merely stepped off the train to greet Secretary Fall at the station and continued on to Los Angeles by the same train. Dr. Bain stayed over night at Secretary Fall's ranch and went over the entire Pearl Harbor project with Secretary Fall, informing him of the status and developments relative thereto since Secretary Fall left Washington about December 1, 1921, and of his (Dr. Bain's) mission to the Pacific Coast. He secured Secretary Fall's approval to all that had been done up to that time and Secretary Fall authorized

him to continue with the negotiations "subject to the working out of a contract." Secretary Fall was careful throughout to [842] restrict the authority of his subordinates so that they could not finally conclude a contract without his personal approval.

Dr. Bain resumed his westward journey the day after his conference with Secretary Fall and reached Los Angeles January 2, 1922. Upon arrival he was met at the depot by Mr. Cotter, and the two men were later joined by Mr. J. Crampton Anderson, another vice-president of the Pan American Petroleum and Transport Company. The three men spent the day together. On the following morning Dr. Bain met Mr. Doheny, Mr. Cotter, Mr. Anderson, and other officers of the defendants in the offices of the company at Los Angeles. At this meeting Mr. Doheny repeated a statement he had previously made that his company would submit a bid in the matter of the Pearl Harbor project.

Before Dr. Bain left Washington, and of his own volition, he had requested Mr. Gano Dunn of the J. G. White Engineering Company of New York to make an offer to do the construction work of the Pearl Harbor project. And in a letter written by Mr. Dunn to the Bureau of Mines of the Interior Department on December 29, 1921, reference is not only made to the proposal of the White Company to do the work, but it is further stated that the White Company hope to amplify their proposal to suit any new condition which might be imposed as a result of Dr. Bain's visit to the Pacific Coast.

The proposed Pearl Harbor project was foreign to the ordinary and normal activities of a producing oil company. While the plan was to secure the construction of the Pearl Harbor project by the use of royalty oils coming to the Government from the naval oil reserves it also involved services that were essentially of an engineering nature. And neither the Pan American Petroleum and Transport Company nor any other commercial oil producing company was equipped and prepared to carry out the proposed contract in its entirety. The difficulties of this situation were met by teaming up the J. G. White Engineering Company with the Pan American Petroleum and Transport Company. This was accomplished through the agency of Dr. Bain, who upon his return to the east arranged a meeting between Mr. Dunn and other officers of the White Company with Mr. Doheny and other officers of the Pan American Petroleum and Transport Company with the result that a coalition was formed which made it possible and practicable for the Pan American Petroleum and Transport Company to obtain the contract of April 25, 1922, and the leases of the naval oil lands which were granted by the Interior [843] Department in order to effectuate said contract and the later one of December 11, 1922. Here was a situation which in and of itself gave to the Pan American Petroleum and Transport Company a distinct advantage over any other oil company or concern that might be interested in bidding on the Pearl Harbor project. The Company controlled by Mr. Doheny

was not only privileged in having the friendship and confidence of the Interior Department, but it was favored to the extent of constant and intimate conferences with the officers of the Interior and Navy Department which according to the evidence was not extended to the same degree to any other bidders.

The activities of Dr. Bain in California are illuminating in this case. He came apparently to submit the entire project to the principal oil companies operating in California oil fields in the vicinity of the naval petroleum reserves and to invite them to bid on equal terms on the Pearl Harbor project. After the conference with the officers of the Pan American Petroleum and Transport Company at Los Angeles he went to San Francisco where he interviewed officials of the following companies in the order named: The Standard Oil Company; Ford, Bacon and Davis, an engineering firm that had much business in connection with the Standard Oil Company; the General Petroleum Company; the Associated Oil Company; and the Pacific Oil Company. The result of such conferences may be summarized as follows:

The Standard Oil Company stated that they would not be interested in the construction part of the contract as their attorney had advised them that there was no legal power under the Act of June 4, 1920, for the Government to make the contract in the manner proposed.

The General Petroleum Company went even further and stated that they would not submit any bid

in the matter as their attorney had advised against the legality of the proposed contract. They suggested, however, that an opinion on the legality of the contract be obtained from the Attorney General, and if he held that the Secretary of the Interior could legally enter into the arrangement the Company would then consider it.

The Associated and the Pacific Oil Companies, which are affiliated companies, [844] also came to the conclusion that the proposed contract was unauthorized by the Act of June 4, 1920, and stated they would bid only upon condition that Congress approved the proposed contract.

The Engineering firm referred to only expected to work conjointly with the Standard Oil Company and they made no statement that they would bid independently, and as will appear later this firm submitted no bid.

With this information Dr. Bain returned to Los Angeles, where he first interviewed officials of the Union Oil Company of California. The true situation respecting this company is uncertain on account of an irreconcilable conflict in the testimony of Dr. Bain and Admiral Robison relative thereto. Dr. Bain testified that he got the impression from the officers of the company with whom he conferred that they were not interested in the proposed contract and he therefore did not leave plans of the project with them and did not send to the company a written invitation to bid as he did to each of the other companies interviewed. Admiral Robison testified that Dr. Bain reported to him that the

Union Oil Company was anxious to bid and that the Government undoubtedly could get a bid from it if one was wanted, but that he (Dr. Bain) advised against it on account of the company being foreign owned. This company, however, did not bid, but when it learned that the contract of April 25th had been made it protested that it had not been given an opportunity to bid on the same.

The final interview that Dr. Bain had with any oil company on the Pacific Coast was a second conference with the officers of the Pan American Petroleum and Transport Company at Los Angeles when Mr. Doheny reiterated his promise and intention to make a bid on the contract. It thus appears that the first as well as the last company to be interviewed and consulted by Dr. Bain on his western trip was the Pan American Petroleum and Transport Company.

Upon Dr. Bain's return to Washington he reported the result of his trip to Secretary Fall and it must have been expected by Secretary Fall that there would be no real competition—indeed, it must have been known to him that there would be only one bidder who would unconditionally offer to do the work of the Pearl Harbor project in consideration of the royalty oil from the naval petroleum reserves and that it was the company owned in [845] large part and controlled by his friend and benefactor, Mr. Doheny. The only other concerns that were given plans of the Pearl Harbor project and asked to bid thereon were the Pittsburg-Des Moines Company, and the Foundation Company

of New York. Being unable to make any satisfactory arrangements to dispose of the royalty oil which was to be the consideration for the Pearl Harbor construction under the plan, these companies were never heard from in the matter.

I am strongly persuaded by the evidence in this case to believe that Secretary Fall never really intended that there should be competition in the plan that he had devised for leasing all of the naval oil reserves. In my opinion it was fear of opposition from naval officers and because Assistant Secretary Finney early in the negotiations of the April 25th contract insisted upon competitive bidding that Secretary Fall consented to even the semblance of competition which the record in this case shows. As early as October 25, 1921, Secretary Fall manifested opposition to public competition in the matter of the leases and [846] contracts in suit. For when the draft of a letter of that date, which has already been mentioned, was prepared by Admiral Robison in the Navy Department it contained a mandatory provision that the contracts and leases of the naval oil reserves should be let by competitive bidding. When this draft was discussed with him for his approval, Secretary Fall suggested that the words "or otherwise" should be added to a certain phrase in the draft which read as follows:

"That the Interior Department will exercise its best efforts to obtain for the Navy as large royalties and as favorable terms as practicable by public competition."

The suggestion was adopted by Secretary Denby on recommendation of Admiral Robison. It reveals the mind of Secretary Fall in the premises.

If there had been a sincere and real attempt to interest the leading commercial oil companies in the project to the end that they would on common ground compete with one another in bidding on the contract so that the Government would obtain the most advantageous and best bid, there would have been a desire and an eagerness to obtain an opinion from the Attorney General as to the legal right of the Government to make the contracts. Dr. Bain testified that he informed all of the companies interviewed by him that an opinion had been obtained from the Judge Advocate-General of the Navy and it is reasonable to infer that in his conferences with Secretary Fall on the way west he had told Secretary Fall of this opinion. Neither Secretary Fall nor any other officer of the Interior Department or Navy Department ever sought or obtained any opinion from the Attorney General or any other disinterested legal adviser of the Government as to whether the contract could be legally made, but instead Secretary Fall resorted to secrecy, misrepresentation and deception.

When Dr. Bain returned to Washington in January, 1922, he recognized the propriety and desirability of obtaining an opinion from the Solicitor of the Interior Department on the legality of the proposed Pearl [847] Harbor contract and he suggested by letter of January 25, 1922, to Acting Secretary Finney that such an opinion be obtained.

Apparently Dr. Bain not only did not feel justified in proceeding with the negotiations for the contract on the strength of the opinion of the Judge Advocate-General of the Navy but the position taken by the oil companies in California evidently persuaded him to request additional legal advice.

By this suggestion Dr. Bain appeared to be desirous of securing real competition to the end that the Government would get the best results obtainable. However, no further legal opinion was ever obtained.

Why Dr. Bain did not seek or suggest the Attorney General's opinion is difficult to understand and his testimony on this point does not clarify the matter. He was asked, why in view of the suggestions of the oil companies he did not request the Attorney General's opinion. And he answered, that he felt that if he asked for an opinion from the Attorney General's office he would not know what kind of a lawyer was going to pass on it, and,

"while they have some very excellent lawyers in the Department of Justice that when you ask for an opinion over there you don't know whether it will get to one of them or somebody who is thinking only of strictly technical legal matters and who gives you a highly technical legal opinion and who has no responsibility whatever for carrying out a thing or getting anything done or somebody who is merely interested in building up a good record for himself and never letting anything be done which might come back on him."

So it appears that notwithstanding Secretary Fall was told by Dr. Bain upon his return from the West of the objections of the oil companies to the making of a contract, ~~that via the attorneys for one of~~ the oil companies had submitted a written opinion opposing the legal right of the Government to make the contracts, and notwithstanding another counsel for another of the oil companies came to Washington and told Fall that he believed the contracts were unauthorized by law, in the face of all these circumstances and events, Secretary Fall remained adamant. This was a peculiar position for him to take if he was not trying to thwart competition and to favor his friend and benefactor Mr. Doheny. If the real purpose of Secretary Fall had been to obtain for the Navy as large royalties [848] and as favorable terms as possible it would have contributed greatly to the accomplishment of such purpose to have stimulated interest and competition among the various oil companies by assuring them by a legal opinion from the legal department of the Government, which was in no way connected with or directly interested in the success or failure of the Pearl Harbor project, that the contemplated contract could be lawfully made. The failure to adopt such a course is another badge of fraud and another of the many suspicious circumstances concerning Secretary Fall's activities in the matter of the contracts in controversy in this case.

An incident which illustrates Secretary Fall's eagerness to close the Pearl Harbor project contract, and another agreement by which he leased

naval petroleum reserve No. 3, in Wyoming, at the same time, occurred a few days before April 15, 1922, the day upon which the bids on the Pearl Harbor contract were to be opened, Secretary Fall was preparing to leave for a visit to his ranch in New Mexico and he asked Dr. Bain and Assistant Secretary Finney how the Pearl Harbor contract was getting along and when they told him that it was not possible to open the bids until April 15 he was disappointed and became impatient at the delay in the Pearl Harbor matter saying that he wished to close both matters together. At the same time he wrote a letter to Secretary Denby in which he stated that he was delaying the Pearl Harbor matter purposely in order that application might be made to have Congress pass some measure that would expressly authorize the exchange of royalty oil for storage and fuel oil.

There are many other circumstances and details connected with the so-called competitive bidding leading up to the contract of April 25th that are curious and suspicious. But this opinion would be too voluminous to mention them all. Suffice it to say that from all of the evidence relative thereto I am satisfied that there was no real competition between the bidders but that the competition was a sham and a pretense. [849]

The revelations at the opening of the bids in the Interior Department on April 15, 1922, substantiates the opinion that there had been no real competition and that precisely what must have been anticipated by Secretary Fall actually happened when

the bids were opened. There were three bids submitted. The Standard Oil Company submitted a bid on the Pearl Harbor project which excluded the construction work. The Associated Oil Company bid conditionally on the approval of the contract by the Congress. And the only other company to bid was the Pan American Petroleum and Transport Company which submitted two bids denominated "Proposal A" and "Proposal B" respectively. The former was in exact conformity to the invitation and involved a profit to the Pan American Company. The latter was for about \$235,000 less and contained a proffer to further credit the Government against the proposal sum for all savings which might be accomplished in the actual construction of the Pearl Harbor project. It was a bid to do the work at cost. In this respect it carried out the promise made by Mr. Doheny to Admiral Robison. It was conditioned however on the grant of a preferential right to all oil leases which might be thereafter made by the Government in naval petroleum reserve No. 1. In this respect it was in line with the understanding between Secretary Fall and Mr. Doheny in November, 1921, as to granting further leases to Mr. Doheny or to his companies in the reserves.

As previously stated herein there was nothing in the written invitations that were sent out to the various oil companies and others who were asked to bid to indicate that the Interior Department intended to or would consider a proposition of a preferential right to lease the naval oil reserves. And no

company other than the Pan American Petroleum and Transport Company apparently considered that a proposal embodying such preferential right would be entertained by the Interior Department or that such a proposition would be in accordance with the invitation to bid. No other company than the Pan American Petroleum and Transport Company had information such as was referred to in the letter of November 28, 1921. Secretary Fall had never told any other officer of any other oil company that he would or expected to grant further leases to oil [850] lands in connection with the Pearl Harbor construction.

It is suggested that "Proposal B" was conceived by Mr. Cotter. But Mr. Cotter was not called as a witness. It may have been that Mr. Cotter actually phrased "Proposal B," but it is also quite probable that he did so from information that he received from other officials of the Pan American Petroleum and Transport Company and from the letter of November 28, 1921, for Mr. Cotter was in the office of Secretary Fall on the day that Secretary Fall received the letter from Mr. Doheny, and it is a fair inference that Mr. Cotter had discussed with both men the matters that had occurred between Secretary Fall and Mr. Doheny relative to the Pearl Harbor Construction work and the granting of further leases in the naval reserves to pay for same.

None of the other companies, except possible the White Engineering Company that was collaborating with the Pan American Petroleum and Trans-

port Company, had been told of the understanding that Mr. Doheny and Secretary Fall had in October, 1921, that the Pan American Petroleum and Transport Company would bid on the Pearl Harbor construction at cost and without profit. And why competition was invited on a construction project that one prospective bidder had stated it would build at cost is difficult to understand.

The only contract in suit as to which there was any kind of competitive bidding was the Pearl Harbor construction contract of April 25, 1922. There was no bidding of any kind for either of the leases by which the Pan American Petroleum and Transport Company obtained dominion and control of about 32,000 acres of the richest oil lands of the naval reserves of the Nation. And there was no bidding competitive or otherwise for the contract of December 11, 1922.

As previously mentioned, one of the contentions of the defendants in this case is that even assuming that fraud and conspiracy have been proven the contracts cannot be annulled and cancelled because no pecuniary damage has been shown. While as I have said I do not agree with this contention, the way in which the so-called competitive bidding was carried on and the partiality that was exhibited in awarding the contracts furnish an [851] answer to this contention. For if all of the persons invited to bid had been told that one of the bidders had already agreed to do the construction work at Pearl Harbor at cost and without profit such information would probably have suggested to the bidders that

under the privilege of submitting alternative bids some matter concerning the leasing of lands in the reserves was contemplated by the Government and might be considered. And in such event all bidders would probably have submitted more attractive bids for the contract. It cannot be said therefore that if the bidding had been upon common grounds and had been really competitive the Government would not have received greater value for its oil and oil leases than it has under the contracts and leases in suit. Moreover, according to Mr. Doheny's testimony before the Senate Committee his companies expected to make a profit of \$100,000,000 from the contracts and leases in suit. If the various oil companies had known or realized what Mr. Doheny had been told by Secretary Fall it is more than probable that less profit would have satisfied them, which would of course have correspondingly increased the value that the Government would receive on account of the leases and contracts in question.

After the bids were opened on Saturday, April 15, 1922, at twelve o'clock noon, in the office of Assistant Secretary Finney of the Interior Department, they were turned over to Dr. Bain and Mr. A. W. Ambrose, Chief Technologist for the Bureau of Mines of the Interior Department. And on Monday, April 17, 1922, Mr. Ambrose filed a report and comparison of the bids with Acting Secretary Finney and recommended that the bid of the Pan American Petroleum and Transport Company, under "Proposal B," be accepted. for the reason that

it was the lowest bid submitted and that the Pan American Petroleum and Transport Company had drilled other leases in naval reserve No. 1 satisfactorily to the Department of the Interior and that by granting the preferential right as suggested in "Proposal B" the Department was certain of a direct saving of over \$235,000 and the possibility of a further saving. [852]

After the report was received Assistant Secretary Finney conferred with Admiral Robison and as a result wired to Secretary Fall, who was then at the ranch in New Mexico, recommending on behalf of himself, Mr. Ambrose and Admiral Robison acceptance of the Pan American Petroleum and Transport Company alternative bid under "Proposal B," Secretary Fall answered by stating that if Admiral Robison and the Secretary of the Navy concurred and authorized it to immediately award and close the contract with the Pan American Petroleum and Transport Company and to make public entire policy in fullest and completest manner. Thereupon Assistant Secretary Finney advised the Pan American Petroleum and Transport Company by letter of the acceptance of their "Proposal B," and awarded the contract to them thereon.

Prior to April 15th when the bids were opened Assistant Secretary Finney had never discussed with Secretary Fall or any other person the idea of granting a preferential right to further leases in the proposed Pearl Harbor contract. He knew nothing about the intention to grant such right. Neither did Admiral Robison.

Immediately after the letter of award was sent the Bureau of Mines in conjunction with the Navy Department began the preparation of a contract pursuant to the award. And during the conferences relative thereto between Assistant Secretary Finney, Mr. Ambrose, Admiral Robison and Mr. Cotter, Mr. Cotter brought up the question of the preferential right which was the condition of the bid of the Pan American Petroleum and Transport Company under "Proposal B." He wanted some definite assurance in writing that his company would receive an additional lease within one year to about 160 acres in one portion of reserve No. 1 and a strip of about 140 acres in another portion of the same reserve at royalties of from 12½% to 45%. Assistant Secretary Finney, Mr. Ambrose and Admiral Robison had agreed to give such leases if Secretary Fall approved thereof. There was no specific mention of this lease in the Pearl Harbor contract of April 25th, but on April 17th a letter was prepared by Assistant Secretary Finney bearing date April 25, 1922, which was signed by Assistant Secretary Finney and Secretary of the Navy Denby in which it was stated that [853] the Department of the Interior agreed to grant to the Pan American Petroleum and Transport Company within one year from the date of the delivery of the Pearl Harbor project contract the two leases requested by Mr. Cotter.

When this letter and the contract were drafted, and on April 20, 1922, Assistant Secretary Finney sent Mr. Ambrose to New Mexico with all of the

papers relative to the award and contract and instructed Ambrose to acquaint Secretary Fall with all of the details in the matter and to submit the same to Secretary Fall for his approval. Mr. Ambrose arrived at Three Rivers, New Mexico, on April 23d, and after submitting the entire matter to Secretary Fall, Secretary Fall sent a telegram to Assistant Secretary Finney authorizing the execution of both contract, that is, the Pearl Harbor project contract and the letter of agreement for further leases under the preferential right of the April 25th contract. And on April 25, 1922, Assistant Secretary Finney executed and signed the contract and delivered the letter agreeing to give the leases. Immediately thereafter the two documents were sent over to Secretary Denby and he signed the same.

Concerning the making of Secretary of the Navy Denby a party to this contract there is another significant circumstance. It was not the intention to have Secretary Denby sign the contract. Mr. Cotter however demanded that Secretary Denby be made a party to the contract and stated that it would not be acceptable to him unless Secretary Denby signed the contract. Assistant Secretary Finney and Dr. Bain would not assume authority to name Secretary Denby as one of the contracting parties but wired Secretary Fall of Mr. Cotter's demand and Secretary Fall authorized Secretary Denby's name to be inserted in the contract. It is apparent that Secretary Fall was the dominant and deciding agency in the making of these contracts by the Government. He did not personally

participate in all of the negotiations but he did retain the ultimate power that brought the contract and lease into being. He was the deciding official in making all of the contracts and leases. He and his department always fixed and determined the royalties in the leases.

The scope of the power asserted by the Secretary of the [854] Interior and reposed in him by this contract of April 25, 1922, is forcefully shown by a letter by Assistant Secretary Finney to Secretary Denby on May 5, 1922. After the contract was executed there was a discussion between Mr. Cotter, Admiral Robison, Assistant Secretary Finney, Mr. Dunn and others as to how the construction and other matters covered by the contract would be handled especially in the event of a dispute or disagreement between the contractors and the Navy or others. Mr. Dunn who was to do the construction work at Pearl Harbor under subcontracts with the Pan American Petroleum and Transport Company insisted that the final arbiter should be the Secretary of the Interior. It was so decided. Admiral Robison consented to such decision and thereupon the following letter was prepared and transmitted. It was received by Secretary Denby and approved by him as will appear by his endorsement. The letter reads:

“Department of the Interior,
Washington,

May 5, 1922.

The Secretary of the Navy.

Dear Mr. Secretary:

April 25, 1922, the Navy and Interior Departments entered into a contract with the Pan American Petroleum and Transport Co. for the exchange of crude oil for fuel oil in storage at Pearl Harbor. It is important that work under this contract begin at the earliest possible moment and that the method of procedure and supervision be agreed upon between the two departments. In that connection I submit for your consideration and approval, if you agree, the following:

Contract consists of two principal parts, the first is the exchange of crude oil for fuel oil to be delivered in tankers at Pearl Harbor. The second part is the construction of oil storage and the receiving of oil in the tanks at Pearl Harbor.

The Department of the Interior shall retain direct control of the oil business involved in this contract; in other words, of the first part of the contract mentioned above.

The Chief of the Bureau of Yards and Docks, Navy Department, Admiral L. E. Gregory, is designated as the representative of the Secretary of the Interior in handling the second part of the contract as noted above. This involves, first, all technical matters in connection with the plans and specifications for storage, and which in its general phases can be most expeditiously handled in Washington;

second, the supervision of construction work in the field at Pearl Harbor; and third, the receiving of the oil at Pearl Harbor from the tankers and placing same in tank storage as it becomes available under this contract until such time as the completed plant shall be turned over to the Government.

The Secretary of the Interior expressly reserves at all times the right to recall the foregoing representation and to designate a successor from the Navy Department as his representative. The right of the contractor to appeal to the Secretary of the Interior, as provided in the contract, is not affected hereby. Notice of any appeal by the contractor from [855] the decision of the officer in charge of the work and the reasons therefor shall be forwarded promptly, being routed through the commandant and the Chief of the Bureau of Yards and Docks on their way to the Secretary of the Interior. This will in no way involve the functions at present exercised by the Chief of the Bureau of Engineering in dealing with the Secretary of the Interior in regard to oil matters in general, since the only function of the representative of the Secretary of the Interior would be the technical work of constructing the tanks, the receiving and storing of the oil during construction, and reporting to the Secretary of the Interior, the amounts received.

Respectfully,
EDWARD C. FINNEY,
Acting Secretary.

Approved:

EDWIN DENBY,
Secretary of the Navy."

It is very doubtful whether Secretary Denby was cognizant of the terms of the contracts. It is certain that he was induced to sign them under a misapprehension. He relied entirely upon Admiral Robison for information concerning the contracts and leases and it is shown that he signed them under the belief that they were necessary as protective measures against drainage on the reserves. Secretary Denby had always taken the position that as much of the oil as possible should be kept in the ground. The contracts and leases in suit were not necessary as drainage protections and were not so intended by either Admiral Robison or Secretary Fall. The contract of April 25th was simply a contract for the use of royalty oil in payment for a large construction job at Pearl Harbor and the filling of tanks therein with fuel oil. At the time it was in contemplation the Government was receiving royalty oil from certain leases in the reserves and the Navy desired to use such royalty oil for the construction instead of selling the oil and paying the proceeds into the treasury as required by previously existing law. There was no thought at the time of making further leases on the reserves except for the one purpose of providing additional royalty oils with which to pay for the construction at Pearl Harbor. However, whatever protection to the reserves was deemed necessary had been carried out by the strip leases that were made before the contract of April 25th had been executed. And a further protection to the reserves [856] against drainage was established by the temporary reserve

agreement with the Pacific Oil Company which was made in February, 1922, by which that company which owned oil lands adjacent to the reserves agreed with the Government to forego further drilling except on six months' notice. So that neither the Navy officer in charge nor the Interior Department had any thought that the Pearl Harbor project or the granting of additional leases in connection therewith had anything to do with the drainage question on the naval reserves.

The Pan American Petroleum and Transport Company was not required to wait long for an additional lease under their preferential right and under their letter of April 25, 1922. On May 19, 1922, by Mr. Cotter, the Company applied for a lease and it was granted the lease of June 5, 1922. No other person, firm or corporation was advised of the Government's intention to make this lease. It was made secretly and without competitive bidding of any kind.

There is a circumstance in connection with the letter of April 25, 1922, which granted the lease of date June 5, 1922, to the Pan American Petroleum and Transport Company, that shows the tendency to favor the company controlled by Mr. Doheny whenever an opportunity came. This letter bears date after the award of the contract of April 25th had been made to the Pan American Petroleum and Transport Company under their "Proposal B" bid. The award of the contract was made April 18, 1922. As far as an enforceable contract to do the Pearl Harbor work is concerned, one had therefore been

accomplished on April 18th by the United States with the Pan American Petroleum and Transport Company. The consideration had been stated and agreed to. It was unnecessary to give any specific leases to oil lands in the reserves. Mr. Cotter, however, speaking for his company, insisted that the preferential right which was given by the April 25th contract should be immediately transformed from a contingent and inchoate right into a vested one and his request was acceded to without delay by Secretary Fall. This was another positive and unmistakable manifestation [857] that the Pan American Petroleum and Transport Company was less interested in the Pearl Harbor contract and the existing royalty oil from the reserves than with the immediate grant of further valuable leases in the reserves to themselves without competition and through favoritism and discrimination. The Pearl Harbor contract was of no value and of little interest to the Pan American Petroleum and Transport Company without the preferential right. It was the preferential right that had real commercial value. It cannot be said with any degree of reasonable probability that Secretary Fall's approval of this grant of the June 5th lease and of the later lease of December 11, 1922, were not to some extent influenced by Mr. Doheny's personal benefactions to him. Favoritism, partiality and discrimination in administering public duties and in reposing valuable public rights in private concerns are often as destructive to governmental integrity and national

welfare as bribery. Public office is yet a public trust wherein all the people are the beneficiaries.

After the contract of April 25th was made Dr. Bain visited California in May, 1922, for the purpose of arranging for the turning over to the Pan American Petroleum and Transport Company the accumulated oil that had been collected from the reserves during the negotiations that lead up to the April 25th contract. He encountered serious opposition by the oil companies that had been receiving the oil under earlier arrangements and the companies were threatening litigation to test the validity of the April 25th contract. In this dilemma he prepared a letter to Secretary Fall, as follows:

"506 Custom House,
San Francisco, Calif., May 12, 1922.

Hon. Albert B. Fall,
Three Rivers, N. Mex.

Dear Mr. Secretary:

I have been here for the last few days arranging for a transfer of the accumulated royalty oil and future royalty [858] oils to the Pan American Company. I have been surprised to find that the Standard and General Petroleum in particular are adopting a very technical attitude toward the transfer, going so far as to raise a question as to whether either company would be safe in making such a transfer or in later handling any of the oil in case the Pan American desired to have them do so. As you will recall Mr. Sutro and Mr. Wyle have been doubtful as to the right of the department to make the exchange contract. They now seem to have

become positive that no such right exists and Mr. Story is even interpreting the law so far as to question the right of the Standard to deliver oil to the Pan American on our order. I have arranged that Mr. Campbell, as representing the department, shall receive the oil and give a receipt for it, and while I am not a lawyer, my impression is that that should end the matter as far as the pipe line companies are concerned. Of course, this is not a matter which primarily concerns the department since we have all been entirely clear in our minds as to the right of the Government to make this exchange and have in fact gone ahead and contracted for the exchange with the Pan American, and the latter is an entirely responsible concern that I assume ends it as far as we are concerned.

There is, however, another phase of it. None of us want Mr. Doheny to get into trouble, and I take it we will want to do anything we can to make it easy for him. I have been told that there was a definite proposal to have one of the smaller companies go into court and fight this contract with a view to getting a decision as to the right of the department to make such a bargain. This proposal was not carried through. Mr. Storey tells me that he objected to it, as he felt that it would embarrass the department and would give support to the trouble makers in Congress. He professed to be anxious and willing to do anything he can help the department to carry out its plans, but to be in the awkward position of having an opinion from his

attorney which might be quoted against him in case the matter ever came up.

Out of all this has come the suggestion repeatedly that the opinion of the Attorney General be obtained as to the legality of the contract. I realize the objections to asking such an opinion, but I have thought it proper to let you know the difficulties that are being raised here so that you might reconsider the matter and decide as to whether you might not properly ask the Attorney General to put in writing what I have understood was his informal and verbal expression of opinion favorable to the action the department has taken. I am not certain that Mr. Doheny cares, but Mr. Cotter will see him tomorrow, and if it does not seem to them important I am giving Mr. Cotter this letter to show you, so that you may know what I have found out here.

The wells on the north line of 2 are coming in in good shape, and Anderson has done excellent work in pushing them ahead.

I am sorry to bother you with this business while you are at home.

Cordially yours,

H. FOSTER BAIN,

Director.

cc Mr. A. W. Ambrose."

Dr. Bain did not mail this letter but gave it to Mr. Cotter who was also in California. And although Mr. Cotter did not testify it appears that the letter never reached Secretary Fall, as Mr. Cotter [859] told Dr. Bain afterward that he had talked the matter over with Mr. Doheny and that

Mr. Doheny said that the matter was unimportant and that he was satisfied with the authority to go ahead. Here is a clear and unmistakable manifestation on the part of Mr. Doheny that he was determined to retain this valuable and unusual leasehold right to the naval oil reserves and that he was not willing to hazard the venture by any litigation or by even the solicitation of an opinion from the Attorney General as to the legality of the contract. This situation alone, in my opinion, negatives the idea which counsel for defendants suggested that Mr. Doheny's interest in this matter was primarily patriotic. Mr. Doheny by this position showed that in May, 1922, at least, he was looking forward and anticipating the valuable and extensive lease that he later obtained on December 11, 1922. The contract of April 25, 1922, meant no profit to him. The lease of June 5th was not valuable. It was small in area and was coexistent with the April 25th contract. It was the preferential right to further leases granted by the April 25th contract that Mr. Doheny expected would fructify into a valuable property right. He was not desirous or willing to risk what he knew the future would bring to him because of his ownership of the preferential right. If the contract which gave him that right would not stand the legal test he would be unable to effectuate any plans for the future. And he wisely decided to let well enough alone as to the legality of the April 25th contract.

There were some other details in connection with the contract of April 25, 1922, and the lease of June

5, 1922, that are significant in the consideration of the first general contention of the plaintiff in this case and they have been covered by the findings of fact and conclusions of law filed simultaneously with this opinion. Further mention herein I deem unnecessary.

We are therefore brought to a consideration of the contract and lease of December 11, 1922. I shall not review much of the record relative to the execution of these agreements. They are inextricably bound to the April 25th contract and all of the agreements are component parts of a plan to lease the naval oil reserves and to use the royalty [860] oil coming to the United States therefrom. If the plan was tainted by the personal and money transactions of Secretary Fall and Mr. Doheny all of its parts are infected.

No competition of any kind was attempted by any department of the Government with respect to the agreements of December 11th. There was no immediate drainage condition that justified them. The only officer of the Government who participated in the making of the contract or lease under the theory that it was a present drainage relief measure was Secretary Denby, and he was mislead in this regard. There was secrecy in the negotiations that lead up to the execution of these agreements and in the actual consummation of them. The royalties that were to be required to be paid to the Government under the lease were not as favorable to the Government as those which had been obtained for leases on reserve No. 2 about this same period. The con-

tract and lease cannot be justified upon any national emergency demand, for there is no evidence that any existed at the time these agreements were made. These contracts, in my opinion, were in furtherance of the plan of Secretary Fall, formed by him soon after he assumed the Interior portfolio, to lease the entire naval reserves of the Nation to private enterprise. They were also to effectuate the understanding which I believe the telling letter of November 28, 1921, shows existed between Secretary Fall and Mr. Doheny to grant privileged leases to the defendant companies.

Shortly after the April 25th contract was made Admiral Robison called the attention of the officers of the Navy to the desirability of increasing the Pearl Harbor reserve fuel station and also of the necessity of increasing the reserve stocks of fuel oils and lubricating oils together with the necessary storage facilities therefor. Little attention was paid to his suggestion at that time. He however was determined to accomplish his incessant desire to strengthen the Nation's defense by building and equipping additional fuel stations by using naval oil therefor. And again on November 20th, [861] 1922, he wrote to the Bureau of the Navy that had direct supervision of such matters, as follows:

"The storage for 1,500,000 barrels of fuel oil at Pearl Harbor under contract with the Pan American Petroleum and Transport Company is nearing completion and it is desirable at this time that information be at hand as to what further disposition should be made of the

royalty oil accruing from Naval Petroleum Reserves Nos. 1 and 2."

On the following day Admiral Robison received authority to proceed with the enlargement of the Pearl Harbor project so as to provide additional fuel oil storage facilities and also a separate unit for gasoline storage.

In the meantime the Interior Department had been solicited by the Pan American Petroleum and Transport Company to extend some relief from their leases in the naval oil reserves on account of the flush production of crude oil occasioned by the opening up of newly discovered fields in California and insufficient refinery facilities therein which had resulted in greatly depreciating the market price of oil. On July 28, 1922, Mr. Cotter wrote to the Secretary of the Interior requesting that his company be permitted to curtail production and cease drilling. He suggested that his company hoped to be able to submit a plan to the Secretary of the Interior to bring better prices for the oil. There are two important features of this letter shown by the following excerpts:

"We are seriously contemplating the adoption of a plan which should bring better prices for this oil, if and when the plan can be consummated. In order that this plan may be developed, it is essential that we should have immediately your consent for suspension of operations, both drilling and pumping, on lands which we have leased from both within and without the Naval Reserves.

This suspension of operations may be made to such an extent as not to include off-set wells, but license to make it complete is necessary in order that development of the contemplated plan may be attempted."

"We believe that if this oil can be safely stored underground, that better prices which the future should develop will result and bring out the liquidation of contract prices in approximately the same length of time with a much smaller quantity of oil.

We hope that you will see your way clear to authorize us to suspend operations both of drilling or production, or either, to such extent as we may find it necessary in connection with the study of our proposed plan, until such time as said plan can be fully developed and submitted to you for your study and [862] approval. We hope to be able to submit this plan within ninety days.

To enable us to commence the initiation of the plan which we have in mind and to avoid the menace of possible failure to fulfill our leases, specific telegraphic authority to discontinue operations, followed by a mail confirmation, is hereby earnestly requested."

This request was immediately granted by Secretary Fall.

The prevailing market conditions made increased drilling in the naval oil reserve unnecessary.

The program of commercial oil companies was to curtail production as far as possible and thus relieve the unsatisfactory market condition so that a reasonable market price could be re-established. It is also clear that the Navy's policy of keeping the oil underground was particularly helpful to the general market condition that prevailed during the summer of 1922. These unsatisfactory market and inadequate refinery conditions afforded further opportunity to favor the Pan American Petroleum and Transport Company by putting into operation its preferential right to oil leases in the naval reserves so that the Pan American Petroleum and Transport Company might carry out its plan to establish a California refinery. If additional refinery facilities could be provided the over-production of crude oil could be transformed into other petroleum products and the general market condition stabilized. As it was however there was neither excuse nor justification for putting into operation the valuable preferential right granted by the April 25th contract so that an enlarged or modified plan had to be brought forward in order to attain the end agreed upon between Mr. Doheny and Secretary Fall as early as November 28, 1921.

Shortly after Mr. Cotter's letter of July 28th Mr. Doheny returned from a summer outing in Alaska and on September 6th he wrote a very friendly letter to Secretary Fall in which he made the following statements:

"I am greatly pleased to note that the authority which you gave to your representative at Bakersfield, Mr. Campbell, has worked out some good results in connection with the temporary [863] flood of oil which has increased the production beyond the capacity of the refineries in this State. The need for storing this surplus is undoubtedly the cause of the decrease in the price of oil, inasmuch as oil purchased in excess of the capacity of the refinery must be stored by the purchaser at a cost of 35¢ to 50¢ per barrel over the cost of such oil as may be treated immediately and find its way into the market.

In connection with this situation I have developed some ideas which I desire to place before you, which I think will work out to the advantage of the Government and the oil producers, generally, in this State. I am preparing a statement of the situation here and of the plan which I would like, under certain conditions, to undertake to carry out, which will give relief of a substantial character and provide additional market for the flush, unrestricted production of the oilfields here."

When Mr. Doheny and Secretary Fall met and discussed the plan mentioned by Mr. Doheny is not disclosed by the record in this case. There is nothing from which it is possible to fix definitely the time of any discussion between them concerning this new plan. It is certain, however,

that they did discuss the matter and probably before it was discussed by any other persons concerned. Mr. Doheny arrived in the east shortly after the letter was written, and in the latter part of October, 1922, he also called upon Admiral Robison to whom he disclosed the plan and with whom he discussed it on at least two different occasions before the contract of December 11, 1922, was made.

In substance his plan as imparted to Secretary Fall and Admiral Robison was to increase the storage facilities at Pearl Harbor and to provide for additional oil storage facilities for the Navy elsewhere of from two to five million barrels and to fill the same with fuel oil as a reserve in addition to furnish and sell to the Navy manufactured oil products from the refinery at ten per cent less than market prices at tidewater. The plan further provided that the Pan American Petroleum and Transport Company would erect an oil refinery at San Pedro, or at some other tidewater point, in California, and construct a pipe-line from the naval oil reserves in California to the refinery and convey the oil from the reserves through the same, and that in consideration of these undertakings the Government would, under the preferential right to lease granted under the April 25th contract, immediately lease to the Pan American Petroleum Company all of the unleased portions of [864] naval reserve No. 1, excepting a certain area upon which no leases would be granted to any concern, and would

authorize immediate extensive and general drilling thereon. The agreement proposed was to continue for fifteen years after the completion of the Pearl Harbor construction. It was in effect a complete surrender and transfer of approximately 30,000 acres of valuable proven oil land and its oil contents, estimated at from 75,000,000 to 250,000,000 barrels of oil, for fifteen years at least. Some idea of the value of this concession, granted secretly, privately and without a semblance of competition, is obtained from Mr. Doheny's testimony before the Senate committee that he expected his companies to make a profit of \$100,000,000 from it.

As a result of Mr. Doheny's conversations with Admiral Robison the plan was discussed by officers of the Navy and Interior Departments and a contract embodying the terms of the contract of December 11, 1922, was agreed upon, and it was also agreed that a lease such as that proposed would be granted to the Pan American Petroleum Company in accordance with the contract. This lease was made on the same day as the contract. Although this contract for additional storage facilities for nearly one and one-half million barrels of oil at Pearl Harbor was entered into on December 11, 1922, the plans for such additional construction were not prepared until long after that date. There seems to have been unnecessary alacrity in effectuating the contract and lease of December 11, 1922.

The negotiations were proceeding smoothly after the conferences between Admiral Robison and Mr. Doheny when a barrier confronted consummation of the plan in the formal execution of the contract and lease contemplated. This obstacle was the all-important question as to what royalties would be paid by the Pan American Petroleum Company under the lease. Admiral Robison insisted upon a higher royalty than the officers of the Pan American Companies would agree to pay. And in this situation Dr. Bain prepared a compromise schedule of royalties which were not as high as those demanded by Admiral Robison nor as low as those contended for by Mr. Doheny. Dr. Bain's schedule was taken to Secretary Fall and Secretary Fall was advised as to the difficulty that existed. He personally [865] got in touch with Mr. Doheny and submitted the compromise proposition to him, and while unable to obtain Mr. Doheny's consent to Admiral Robison's royalties he did secure Mr. Doheny's acquiescence in Dr. Bain's compromise schedule of royalties. We have no way of knowing the conversations that occurred between Secretary Fall and Mr. Doheny with respect to this controversy but we do know that Secretary Fall informed Admiral Robison that he had discussed the matter with Mr. Doheny and had submitted Dr. Bain's compromise schedule and had obtained Mr. Doheny's consent thereto.

Admiral Robison, however, was not ready to agree to accept the royalties which were tentatively

agreed to by Secretary Fall and Mr. Doheny, and a meeting between Admiral Robison and Mr. Doheny took place, wherein Mr. Doheny with some chagrin stated that he would not agree to any higher royalties than those suggested by Secretary Fall. And Admiral Robison, fearful that the entire plan would miscarry, finally agreed to accept the royalties that were satisfactory to Mr. Doheny. And these are the royalties specified in the lease of December 11, 1922. It is the royalties specified in this lease that determine the value of the lease and of the companion contract of December 11th to the defendants and it was Secretary Fall who finally decided and actually fixed the royalties therein. Secretary Denby personally took no part in the negotiations and never read the contract thoroughly. He relied entirely upon Admiral Robison. He had never met Mr. Doheny until the time that he signed the contract on December 11, 1922, when Admiral Robison introduced Mr. Doheny to him.

This lease assured the defendants a sufficient supply of oil to enable them to enter the refinery business in California.

The contract and lease of December 11, 1922, were made, as far as Admiral Robison was concerned, to extend his desire to strengthen the national defense by utilizing oil from the naval reserves, and on the part of Secretary Fall and Mr. Doheny they [866] were made to effectuate the preferential right given to the Pan American Petroleum and Transport Company by the contract

of April 25, 1922, and to enable that company to obtain control of practically all of naval petroleum reserve No. 1. The motive and plan of Secretary Fall concerning the lease of December 11, 1922, is illuminated by his correspondence with citizens and concerns who were anxious to know whether it was his policy to grant leases in the reserves. Many of these persons wrote to him during the year 1922, and as late as the latter part of October therein, and requested information as to whether it was possible to obtain oil leases in the naval oil reserves. To all of these inquiries he stated that the policy of the Interior Department was to grant no leases in the reserves except such as were absolutely necessary in order to protect the reserve from drainage by outside drillings. These statements were certainly not in accord with the truth. He was at this time considering leasing the entire reserve No. 1 to the Pan American Petroleum and Transport Company and the contemplated lease had no drainage aspect.

To sustain these contracts and leases in view of the multitude of irregularities, favoritisms, discriminations, improprieties and wrongs shown by the record in this case is more than this court can do. Some of the specific means alleged to have been employed by Secretary Fall and Mr. Doheny to consummate the conspiracy have not been proven by the evidence in this case, but in general the allegations of fraud and conspiracy have been established. In my opinion it has been clearly proven that as early as November 28, 1921, there was a

secret definite understanding, arrangement and agreement between Secretary Fall and Mr. Doheny that the companies controlled by Mr. Doheny would be given extensive and valuable oil leases in the naval petroleum reserves in the consideration of the building of the storage facilities at Pearl Harbor, Hawaii, and the filling of the same with fuel oil, and that all of the contracts and leases in controversy in this suit were and are the outgrowth, development and accomplishment of such secret plan.

My conclusion upon the issue of fraud and conspiracy is that the charge thereof alleged in the amended bill of complaint has been sustained and that the contracts and leases involved in this controversy must be cancelled, annulled and set aside. [867]

I now consider the second ground of attack against the contracts and leases in suit. The allegations of the amended bill of complaint in so far as this second ground of attack is concerned are, generally, that the contracts of April 25, 1922, and December 11, 1922, and the leases of June 5, 1922, and December 11, 1922, respectively, were made without any legal authorization therefor, that is to say, that there was no law of the United States which authorized any officer of the United States to enter into any such contracts or leases so as to make them or any of them binding *an* enforceable obligations of the United States, and consequently that they are and each of them is absolutely void and of no legal force or effect what-

ever. In discussing this phase of the case it will be assumed that the official authorized by the wording of the Act of June 4, 1920 (41 Stat. 812), actually made the contracts and leases notwithstanding this Court has determined that such was not the fact. It is the legal power of the Secretary of the Navy under the Act of June 4, 1920, that is to be considered and in the consideration of it it will be assumed that the Secretary of the Navy in fact exercised such power.

The precise question for decision is whether any law of the United States authorizes the officers of the Government of the United States to exchange royalty crude oil and gas due to the United States from oil and gas leases on lands within the naval petroleum reserve for fuel oil for naval use and for the storage facilities in which to contain and reserve such fuel oil for use by the Navy. If it be determined that there exists any law empowering the Government to accomplish such an exchange generally, the next and ultimate question is whether the particular contracts and leases in controversy in this case are valid and enforceable executions of such power.

The validity of the agreements in suit rests entirely upon the scope, terms and effect of four provisos annexed to the Naval Appropriation Act of 1920 which have been referred to throughout the trial of this case and in the briefs of counsel as the Act of June 4, 1920, and such designation will be continued herein.

The Act is as follows: [868]

“Provided that the Secretary of the Navy is directed to take possession of all properties within the navel petroleum reserves as are or may become subject to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled ‘An Act to provide for the Mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain,’ or pending applications for United States patent under any law; to conserve, develop, use and operate the same in his discretion, directly or contract, lease, or otherwise, and to use, store, exchange or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States; And provided further, That the rights of any claimant under said Act of February 25, 1920, are not affected adversely thereby; And provided further, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922; Provided further, That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value

of the oil, as the Secretary of the Navy may direct." (41 Stat. 812)

My attention has been called to no ruling or decision of any court in which this Act of Congress has been considered, interpreted or construed. In order to ascertain the intent as well as the scope of this law, consideration should be given to the legislative history relating to the naval petroleum reserve and leading up to the passage of this statute. The lands known as Naval Petroleum Reserve No. 1 in which all of the oil bearing lands involved in this suit are located were carved out of the public domain and set apart for naval reserve purposes by an Executive order of the President of the United States promulgated September 2, 1912. In this order it is stated that these lands "shall be held for the exclusive use and benefit of the United States Navy." Prior to the promulgation of this Executive order the lands had been withdrawn from public entry by another Executive order of the President of the United States in 1909. While the lands were segregated for the use of the Navy by these executive mandates there had been provided no legislation whereby any of the withdrawn lands could be used or occupied until the Leasing Act of February 25, 1920 (41 Stat. 437), was passed. This Leasing Act authorized leasing of lands in the naval oil reserves in settlement of pre-existing claims under the placer mining laws of the United States. It has been previously noted that the only provision in the Leasing Act of 1920 as to the use and disposition of royalty oils accruing to

the United States from leases made under said act was that the Secretary of the Interior, "except whenever in his judgment it is desirable to retain the same for the use of the United States," [869] shall offer the royalty oil and gas for sale at public auction. In cases where no satisfactory bid was received he then might re-advertise such royalty oil and gas for sale, or might sell the same at private sale at not less than the market price, or he might accept the value thereof from the lessee. The Leasing Act further empowered the Secretary of the Interior, pending the making of a permanent contract for any sale of royalty oil in accordance with the provisions of such act, to sell the current product at private sale at not less than the market price. (Sec. 36, Act of Feb. 25, 1920, *supra*.)

The Secretary of the Interior was therefore given by this Leasing Act of 1920 but two alternatives as to any royalty oil and gas within or produced from the naval oil reserves. He could either retain it for the use of the United States, or sell it. The power to retain the royalty oil and gas for the use of the United States was neither substantial nor practicable because the Secretary of the Interior had no storage facilities in which the oil could be retained after production. This power was illusive and fictitious. Moreover, the royalty crude oil could not be satisfactorily used except in the course of some exchange, or other disposition, as to which no specific powers were granted by law. The crude oil as such could not be used by the Navy. It was unsuitable to any naval use. It was therefore of the ut-

most importance if the naval oil reserves were to be such in fact as well as in name that some remedial and enabling legislation be provided immediately in order that the Navy might really and actually be the beneficiary of the oil reserves of the nation which were set apart by Congress for the Navy's use. This purpose had not been accomplished by the Leasing Act or by any other existing legislation as under all acts prior to the Act of June 4, 1920, the right to deal with these reserves was strictly limited without any consideration being given to the interest of the Navy and even the royalty oils due to the Government from leases to land within the reserves were handled on a purely commercial basis. There was no real naval use authorized by law.

These reserves while legally carved out of the contiguous and adjacent lands are nevertheless physically inextricably connected with such lands. [870] The line of demarcation exists only upon the surface of the reserves. The fugitive mineral which makes the reserves of any value or use to the Navy cannot be confined within the limits of the reserves as long as those who own or operate the contiguous areas of land extract oil and gas by drilling wells upon their lands. There had been prior to the passage of the Act of June 4, 1920, much development of such adjacent lands. Many wells were drilled on such lands and many of them produced oil and gas in great quantities and continuously. This condition was necessarily menacing to the naval petroleum reserves because it had been scientifically determined that much of the

oil and gas in the reserves was being drained into the private property of the adjacent lands, and there was no way by which such oil could be recovered. Even defensive measures to protect the oil and gas within the reserves were impossible as there was no law under which such measures could be justified. Necessary offset wells could not be drilled, and if conditions respecting the reserves had continued as they were before the passage of the Act of June 4, 1920, the reserves would ultimately have been depleted and the Navy would not have received any benefit whatever from them. So until the Act of June 4, 1920, there was no comprehensive or adequate scheme for administering the naval reserves so that the Navy might be the recipient and beneficiary of these reserves and their products. There was no way by which the object for which these oil lands were carved out of the public domain could be attained.

It is apparent therefore from a study of the legislation in effect prior to the enactment of the law of June 4, 1920, and the known physical and geological conditions as shown by the evidence in this case, as well as from a consideration of the words and terms of the statute of June 4, 1920, that Congress intended by it to construct a complete and comprehensive legislative scheme broad enough to cover all matters in connection with naval reserve affairs and to supplant all previous congressional action with respect to the control of the naval petroleum reserves of the United States. The paramount intent was to preserve the reserves for

the use of that agency of the Government for which they had been set apart and to invest the head of such agency of Government with plenary power to control [871] and administer these reserves as his discretion would dictate and for the benefit of the United States. The statute therefore being remedial is to be liberally and not strictly construed by the court in order to carry out and effectuate the legislative intent.

Stewart vs. Kahn, 11 Wall. U. S. 493.

Hamilton vs. Rathbone, 175 U. S. 414.

Harris vs. Bell, 254 U. S. 109.

If possible a remedial law must be construed in such a way as to effectively accomplish the legislative purpose. Harris vs. Bell, *supra*.

Our entire object must be to ascertain the intention of the legislature and the ill intended to be remedied and in the ascertainment of such intentions and in order to give the law in question a proper construction the Court may look into prior and contemporaneous acts, the reason which induced the act in question, the mischief to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by the statute. Hamilton vs. Rathbone, *supra*.

And in construing a remedial statute such as the Act of June 4, 1920, in the absence of clear necessity to the contrary, the words and language of the law must be interpreted and applied in their ordinary usage and meaning.

De Ganay vs. Lederer, 250 U. S. 376.

Dewey vs. United States, 178 U. S. 511.

U. S. vs. First National Bank, 234 U. S. 245.

The particular words in the Act of June 4, 1920, which it is necessary to construe in this case are "exchange" and "store." The power to "store" was exercised in this case primarily through the operation of an exchange, so the crux of this controversy is the extent and scope of the "exchange" power. The ordinary meaning of the word "exchange" is:

"A contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only."

California Civil Code, Sec. 1804.

In the contracts now before the Court the parties exchanged crude oil taken from the naval petroleum reserves for fuel oil and other petroleum products usable and necessary for naval use and necessary storage facilities by which such fuel obtained by the exchange could be possessed and reserved [872] for use by the Navy.

The plaintiff asserts that under the Act of June 4, 1920, this cannot be done. The contention is that crude oil may be exchanged under said act only for fuel oil or some form of petroleum products derived from crude oil. That the storage facilities or containers contracted for cannot be obtained under the exchange power or any other power conferred upon the Secretary of the Navy by this law. I am unable to agree with such contention. In taking this position plaintiff reads into the meaning of the word "exchange" something that is not found in the Act of June 4th or in the meaning of the word

itself. The word is employed in the statute in its ordinary sense without any limitation, explanation or qualification, and plaintiff is not justified in imposing, or inserting, or reading into the law, anything. The plaintiff's concession that crude oil may be exchanged for fuel oil destroys the force of the contention because there is nothing in the statute which justifies the exchange of crude oil from the reserves for fuel oil to the exclusion of any other commodity usable for naval purposes for the benefit of the United States. Why crude oil can be exchanged for fuel oil but not for commodities and facilities necessary to store and to use such fuel oil I fail to see.

The exchange power granted by the Act of June 4, 1920, is general, unrestricted and plenary. Its only limitations are the discretion of the Secretary of the Navy and the Benefit of the United States. As long as the power was exercised within these two limitations it was unquestionable. The word implies no other meaning in the statute and Congress could have intended nothing less. This construction is re-enforced when the other provisions and verbiage of the statute are examined and considered. The Act was a broad grant of power from Congress to the Secretary of the Navy to administer, control and use these reserves in any manner that his discretion dictated in order to make them actually petroleum reserves for the use of the Navy and the benefit of the United States. The Congress appropriated and set aside for the use of the Navy not only the lands and their petroleum contents but

it also additionally appropriated and set aside \$500,000 in money which it gave the Secretary of the Navy the right to use until July 1, 1922, in [873] connection with his general power of administration and control of the reserves for the benefit of the United States. The grant of power as well as the discretion to be exercised by the Secretary of the Navy in executing this grant under the Act of June 4, 1920, extends to all points and conditions connected with the naval reserve lands and the handling, use and disposition of the Government direct and royalty products therefrom, either by selling the production or by exchanging the products immediately on production or afterward for the purpose of giving and securing to the Navy a supply and reserve of fuel oil or other petroleum products necessary for the Navy and beneficial to the United States. Anything done by the Secretary of the Navy in good faith to attain these purposes is lawfully done within the comprehensive, plenary and exclusive Act of June 4, 1920.

If this exchange power is unlimited then no reason can be assigned why all things entering into an exchange should be confined upon the lands of the naval petroleum reserves. The United States is more benefited by effecting an exchange of the royalty crude oil for fuel oil delivered at points where the fuel oil can be used by the Navy than by retaining the oil obtained in the exchange upon the lands of the reserve. The purpose and intent of the lawmaker was to not only establish and create a naval oil reserve but to do so in a practical,

effective and useful manner. It is certainly unreasonable to assume that it was intended that the oil and petroleum products of the reserve should always be kept inland and underground.

If plaintiff admits that the royalty crude oil can be exchanged for fuel oil under this law then he must go a step further and admit that a receptacle necessary to hold the fuel oil can be received in the exchange and if the container can be received and utilized upon the lands of the reserve there is no reason apparent to me why the fuel oil and its container cannot be received at some other point. This seems to me to be not only implied from the power to effect the exchange but the law expressly authorizes it to be done by giving the Secretary the power to "store the oil and its products." [874]

But it is said that it cannot be supposed that it was within the intention of Congress to allow the Secretary of the Navy to render so large a portion of the Navy's crude oil unavailable for fuel purposes of the Navy as the amount which is required under the exchange provisions of the contracts to be delivered in consideration of the construction of the additional storage facilities at Pearl Harbor as distinguished from the fuel oil to be delivered into such storage facilities when completed. But plaintiff forgets that before this Act of June 4, 1920, became law, all of the royalty oil from these Naval reserves was being sold and was therefore totally unavailable for direct naval use or national defense either as fuel or otherwise. Moreover, under this new law the power to sell the royalty crude oil still

exists as completely as before and surely Congress did not intend to subtract from or reduce the power to dispose of this royalty crude oil, but on the contrary manifestly intended to enlarge and extend the power.

The money appropriation clauses do not affect in any manner the general investiture of the exchange and storage powers. This is not only apparent because of the words of the statute but also because it would be absurd to say that the Congress intended to provide for the conservation and safeguarding of the reserves only until July 1, 1922. The main purpose was to correct and to remedy an evil that existed in the management and control of this property. Correction or remedy for two years would be insufficient. The evil to be remedied was permanent and becoming progressively worse and it is certainly not to be held that the small amount of money appropriated was considered adequate to attain the main purpose of the law. The whole statute must be given effect if this can be done. It cannot be done by limiting the exchange power of the Secretary of the Navy by the money appropriation. It would then provide for merely a temporary reserve which in reality would amount to no reserve at all. An oil reserve inherently and necessarily pertains to a future use.

There are certain provisions in the contracts in controversy that clearly manifest the intentions of the parties in making such contracts and which must be considered in determining whether such parties actually and legally made an exchange con-

tract by the agreements in suit. In the contract of April 25, [875] 1922, it is stated:

"It is the intention of the parties hereto to effect an exchange of crude oil which is unsuitable for fuel for the United States Navy and which is produced from naval petroleum reserves in California for fuel suitable for the use of the United States Navy to be delivered by the contractor at the United States Naval Station at Pearl Harbor, Territory of Hawaii, into storage facilities to be constructed and erected by the contractor."

And in the later contract of December 11, 1922, which was in part an enlargement and extension of the April 25th contract, it is also provided that:

"Whereas a certain contract was entered into by the above named parties dated April 25th, 1922, providing for the exchange of royalty crude oil belonging to the Government and produced from Naval Reserves Nos. 1 and 2 in the State of California for fuel oil in storage at Pearl Harbor, T. H., including tanks and incidental facilities, and whereas said contractor has expressed a willingness to furnish the desired amount of fuel oils and other petroleum products in storage for crude oil in the field," etc., etc.

And further in Article II of the contract of December 11, 1922, it is stated that:

"For the consideration herein mentioned and contained, to-wit, the furnishing of oils in stor-

age and facilities and options as specified above, the Government agrees to deliver in exchange to contractor all royalty oil," etc.

There is no language in either of the contracts indicative of an intention on the part of the parties thereto to effectuate an arrangement wherein cash or money would be transferred between the parties, except an option retained by the Government effective after the completion of the Pearl Harbor project and other projects under the December 11th contract. This option had no relation to the exchange elements of the contracts. There are terms used in the contracts which imply that in arriving at the basis of the exchange agreements certain pecuniary computations are made, but under the decisions of the federal courts this method of ascertaining the quantum of the things sought to be exchanged does not destroy the exchange quality of the contracts.

But the plaintiff has earnestly contended that assuming that the Act of June 4, 1920, grants to the Secretary of the Navy the power to exchange the royalty oil in the reserves for fuel oil and storage facilities the contracts of April 25, 1922, and December 11, 1922, respectively, are not exchange contracts but in reality sales of the royalty oil. Plaintiff says [876] that the April 25th and the December 11th contracts were not true contracts of exchange because no final fixed quantity of either crude oil or fuel oil was definitely specified as the maximum amount which was deliverable by either party to the other.

The provisions of the April 25, 1922, contract in this regard, stated generally, are: That on April 25, 1922, the price of crude oil in the field was \$1.10 per barrel, and the price of fuel oil at the same time at the California Coast was \$1.50 per barrel. It was understood and agreed that deliveries of fuel oil would be made by the contractor at different times thereafter and that the price thereof might at the date of delivery of a given quantity vary from the reference price of \$1.50 specified in the contract. It was also stated that the delivery of royalty oil would be made at various times until the cost of the Pearl Harbor storage and the fuel oil to fill it was defrayed and that at such times the published field price of such royalty crude oil might also vary from the specified reference price of \$1.10 per barrel, and therefore, in order to protect the interests of both parties to the contract and avoid making a purely gambling contract, it was provided that the quantities of crude oil delivered on the one hand and of fuel oil delivered on the other should be subject to change from amounts originally estimated, such change being proportionate to the changes in price above stated of these respective commodities.

And with respect to the December 11, 1922, contract, inasmuch as it differed from the April 25th contract in having no proposal sum of barrels of royalty crude oil for which the contractor agreed to do those various things mentioned in the December 11th contract, provision was made in said December 11th contract that all royalty crude oil delivered to the contractor according to the contract should be

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delivered at published field price on day of delivery and that all fuel oil delivered by contractor to the Government should be delivered at the market price thereof at the respective dates of delivery at California shipping points plus the going rate for transportation to Pearl Harbor, Hawaii. In other words, both contracts contemplated practically certain changes in the price or market value of the two commodities to be delivered during the lives of the contracts respectively, and accordingly [877] made the quantities respectively deliverable in final adjustment of the obligations of the parties depend upon the extent of the price changes.

As I have said, it is clear however that no provision in either contract contemplates or implies the payment of any cash by either party to the other at any time or under any circumstances in connection with the proposed charges whatever may be the fact as to the differences in the valuation of the commodities involved. There is a provision in the December 11th contract in which the Government is given the right to take the equivalent of the royalty crude oil delivered in cash instead of fuel oil and storage facilities. This option applies only after the Pearl Harbor project under both the April and December contracts has been completed and if it does destroy the exchange feature of this contract it does so only upon the entire completion of the Pearl Harbor project under both contracts, and would only vitiate the December contract to a limited extent and not totally, and as no attempt has

been made to effectuate such provision or option its effect is immaterial in this case.

McCullough vs. Smith, 243 Fed. 823;

Burke vs. Southern Pacific Co., 234 U. S. 669.

Except as just stated these two contracts provided that, while the quantity of the commodity was dependent upon price changes, there was never to be delivered by either party to the other anything but property of the kind and quality specified in the contracts, and under no circumstances or conditions except as stated was any payment of money to be made.

This claim of plaintiff, that the determination of the quantity of the commodities to be delivered by reference to varying market prices of the two kinds of petroleum products transformed the arrangement embodied in the contract from an exchange to a sale on the one hand of royalty crude oil and a purchase on the other of fuel oil and of storage facilities, is untenable. The Supreme Court of the United States in *Postal Telegraph-Cable Company vs. Tonopah & Tidewater Railroad Company*, 248 U. S. 471, has held that contracts similar and analogous to the contracts of April 25, 1922, and December 11, 1922, were exchange contracts. This case and those in the lower federal courts from which it arose cannot be distinguished in principle [878] from the case at bar. The contract under consideration in the *Postal Telegraph-Cable Company vs. Tonopah & Tidewater Railroad Company*, *supra*, was one where, *inter alia*, the telegraph company agreed to transmit free of charge all railroad business tele-

grams between all points on the railroad, and also agreed to issue to the railroad officers annual franks for railroad messages to points off the railroad lines to an amount not exceeding \$10,000 per annum, calculated at the regular day rates, and the railroad company agreed to transport free of charge the employees, materials and supplies of the telegraph company to points on its lines, and also to transport free of charge the employees, materials and supplies of the telegraph company to points off the lines to an amount not exceeding \$10,000 per annum, calculated at current transportation rates. The question arose as to whether such a reciprocal arrangement constituted a true exchange contract of services within the meaning of Section 1 of Interstate Commerce Act as amended in 1910.

The situation shown by this telegraph-railroad contract is almost the identical situation established by the contract of April 25, 1922, and of December 11, 1922. The engagement in the cited case was not for the transportation of a given number of men or a given number of tons of freight on the one hand, and a given number of telegrams on the other, but in each case the *quantum* of the service to be rendered was to be fixed by reference to a changeable cash standard, that is to say, such amount of service as based upon the cash standard for the unit of service should equal a given aggregate sum. In the course of this opinion Justice Holmes said:

“Exchange is barter and carries with it no implication of reduction to money as a common

denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received."

In other words, the Supreme Court held that the parties may exchange without necessarily making any reference to money, but if they desire they may estimate the value of the respective things involved in any manner which "self interest" may determine.

In *Baltimore & Ohio Railroad Company vs. Western Union Telegraph Company*, (C. C. A.) 242 Fed. 914, the Court was considering whether a contract identical [879] with the one in the *Tonopah Railroad case*, *supra*, was an exchange contract for services. In pointing out that the placing of a money valuation upon the properties exchanged or to be exchanged does not convert the transaction into a sale in the absence of such an intention between the parties, it said:

"In our opinion (in the absence of fraud) the right to exchange implies the right to fix the rate, method, and amount of exchange. The agreement being to exchange the carriage of goods against the transmission of intelligence, each party has the further right to fix the value of the services of each to the other; it makes no difference whether for convenience they ascertain that value by the usual money measurement or adopt some other course."

It cannot be truthfully said that an exchange becomes a sale whenever one of the things exchanged is valued. An exchange is always an exchange when

things other than money are transferred in consideration of other such things, whether or not either or both of the things have or are given by the parties a money value.

If the engagement embodied in the contracts in suit should be held to be a sale it would still be within the terms of the Act of June 4, 1920, because that statute gave to the Secretary of the Navy the power to sell the royalty oil as well as to exchange it. I am of the opinion however that the contracts are exchange contracts. It was not only the intention of the parties to make them exchange contracts but under the authorities cited they must be held to be exchange contracts.

The final contention of plaintiff is that the contracts and leases involved in this action are illegal and void and should be annulled because in them the Secretary of the Navy has surrendered, relinquished and delegated to the Secretary of the Interior essential and vital powers which are vested solely in the Secretary of the Navy by the Act of June 4, 1920.

This question depends to some extent on the effect that is to be given to the Executive order of May 31, 1921. It is to be noted, however, that defendants did not consider that Executive order as authorizing the Secretary of the Interior to make the contracts and leases in suit. Attention has already been called to the demand of the defendants at the time that the initial and paramount contract of April 25, 1922, was about to be signed that the Secretary of the Navy must sign this contract. There apparently [880] had been no intention on the

part of Secretary Fall, Admiral Robison or any other official of the Government that anyone but the Secretary of the Interior would be required to sign the contract on behalf of the Government.

If the Executive order of May 31, 1921, purports to confer upon the Secretary of the Interior the authority which Congress had lodged exclusively in the Secretary of the Navy, it is, in my opinion, void to that extent. The President in peace time could not even under his powerful and extensive general executive authority transfer from one member of his Cabinet to another member of his Cabinet powers and duties that had been conferred by the Congress on a specified Cabinet officer that call for the exercise of discretion by the Cabinet officer from whom such power is attempted to be transferred. Insofar as systematizing, co-ordinating and facilitating the conduct of the Executive departments of Government are concerned the President could lawfully transfer duties between Cabinet officers, but the transfer attempted by the Executive order of May 31, 1921, goes much further. The office of Secretary of the Navy was created by Act of Congress, and the Congress under the Constitution is given sole power to provide and maintain a Navy. The administration and conservation of the naval petroleum reserves comes within the power conferred by the people upon Congress alone, and in delegating certain and specific powers and rights to the Secretary of the Navy with respect to the naval petroleum reserves which call for the exercise of such officer's discretion it must be held that Congress did not

intend that some other branch of the Government could transfer this power to some other officer or divest the officer, in whom Congress reposed the authority, of the power which Congress has conferred upon such officer exclusively. No branch of the Government but Congress can divest or transfer the power so delegated. Even the Secretary of the Navy himself cannot delegate or transfer essentially discretionary powers concerning the naval petroleum reserves which have been reposed in him exclusively by the Congress. He may with the approval of the President establish regulations in execution of or supplementary to, but not in conflict with, the statutes defining his powers.

United States vs. Symonds, 120 U. S. 49.

The leases of June 5, 1922, and December 11, 1922, give the Secretary [881] of the Interior *sold* authority to oversee the progress of the work upon the leased area requiring for this purpose the submission to him of plats showing such work, and of sale contracts with respect to the disposal of the oil and gas produced under the leases. The Secretary of the Interior is further expressly given the sole right to permit suspension of work under the leases, and also the sole right to authorize, sanction or permit any assignment or subleasing, as well as full exclusive authority to terminate or surrender the lease. It is his and not the Secretary of the Navy's discretion that settles and determines such matters.

By the two contracts the Secretary of the Interior solely is also given vital and extensive powers re-

quiring the exercise of discretion. Among these is the right to grant additional leases on such lands in the naval oil reserves as he may designate if he shall determine that the royalty oil from the reserves diminishes so that the Pearl Harbor contract will be unduly prolonged. And Article XI of the contract of April 25, 1922, confers solely upon the Secretary of the Interior complete authority and power to determine when and upon what terms Townships 30 and 31 South, Range 24 East, M. D. M., of Reserve No. 1 may be leased to the defendants. The December 11th contract reiterates and re-establishes the right of the Secretary of the Interior to determine how and when the defendant may exercise its valuable preferential right conferred by Article XI of the contract of April 25th, and also vests the Secretary of the Interior with sole power to direct the defendant to fill the storage tanks at Pearl Harbor with fuel oil. Other instances of the delegations of vital power to the Secretary of the Interior are found in the specifications which accompany each of the contracts and are part of them. It is unnecessary to specifically mention them here. Suffice it to say that these powers are so important, necessary and essential to the agreements that if they are eliminated the essence and vitality of the entire plan of the contracts and leases is gone.

These delegated powers are not merely incidental to any power retained by the Secretary of the Navy. They are not purely ministerial or administrative. They are in fact the principal controlling powers

that the Act of June 4, [882] 1920, vests exclusively in the Secretary of the Navy so that he, and he only, can control and administer these reserves for the benefit of the Navy and of the United States. The delegated powers require the Secretary of the Interior to exercise judgment and discretion, and the attempted transfer of such powers from the Secretary of the Navy renders the contracts and leases void.

Mechem on Public Officers, Secs. 567-568-604.

1 McQuillin on Municipal Corporations, 839.

There is no merit in the contention of defendants that the Secretary of the Interior is merely made the agent of the Secretary of the Navy by these provisions of the contracts in which the delegations of powers are found. The authority is conferred on the Secretary of the Interior and juris and not as the representative of the Secretary of the Navy.

I conclude this opinion by summarizing my decision of this case as follows:

The plaintiff is entitled to the cancellation and annulment of each of the contracts and leases in controversy by reason of fraud and conspiracy of Secretary Fall and Mr. Doheny as alleged in the amended bill of complaint and also because each of said contracts and leases is void on account of the illegal and invalid transfer and delegation of power from the Secretary of the Navy to the Secretary of the Interior as shown by certain provisions in each of the contracts and leases. If it were not for the fraud and conspiracy of Secretary Fall and Mr. Doheny and the unlawful delegation of power in the

agreements, the contracts and leases in suit would be authorized and would be binding obligations upon the United States of America under the Act of June 4, 1920.

The record in this case, however, does not entitle the plaintiff to the full relief demanded by the amended bill, and although plaintiff makes no offer to do equity in the premises, this court nevertheless in a suit of this kind has the inherent power to administer equity between the parties commensurate with the special circumstances and conditions of the case. [883]

Pomeroy's Equity Jurisprudence, Vol. 5, Sec. 2110.

Plews vs. Burrage (C. C. A.) 274 Fed. 881.

Twin Lakes L. & W. Co. vs. Dohner (C. C. A.) 242 Fed. 399.

Knappen vs. Freeman, 47 Minn. 491.

The evidence proves that there has been constructed and completed under the direction of the defendants at Pearl Harbor, Hawaii, all of the fuel oil storage facilities mentioned in the contract of April 25, 1922, and that there has also been constructed and completed under the direction of the defendants at Pearl Harbor, Hawaii, much of the additional storage facilities for crude oil products mentioned in the contract of December 11, 1922; and it has been clearly established that such construction projects and property are of benefit and value to the United States of America and to its Navy, and that the construction of such property has been done economically and without waste or

extravagance, and that such constructed facilities are now available for use by the United States of America and are now located on property of the Government at Pearl Harbor, Hawaii, and that the money expended for the construction and completion of said storage facilities for crude oil products at Pearl Harbor, Hawaii, has been expended by defendants upon property of the United States of America and under the supervision and inspection of the duly appointed officers of the United States Navy.

Such property should be retained by the plaintiff and the defendants are entitled to be credited with and to receive payment from the plaintiff for the cost price of the storage facilities for crude oil products completed and installed at Pearl Harbor, Hawaii, together with the cost price of such fuel contents thereof as have been to the date hereof placed within said storage facilities at Pearl Harbor, Hawaii, under the supervision of officers of the United States Navy. The plaintiff will also be required to pay or to credit the defendants with such money as has been actually expended in drilling and putting on production any wells drilled under the lease of June 5, 1922, or the lease of December 11, 1922.

During the pendency of this action the lands within the naval petroleum reserves in controversy have been controlled, managed and operated by receivers of this court, Rear Admiral Harry H. Rousseau, C. E. C., U. S. N., and Mr. J. Crampton Anderson in an unusually efficient and economical

manner. [884] Production of oil therein has been curtailed to the fullest extent consistent with offset and defensive requirements and there has been a cessation of drilling on the land in controversy except where drilling was imperative. It is necessary that such defensive activities be continued at least until the entry of final decree herein and the receivership will therefore continue until further order of the court.

In order to carry out the terms of this decision a special master in chancery will be appointed *pro hac vice*.

Special counsel and solicitors for plaintiff will prepare a decree pursuant to the findings of fact and conclusions of law which I have filed with this opinion and under the rules of this court.

Dated this 28th day of May, 1925.

PAUL J. McCORMICK,
United States District Judge. [885]

(Name of Court and Title of Case.)

FINDINGS OF FACT.

Filed May 28, 1925. Chas. N. Williams, Clerk.
By R. S. Zimmerman, Deputy.

From the evidence in this suit the Court finds:

1. That defendant Pan American Petroleum Company is, and at all times mentioned in the amended bill of complaint was, a corporation duly organized and existing under and by virtue of the laws of the State of California, and at all of said

times was and now is wholly owned and absolutely controlled, through the ownership of its entire capital stock, by the other defendant, Pan American Petroleum and Transport Company.

2. That Pan American Petroleum and Transport Company is now, and was at all times mentioned in the amended bill of complaint, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware.

3. That Edward L. Doheny was, up to July 24, 1922, President of each of the defendant corporations. That on or about July 24, 1922, he retired as president of the Pan American Petroleum Company and became chairman of its board of directors. That he continued as president of defendant Pan American Petroleum and Transport Company up to December 7, 1923, at which time he retired as such president and was duly elected chairman of the board of directors of said corporation.

4. That at all times mentioned in the amended bill of complaint said Edward L. Doheny, directly or indirectly, controlled over fifty per cent of the voting stock of defendant Pan American Petroleum and Transport Company.

5. That said Edward L. Doheny, at all times mentioned in the amended bill of complaint, purported to be and was in fact in effective control of the policies and actions of Pan American Petroleum and Transport Company and its subsidiary, Pan [886] American Petroleum Company.

6. That Albert B. Fall, from March 5, 1921, until March 4, 1923, was the duly appointed, qualified,

and acting Secretary of the Interior of the United States of America.

7. That Edwin Denby, at all times mentioned in the amended bill of complaint, was the duly appointed, qualified, and acting Secretary of the Navy of the United States of America.

8. That at and long prior to the filing of the bill of complaint herein, United States of America, the plaintiff, was and has ever since remained the owner in fee simple of the lands described in paragraph 5 of the amended bill of complaint; that all of said lands were a part of the unappropriated public domain of the United States of America.

9. That on, to wit, September 2, 1912, the President of the United States of America, pursuant to law, made a certain Executive order setting apart the lands described in paragraph 5 of the amended bill of complaint, wherein and whereby he ordered as touching said lands, as follows:

"It is hereby ordered that all lands included in the following list and heretofore forming a part of petroleum reserve No. 2, California No. 1, withdrawn on July 2, 1910, from settlement, location, sale, or entry and reserved for class-identification and in aid of legislation under the authority of the act of Congress entitled 'An Act to authorize the President of the United States to make withdrawals of public lands in certain cases (36 Stat. 847),' shall hereafter, subject to valid existing rights, constitute naval petroleum reserve No. 1, and shall be held for the exclusive use or benefit of the United States Navy until this order is revoked by

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the President or by act of Congress. To this end and for this public purpose the order of July 2, 1910, is modified and the withdrawal of that date is continued and extended in so far as it effects these lands.

Mount Diablo Meridian.

T. 30 S., R. 22 E., sec. 24, all.

T. 30 S., R. 23 E., sec. 10, all; secs. 12 to 30, inclusive; secs. 32 to 36, inclusive.

T. 31 S., R. 23 E., secs. 1 to 4, inclusive; secs. 10 to 14, inclusive.

T. 30 S., R. 24 E., secs. 17 to 20, inclusive; secs. 28 to 34, inclusive.

T. 31 S., R. 24 E., secs. 1 to 12, inclusive; sec. 18, all.

WM. H. TAFT,

President.

September 2, 1912."

10. That on May 31, 1921, Warren G. Harding, the President of the United States of America, made and issued a certain writing which is known as the Executive order of May 31, 1921, and is as follows:

"EXECUTIVE ORDER.

Under the provisions of the act of Congress approved February 25, 1920 [887] (41 Stat. 437), authorizing the Secretary of the Interior to lease producing oil wells within any naval petroleum reserves; authorizing the President to permit the drilling of additional wells or to lease the remainder or any part of a claim upon which such wells have been drilled, and under authority of the act of Congress approved June 4, 1920 (41 Stat. 812),

directing the Secretary of the Navy to conserve, develop, use, and operate, directly or by contract, lease, or otherwise, unappropriated lands in naval reserves, the administration, and conservation, of all oil and gas bearing lands in naval petroleum reserves Nos. 1 and 2, California, and naval petroleum reserve No. 2 in Wyoming and naval shale reserves in Colorado and Utah, are hereby committed to the Secretary of the Interior subject to the supervision of the President but no general policy as to drilling or reserving lands located in a naval reserve shall be changed or adopted except upon consultation and in co-operation with the Secretary or Acting Secretary of the Navy. The Secretary of the Interior is authorized and directed to perform any and all acts necessary for the protection, conservation, and administration of the said reserves subject to the conditions and limitations contained in this order and the existing laws or such laws as may hereafter be enacted by Congress pertaining thereto.

WARREN G. HARDING.

The White House, May 31, 1921."

11. That the said Albert B. Fall did not make any false, fraudulent, or untrue representations of fact to the said Warren G. Harding, the President of the United States of America, for the purpose of inducing the making of the Executive order of May 31, 1921.

12. That said Albert B. Fall was very active in procuring the transfer of the naval oil reserves from the Navy Department to the Interior Depart-

ment, and subsequent to the promulgation of the Executive order of May 31, 1921, said Fall dominated the negotiations that eventuated in the contracts and leases in suit.

13. That Edwin Denby, Secretary of the Navy, was passive throughout all of the negotiations that eventuated in the contracts and leases in suit, and took no active part in said negotiations, and that he signed the contracts of April 25, 1922, and December 11, 1922, and the lease of December 11, 1922, and the letter of April 25, 1922, under misapprehension and without full knowledge of the contents of said documents.

14. That on July 8, 1921, said Albert B. Fall did communicate in writing to said Edward L. Doheny as follows:

"There will be no possibility of any further conflict with Navy officials and this Department, as I have notified Secretary Denby that I should conduct the matter of naval leases under the direction of the President, without calling any of his force in consultation unless I conferred with himself personally upon a matter of policy. He understands the situation and that I shall handle matters exactly as I think best and will not consult with any officials of any bureau in his department, but only with himself, and such consultation will be confined strictly and entirely to matters of general policy."

15. That said Edward L. Doheny, and the defendants Pan American Petroleum and [888] Transport Company and Pan American Petroleum

Company, from and after July 8, 1921, understood and acted upon the belief that said Albert B. Fall had authority to make contracts and leases touching royalty oils from lands in the naval reserve and touching said lands themselves, and said Doheny and said Pan American Petroleum and Transport Company and said Pan American Petroleum Company dealt with said Fall accordingly.

16. That between July 8, 1921, and October 25, 1921, said Albert B. Fall and said Edward L. Doheny held personal conferences with regard to the royalties reserved to the United States under a certain lease granted to Pan American Petroleum Company for a strip of land in the northeastern portion of Section 1, Township 31 South, Range 24 East, M. D. M., Kern County, California.

17. That between July 8, 1921, and October 25, 1921, said Albert B. Fall and said Edward L. Doheny held conferences respecting a proposal to be made by and on behalf of Pan American Petroleum and Transport Company, a corporation, whereby said Pan American Petroleum and Transport Company, a corporation, should receive from the United States of America royalty oil accruing to the United States of America from leases on land in naval reserves Nos. 1 and 2, California, and in consideration of such receipt should agree to erect certain storage tankage facilities at Pearl Harbor, T. H., and fill the same with fuel oil.

18. That at such conferences between said Albert B. Fall and said Edward L. Doheny had between July 8, 1921, and October 25, 1921, the matter of

granting further leases in naval reserve No. 1 was discussed between said Fall and said Doheny.

19. That on or before October 25, 1921, and prior to March 7, 1922, said Albert B. Fall and Admiral John K. Robison, personal representative of Secretary of the Navy Edwin Denby in naval reserve matters, agreed that the proposed contract for the construction of tankage facilities and filling the same should be kept secret.

20. That the reason and purpose of said agreement for secrecy was in order that Congress and the public should not know what was being done, and was not military reasons.

21. That pursuant to said agreement the proposed contract was concealed and kept secret until after the award was made on April 18, 1922, to Pan American Petroleum and Transport Company. [889]

22. That at and prior to November 30, 1921, there was pending in the Department of the Interior of the United States for action by the said Albert B. Fall, as Secretary of the Interior, a petition of Pan American Petroleum Company praying a reduction of the royalty of 55½ per cent reserved to the United States in the lease of July 12, 1921, whereby the United States leased to said company certain territory in the northeastern portion of Section 1, Township 31 South, Range 24 East, M. D. M., Kern County, California, in naval reserve No. 1.

23. That at and prior to November 30, 1921, there was pending before the Department of the

Interior of the United States, for action by the said Albert B. Fall, as Secretary of the Interior, a proposition by Pan American Petroleum and Transport Company, a corporation, whereby, in consideration of the receipt of royalty oils by said company, and in consideration of the granting of further leases of lands in naval reserve No. 1 to said company, said company would agree to erect certain storage tankage facilities at Pearl Harbor, T. H., and fill the same with fuel oil.

24. That on, to wit, November 28, 1921, said Edward L. Doheny, acting for and on behalf of defendant Pan American Petroleum and Transport Company, submitted to said Albert B. Fall a proposition in writing, a true copy whereof is as follows:

**"PAN AMERICAN PETROLEUM AND
TRANSPORT CO.,**

Office of the President,

New York, November 28, 1921.

The Honorable, the Secretary of the Interior,
Washington, D. C.

Dear Mr. Secretary:

Along the lines of your suggestion, I have made some inquiries regarding the cost of constructing tanks for the storage of one and one-half million barrels of fuel oil at Pearl Harbor. I find that the best price obtainable for these tanks, the Government to stand the cost of transporting the material from the ship's side to the tank site, and the cost of grading and otherwise preparing the tank site, is \$19,960 per tank, or \$0.363 per barrel of storage capacity.

The present price of crude oil in the field in California is \$1.13 per barrel. The present cost of fuel oil delivered at Pearl Harbor is \$1.90 per barrel.

The cost of 1,485,000 barrels of fuel oil delivered at Pearl Harbor at present rates would be \$2,821,500, which, added to the cost of constructing the 27 tanks necessary to store this amount of oil, which is \$538,920, makes a total of \$3,360,420.

Therefore, were we to construct the tanks and furnish the oil on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserves and to be leased to us, it would require a return to us in royalty crude valued at \$3,360,420, or 2,973,823 barrels, figures at to-day's price. Of course, interest on the money invested should also be figured until final adjustment is made through the payment of royalty oil.

I suppose you will turn this matter over to First Assistant Secretary Finney, who, with Rear Admiral Robison, may arrange the details of it during your absence, and as I also expect to be absent, I am confidentially furnishing Mr. Cotter with the information so that he can intelligently discuss the matter with Mr. Finney.

Cordially yours,

E. L. DOHENY." [890]

25. That on, to wit, November 29, 1921, said Albert B. Fall wrote, signed, and forwarded to Admiral J. K. Robison, Chief of the Bureau of

Engineering of the United States Navy, a letter which is as follows:

"November 29, 1921.

My Dear Admiral:

Mr. Cotter will wait upon you with data, etc., with relation to oil tanks and royalty oils in connection with Pearl Harbor demands.

I have asked him also to hand you, for your inspection, the original of a letter from Colonel Doheny addressed to myself, containing a *résumé* of the data.

Should you think best to accept this proposition then of course it would be necessary, in my judgment, to turn over to Col. Doheny, if we can do so, leases upon further wells or area in the naval reserve in which he is now drilling. If this is done it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan American.

The gas pressure is lessening to such a degree that the output of the wells of the two latter companies, as well as of other companies drilling in this neighborhood, is decreasing and is very disappointing. The two companies named are pumping their wells and of course they are not making any money but will experience a loss in the payment of the fifty-five per cent royalty to the Government.

If you approve the proposition, will you kindly indicate to me such approval by simple endorsement upon Col. Doheny's letter to myself, signed

by yourself. Your simple O. K. will be sufficient.

Very sincerely yours,

ALBERT B. FALL.

Rear Admiral John K. Robison,

Engineer in Chief, Navy Department."

26. That on, to wit, November 30, 1921, said Albert B. Fall was willing, ready, and desirous to consummate a contract with Pan American Petroleum and Transport Company along the lines outlined in said letter of November 28, 1921, and said letter of November 29, 1921.

27. That said letters mentioned in Findings 24 and 25, above, contain, express and imply an understanding and agreement between said Albert B. Fall, as Secretary of the Interior of the United States of America, and Edward L. Doheny, as executive and managing officer of Pan American Petroleum and Transport Company, a corporation, that Fall would upon the execution of the contract along the lines agreed upon in said letter of November 28, 1921, grant to the Pan American Petroleum and Transport Company, a corporation, further and additional leases in naval petroleum reserve No. 1, in consideration for the construction of storage facilities for 1,485,000 barrels of fuel oil at Pearl Harbor, T. H., and the filling of the same with fuel oil, the said construction and fuel oil to be exchanged for royalty crude oil due the United States from existing leases and further leases agreed to be made in the naval petroleum reserves, and said correspondence was in no sense

and was not understood to be a mere [891] estimate.

28. That prior to November 30, 1921, said Albert B. Fall and said Edward L. Doheny discussed a proposal that the said Edward L. Doheny should advance and deliver to the said Albert B. Fall the sum of \$100,000 lawful money of the United States for the personal use of said Albert B. Fall; and that said Edward L. Doheny agreed if and when said Albert B. Fall should need said sum to advance the same to him.

29. That on, to wit, November 30, 1921, said Edward L. Doheny, then being in New York City, New York, did at the request of said Albert B. Fall, transmit to said Albert B. Fall in Washington the sum of \$100,000 lawful money of the United States.

30. That said Edward L. Doheny did not transmit said sum in the usual manner customary in business transactions as he could have done; but on the contrary transmitted the same in currency.

31. That the said currency was obtained from Blair & Company, bankers, of New York City, by the use of the check of Edward L. Doheny, Jr., the son of Edward L. Doheny.

32. That the said currency was sent in a satchel by the hands of said Edward L. Doheny, Jr., from New York to Washington, where the said currency was delivered to said Albert B. Fall. That no entry of the withdrawal of said currency appears in the account of said Edward L. Doheny with Blair & Company.

33. That no entry of said advance or of said transaction, nor of any personal transaction growing thereout between said Albert B. Fall and said Edward L. Doheny, has ever been made a matter of record or entry in the books of said Edward L. Doheny or of either of the defendants.

34. That said Albert B. Fall did, on November 30, 1921, hand to said Edward L. Doheny, Jr., who delivered the same to said Edward L. Doheny, a note payable on demand after date and bearing date Washington, D. C., November 30, 1921, in the sum of \$100,000 and payable to said Edward L. Doheny at New York City, or Los Angeles, California, value received with interest.

35. That no sum, either on account of principal or interest, has been paid by the said Albert B. Fall to the said Edward L. Doheny on account of said note, or on account of said sum of \$100,000 so advanced or on account of interest thereon.

36. That within a few weeks after the giving of said note the signature of Albert B. Fall thereon was torn from said note by said Edward L. Doheny, and said [892] note remains so torn.

37. That the purpose of such tearing was so that said note would not be an enforceable obligation of said Albert B. Fall in the hands of third parties.

38. That on or before December 1, 1921, said Albert B. Fall issued instructions to his subordinates in the Department of the Interior, that the petition of the Pan American Petroleum Company for reduction of royalties under the lease of July 12, 1921, should be refused, but that said company

should, as relief, be granted a lease at regulation Interior Department royalties in Section 1, T. 30 S., R. 24 E., M. D. M., Kern County, California, in naval reserve No. 1.

39. That said Albert B. Fall from, to wit, January 27, 1922, to April 15, 1922, knew and understood that Pan American Petroleum and Transport Company would make a bid to construct storage tankage facilities at Pearl Harbor, T. H., and fill the same with fuel oil, in consideration of the delivery to it of royalty oil of the United States, and in consideration that it should be assured further leases in naval reserve No. 1, Kern County, California. That said Albert B. Fall from, to wit, January 27, 1922, to April 25, 1922, was informed that the bid to be made by Pan American Petroleum and Transport Company would, so far as construction of storage tankage facilities and the filling of the same with fuel oil, be a bid at cost, and he further knew that said bid would involve the granting or assuring to Pan American Petroleum and Transport Company of further oil and gas leases of land lying within naval petroleum reserve No. 1 in California.

40. That no other person or corporation, except certain officers and agents of the United States, and except those operating with Pan American Petroleum and Transport Company in the matter, was advised that Pan American Petroleum and Transport Company would bid at cost for the construction and filling of said storage tankage facilities at Pearl Harbor, T. H.

41. That no other person or corporation was informed by said Albert B. Fall, or by any person acting on behalf of the United States in the premises, that the United States would consider a bid conditioned upon the assurance to the bidder of the granting of further leases in naval petroleum reserve No. 1, California, or preferential right to leases therein if and when made.

42. That due to the interest of said Albert B. Fall in furthering a contract with the Pan American Petroleum and Transport Company touching the construction and [893] filling of storage tankage facilities at Pearl Harbor, T. H., and the granting of further leases to Pan American Petroleum and Transport Company in naval petroleum reserve No. 1, California, Pan American Petroleum and Transport Company and its engineering representative, J. G. White, Engineering corporation, were, beginning in December, 1921, and continuing until April 15, 1922, kept in close touch with the development of the plans for said construction and for the making of a contract touching the same, and had opportunities for conference and advice from the officers and employees of the United States which no other bidder was afforded.

43. That the only oil companies with whose officers or representatives officers or employees of the United States conferred touching a proposed contract for delivery of royalty oils of the United States in consideration of the construction of storage tankage facilities at Pearl Harbor, T. H., and the filling of the same with fuel oil, were Pan

American Petroleum and Transport Company, Standard Oil Company of California, General Petroleum Company, Associated Oil Company, Pacific Oil Company, and Union Oil Company of California.

44. That said Albert B. Fall knew prior to April 15, 1922, that counsel for General Petroleum Company considered the proposed contract illegal and that said Company would not submit a bid.

45. That no invitations for proposals for the Pearl Harbor project were sent to General Petroleum Company.

46. That said Albert B. Fall knew prior to April 15, 1922, that counsel for Standard Oil Company of California was of opinion that the proposed contract was illegal and had written an opinion to that effect, and that Standard Oil Company of California would not bid upon the construction of tankage facilities in consideration of delivery of Government royalty oils.

47. That it was or could have been known to said Albert B. Fall prior to April 15, 1922, that Union Oil Company of California had not been asked to submit a bid for the construction of tankage facilities and the filling of the same with fuel oil at Pearl Harbor, T. H.

48. That no invitations for proposals for the Pearl Harbor project were sent to Union Oil Company of California.

49. That it was known to said Albert B. Fall prior to April 15, 1922, that [894] Associated Oil Company would not submit a bid for the con-

struction of storage facilities at Pearl Harbor and the filling of the same with fuel oil except upon the condition that authority should be obtained from Congress for the making of such a contract.

50. That said Albert B. Fall, prior to April 15, 1922, knew that invitations had been furnished to two construction companies, but he was of the opinion, and so stated, that it was impossible for construction companies to make bids on the proposed work of construction at Pearl Harbor, T. H., because the same would have to be paid for by delivery of royalty oils belonging to the United States.

51. That an invitation for proposals was issued calling for bids to be made to the Secretary of the Interior which bore date March 7, 1922. That the proposals submitted thereunder were opened April 15, 1922. That the only proposals received were as follows:

A proposal from Associated Oil Company which was conditioned upon congressional action approving the form of contract intended to be made.

A proposal from Standard Oil Company of California which did not cover the proposed construction work mentioned in the invitation, but applied only to the furnishing of fuel oil.

Two proposals from Pan American Petroleum and Transport Company, one called Proposal A, which was in accordance with the invitation, and the other called Proposal B, which was not in accordance with the invitation.

52. That said Proposal B named a smaller lump sum in barrels of crude royalty oil than did Pro-

posal A; that said Proposal B agreed that if the contractor's actual cost of the doing of the work of construction were less than a stipulated amount mentioned in the proposal, any savings effected below said stipulated amount should be credited to the Government; and that said proposal B was conditioned upon the granting by the United States of a preferential right to the Pan American Petroleum and Transport Company to become the lessee in all leases which might thereafter be granted by the United States for recovery of oil and gas in naval petroleum reserve No. 1, California.

53. That no other bidder was invited to compete for a contract upon the terms mentioned in Proposal B of Pan American Petroleum and Transport Company, nor was any bidder invited to bid upon any terms involving the granting of preferential rights to leases by the United States. [895]

54. That no person or corporation was advised by the officers or employees of the United States that it was expected any bid would be received for the doing of the construction work at Pearl Harbor at cost.

55. That said Albert B. Fall was not in Wilmington when the proposals were opened and scheduled on April 15, 1922. He left Washington for Three Rivers, New Mexico, on April 13, 1922.

56. That before said Albert B. Fall left Washington on April 13, 1922, he gave instructions to his subordinates that no bid should be accepted and no contract should be awarded without his first being

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informed and without his consent thereto being given.

57. That on April 18, 1922, the Acting Secretary of the Interior, Edward C. Finney, communicated by telegraph with said Albert B. Fall, advising that certain officers and employees of the United States named in said telegram recommended the acceptance of Proposal B; that on the same date said Albert B. Fall gave his consent by telegram to the acceptance of Proposal B.

58. That on April 18, 1922, pursuant to the consent and direction of said Albert B. Fall, Edward C. Finney, then Acting Secretary of the Interior, as such, purported to make an award to Pan American Petroleum and Transport Company by transmitting to said Company a letter in the words following:

“DEPARTMENT OF THE INTERIOR,

Washington,

April 18, 1922.

PAN AMERICAN PETROLEUM AND TRANSPORT CO.,

120 Broadway, New York City, N. Y.

Gentlemen: Your bid filed April 15, 1922, for the exchange of Government royalty oils from naval reserves Nos. 1 and 2, California, for fuel oil and storage for naval purposes at Pearl Harbor, Hawaii, has been examined in connection with other bids submitted, and your alternative bid B found to be the lowest and best bid received. Accordingly award is hereby made to you of said contract,

per your alternative bid B. Formal contract is being prepared for execution.

Respectfully,

E. C. FINNEY,

Acting Secretary.

59. That subsequent to the forwarding of the letter mentioned in Finding No. 56, J. J. Cotter, Vice-President of Pan American Petroleum and Transport Company, stated that that Company did not desire to proceed with the making of the contract pursuant to said letter unless the United States would agree that within twelve months from the date of the contract it would grant to the Pan American Petroleum and Transport Company a lease or leases on some portion of the lands lying within [896] the boundaries of naval reserve No. 1, California.

60. That on April 20, 1922, Arthur W. Ambrose, Chief Petroleum technologist of the Bureau of Mines of the Department of the Interior of the United States, was sent with all documents and papers relative to the same to Three Rivers, New Mexico, to consult with the said Albert B. Fall concerning the same. It is not clear whether said Ambrose took with him a draft of the letter of April 25, 1922, Exhibit "E" of the amended bill of complaint, in order to show the same to the said Albert B. Fall. It is, however, true that he was instructed to consult the said Fall concerning same.

61. That pending the arrival of said Ambrose at Three Rivers, New Mexico, for consultation with said Albert B. Fall, certain officers and employees

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of the United States were at work in drafting the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint.

62. That on April 23, 1922, said Albert B. Fall, by telegram, advised Edward C. Finney, Acting Secretary of the Interior, that he should go ahead with the contract and should execute the same on behalf of the Department of the Interior.

63. That amongst other matters as to which said Ambrose was instructed to consult said Albert B. Fall on the arrival of said Ambrose at Three Rivers, New Mexico, on or about April 23, 1922, was the question whether said Edwin Denby, as Secretary of the Navy, should be made a party to the proposed agreement to be made with the Pan American Petroleum and Transport Company.

64. That by telegram dated April 23, 1922, said Albert B. Fall consented and agreed that said Edwin Denby should be made a party.

65. That the question whether said Edwin Denby should be made a part to the agreement and whether the Executive Order of May 31, 1921, Exhibit "A" of the amended bill of complaint, had any legal force and effect, was originally raised by J. J. Cotter, Vice-president of and attorney for Pan American Petroleum and Transport Company.

66. That said Cotter refused to permit Pan American Petroleum and Transport Company to enter into said contract unless said Edwin Denby should be made a party to and sign said contract as Secretary of the Navy of the United States.

67. That from the inception of negotiations with

Pan American Petroleum and Transport Company touching a proposed contract for the erection of storage facilities and filling the same with fuel oil at Pearl Harbor, T. H., Albert B. Fall kept in [897] touch with the matter and no matter of policy or action of importance was determined without his consent first had and obtained.

68. That the condition inserted in Proposal "B" by Pan American Petroleum and Transport Company touching a preferential right to leases in naval petroleum reserve No. 1, California, was so inserted with the express purpose on the part of the officers and employees of said Company that no other Company should have an opportunity to obtain leases in said naval petroleum reserve, and so that said Pan American Petroleum and Transport Company should be able to eliminate competition for such leases as the United States might thereafter decide to make.

69. That the guarantee of certain specific leases in the letter of April 25, 1922, Exhibit "E" of the amended bill of complaint, was not necessary, nor was it necessary to make the lease of June 5, 1922, Exhibit "F" of the amended bill of complaint, when the same was made, to prevent drainage.

70. That the purpose of the guarantee of certain leases in the letter of April 25, 1922, Exhibit "E" of the amended bill of complaint, was to assure the production of additional royalty oil to be used by the United States as consideration for the construction of storage tankage facilities at Pearl Harbor, T. H., and the filling of the same with fuel oil.

71. That the posted field price of crude oil in California declined rapidly after the making of the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint.

72. That in the autumn of 1922 Pan American Petroleum and Transport Company, and said Edward L. Doheny, were in correspondence and consultation with said Albert B. Fall concerning a proposal that the Pan American Petroleum and Transport Company should at once become lessee of certain areas in naval petroleum reserve No. 1, California, and in consideration thereof should agree to do for the United States the things mentioned in a written proposition. The proposition of Pan American Petroleum and Transport Company to become lessee of certain area in naval petroleum reserve No. 1, California, and to give certain considerations to the United States in consideration of becoming such lessee, was by said Edward L. Doheny reduced to writing and delivered to said Albert B. Fall sometime in October or November, 1922.

73. That said proposition so reduced to writing was delivered by said Albert B. [898] Fall to certain other officers and employees of the United States with his favorable recommendation.

74. That as a result of said proposition said Edward L. Doheny subsequently enlarged the same by a proposition in writing bearing date November 6, 1922, made certain further suggestions with regard to the areas to be leased to Pan American Petroleum and Transport Company, and with re-

gard to the considerations which the Pan American Petroleum and Transport Company would give to the United States for such lease or leases.

75. That as a result of said second proposition of said Edward L. Doheny negotiations were had between certain officers of Pan American Petroleum and Transport Company, or its nominee, Pan American Petroleum Company and certain officers, and employees of the United States, concerning a proposed lease to be granted on lands in naval petroleum reserve No. 1, California.

76. That said Albert B. Fall and said Edward L. Doheny conferred together concerning a schedule of royalties to be inserted in the proposed lease to Pan American Petroleum and Transport Company, or its nominee, Pan American Petroleum Company, with the result that said Albert B. Fall and said Edward L. Doheny agreed upon a schedule of royalties which was the schedule of royalties recommended by said Albert B. Fall and which became the schedule of royalties in the lease to Pan American Petroleum Company, Exhibit "D" of the amended bill of complaint.

77. That said lease of December 11, 1922, Exhibit "D" of the amended bill of complaint, was arranged by private negotiation and no competition of any kind was had in the making thereof. That no other oil company was invited to submit a proposal for such lease, although at least one other oil company would have been interested in the matter.

78. That for some time prior to the making of the lease of December 11, 1922, Exhibit "D" of the

amended bill of complaint, and down to October 25, 1922, said Albert B. Fall and other officers and employees of the United States who were in close touch with him in connection with the administration of the naval petroleum reserves, stated to persons making inquiry for leases in naval petroleum reserve No. 1 in effect that it was not the intention of the Department of the Interior or of the United States to make any leases or to drill in naval reserve No. 1, California, except for purely defensive purposes, and that there was no immediate leasing [899] or drilling in contemplation.

79. That the representations mentioned in Finding No. 78, above, at least so far as said Albert B. Fall was concerned, were false and untrue and known by him so to be.

80. That in February, 1922, an agreement was made by the United States with Pacific Oil Company, which is still in force, whereby no drilling should be done by either party to the agreement, except on six months notice to the other party. This agreement covered the following described lands:

T. 30 S., R. 24 E., M. D. M., Kern County, California; SW. $\frac{1}{4}$ Sec. 27, S. $\frac{1}{2}$ Sec. 28, S. $\frac{1}{2}$ Sec. 29, SE. $\frac{1}{4}$ Sec. 30, E. $\frac{1}{2}$ Sec. 31, all of Sections 32 and 33, W. $\frac{1}{2}$ Sec. 34.

T. 31 S., R. 24 E., M. D. M., Kern County, California; NW. $\frac{1}{4}$ Sec. 3, N. $\frac{1}{2}$ Sec. 4, N. $\frac{1}{2}$ Sec. 5, NE. $\frac{1}{4}$ Sec. 6.

81. That in October, 1922, an agreement was made whereby no drilling was to be done in Section

31 T. 30 S., R. 24 E., M. D. M., and Section 36, T. 30 S., R. 23 E., M. D. M., both said sections in Kern County, California, in naval reserve No. 1. Said agreement is still in force.

82. That there was no necessity, on account of threatened drainage, to make the lease of December 11, 1922, Exhibit "D" of the amended bill of complaint, at the time it was made.

83. That at the time of making the contract of December 11, 1922, and the lease of December 11, 1922, Exhibit "C" and "D" of the amended bill of complaint, the plans for the further construction work at Pearl Harbor, T. H., had not been prepared. Said plans were not forwarded by the Navy Department until January 7, 1923.

84. That the contract of April 25, 1922, Exhibit "B" of the amended Bill of Complaint, is a contract for the construction of a reserve fuel depot at Pearl Harbor, T. H., and the filling of the same with fuel oil.

85. That the contract of December 11, 1922, Exhibit "C" of the amended bill of complaint, constitutes, *inter alia*, a contract for the erection of two reserve fuel depots for the United States Navy at Pearl Harbor, T. H., and the filling of the same with certain petroleum products.

86. That at the time said Edward L. Doheny made said payment of \$100,000 to said Albert B. Fall, it was understood by said Edward L. Doheny and said Albert B. Fall that said Albert B. Fall need not repay the same or any part thereof in kind to said Edward L. Doheny.

87. That at the time said Edward L. Doheny made said payment of \$100,000 to said [900] Albert B. Fall, said Edward L. Doheny expected that if said Albert B. Fall did not sell or turn over certain ranch land owned by said Albert B. Fall, or to be acquired by him, in New Mexico, said Edward L. Doheny would cause Pan American Petroleum and Transport Company to employ said Albert B. Fall at a salary sufficiently large to enable said Albert B. Fall, out of one-half thereof, to pay off said amount in five or six years.

88. That at the time said Edward L. Doheny made said payment of \$100,000 to said Albert B. Fall, said Edward L. Doheny knew that said Albert B. Fall expected to leave the service of the Government and to accept employment with the Pan American Petroleum and Transport Company or with the Pan American Petroleum Company, or both, through the procurement and good offices of said Edward L. Doheny.

90. That said Edward L. Doheny and said Albert B. Fall did act in co-operation and collusion with respect to the royalties being paid and to be paid on subsequent leases by Pan American Petroleum and Transport Company and its subsidiary, Pan American Petroleum Company, and the royalties fixed in the leases in suit were fixed, arranged and settled by said Fall and said Doheny.

91. That by the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint, and also by the contract of December 11, 1922, Exhibit "C" of the amended bill of complaint, the Secre-

tary of the Navy of the United States of America surrendered and delegated to the Secretary of the Interior of the United States of America vital, essential and discretionary rights, powers and duties which were conferred exclusively and solely upon the said Secretary of the Navy by the Congress of the United States of America.

92. That there has been constructed and completed under the direction of the defendants at Pearl Harbor, Hawaii, all of the fuel oil storage facilities mentioned in the alleged agreement of April 25, 1922, and there has also been constructed and completed under the direction of the defendants at Pearl Harbor, Hawaii, much of the additional storage facilities for crude oil products mentioned in the alleged agreement of December 11, 1922, and that such projects and property are of benefit and value to the United States of America, and have been constructed economically and without waste or extravagance, and are now available for use by the United States of America, and are now located on property of the United States of America [901] at Pearl Harbor, Hawaii, and that the money expended for the construction and completion of said storage facilities for crude oil products at Pearl Harbor, Hawaii, has been expended by defendants upon the property of the United States of America and under the supervision and inspection of the duly appointed officers of the United States Navy, and said property so constructed and completed upon the property of the United States of America at Pearl Harbor, Hawaii, should be retained and kept thereon.

CONCLUSIONS OF LAW.

From the foregoing findings of fact the Court draws the following conclusions of law:

1. That the payment of \$100,000 by Edward L. Doheny to Albert B. Fall, under the circumstances under which said payment was made in this case, was *contra bonos mores* and against public policy.

2. That the question whether the directors and stockholders of Pan American Petroleum and Transport Company knew of said payment is immaterial.

3. That the making of said payment constitutes a fraud upon the United States of America and renders voidable all contracts and transactions made between Pan American Petroleum and Transport Company, or its subsidiary, Pan American Petroleum Company, and the United States of America subsequent thereto.

4. That Edward L. Doheny and Albert B. Fall did conspire and confederate for the making of certain contracts and agreements of great benefit and advantage to the Pan American Petroleum and Transport Company, and pursuant to said confederation and conspiracy there were made the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint; the alleged contract of April 25, 1922, Exhibit "E" of the amended bill of complaint; the lease of June 5, 1922, Exhibit "F" of the amended bill of complaint; the contract of December 11, 1922, Exhibit "C" of the

amended bill of complaint; and the lease of December 11, 1922, Exhibit "D" of the amended bill of complaint.

5. That the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint, was not let upon competitive bidding.

6. That the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint, and the contract of December 11, 1922, Exhibit "C" of the amended bill of [902] complaint, the lease of June 5, 1922, Exhibit "F" of the amended bill of complaint, and the lease of December 11, 1922, Exhibit "D" of the amended bill of complaint, are voidable at the option of the United States of America and should be delivered up to be cancelled.

7. That the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint, and the contract of December 11, 1922, Exhibit "C" of the amended bill of complaint, are null, void, and of no effect, because they constitute unlawful delegation of authority to the Secretary of the Interior contrary to the terms and provisions of the Act of June 4, 1920, and the same should be surrendered up by defendant Pan American Petroleum and Transport Company to plaintiff for cancellation.

8. That the executive order of May 31, 1921, issued by Warren G. Harding the President of the United States of America is, in so far as it attempts to transfer a discretionary power to the Secretary of the Navy to the Secretary of the Interior, in-

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effectual and in excess of the executive power of the President of the United States of America.

9. That the lease of June 5, 1922, Exhibit "F" of the amended bill of complaint was part of the consideration of an illegal contract, to wit, the contract of April 25, 1922, Exhibit "B" of the amended bill of complaint, and the same should be delivered up by defendant Pan American Petroleum and Transport Company to be cancelled.

10. That the lease of December 11, 1922, Exhibit "D" of the amended bill of complaint, constituted part of the consideration given by the United States of America for the contract of December 11, 1922, Exhibit "C" of the amended bill of complaint, said contract being wholly void and illegal, said lease is likewise void and illegal and should be delivered up for cancellation by the defendant Pan American Petroleum Company.

11. The defendants Pan American Petroleum and Transport Company and Pan American Petroleum Company should cease to trespass upon the lands of the United States of America and should forthwith surrender possession of the lands mentioned in the amended bill of complaint, and all of them, to the United States of America, and said defendants and each of them will be enjoined and restrained from further operations [903] or activities of any kind on any of the lands in controversy in this suit, and will be restrained and enjoined from removing or attempting to remove any materials, tools, machinery, appliances, structures or equipment now upon or within said lands.

12. That the defendants should be paid for and allowed credit for moneys which they have actually expended in the construction of the storage facilities for crude oil products which have been furnished at Pearl Harbor, Hawaii, under the alleged agreement of April 25, 1922, Exhibit "B" of the amended bill of complaint, and under the alleged agreement of December 11, 1922, Exhibit "C" of the amended bill of complaint.

13. That a full, just, true, and complete account should be taken and is hereby ordered to be made between the United States of America and the defendant corporations whereby it should be ascertained what total and gross amount of oil and petroleum products the defendants have produced, taken, extracted, or removed from the lands covered by the lease of June 5, 1922, Exhibit "F" of the amended bill of complaint, and the lease of December 11, 1922, Exhibit "D" of the amended bill of complaint, and the value of lawful money of the United States of America of such oil and petroleum products so produced, taken, extracted or removed; and upon the ascertainment of the total and gross quantity of such oil and petroleum products, and of the pecuniary value thereof, that such sum or sums of lawful money of the United States of America hereafter to be found due, if any, upon such accounting should be paid by the defendants or either of them to the plaintiff. In said accounting the defendants will be entitled to be credited with and shall receive payment for the cost price of the storage facilities for crude oil

products completed and installed at Pearl Harbor, Hawaii, together with the cost price of such fuel oil contents thereof as have been to the date hereof placed within said storage tankage at Pearl Harbor, Hawaii, under the supervision of the officers of the United States of America and of the Navy thereof, and will also be entitled to credit and payment for the actual expenditures of money in drilling and putting on production any wells drilled under the leases of June 5, 1922, and December 11, 1922, to the date hereof and which are now being operated by the receivers herein, and will not be entitled to any further payment or credit on account of any of the transactions in controversy in this action or by reason of any of the contracts and/or leases in suit. A special master in chancery, *pro hac* [904] *vice*, is hereby appointed, and will be hereafter named, to take and make the accounting hereby decreed, and said special master in chancery shall upon completion of said accounting report his findings of fact and conclusions of law to this court for further action by this court in the premises. The Receivers heretofore appointed will continue to operate and control the property in controversy in this case under the order made March 17, 1924, and supplementary thereto until further order herein.

14. That all costs of this suit should be paid by the defendants.

Special counsel and solicitors for plaintiff will prepare a decree pursuant to and in accordance with the foregoing findings of fact and conclusions

of law and present the same under the rules of this court.

Dated this 28th day of May, 1925.

PAUL J. McCORMICK,
United States District Judge. [905]

(Name of Court and Title of Case.)

SUPPLEMENTAL FINDINGS OF FACT.

Filed July 11, 1925. Chas. N. Williams, Clerk.

From the evidence taken in this cause on July 11th, 1925, the Court, in addition to the findings of fact and conclusions of law heretofore filed, dated on the 28th day of May, 1925, finds:

92. That all of the additional storage facilities for crude oil products, mentioned in the alleged agreement of December 11, 1922, referred to in Finding of Fact No. 91, have now been completed.

93. That the said defendant Pan American Petroleum and Transport Company, also in compliance with and performance of the terms of the said alleged agreement of April 25, 1922, delivered into the possession of the United States of America and into the storage facilities at Pearl Harbor, Hawaii, constructed by the said defendant, as aforesaid, 1,453,274.94 barrels of fuel oil of the quality required by the said agreement, and that the said fuel oil was accepted and retained by the United States of America, and is still retained by it, and that the same was and is of a value and benefit to the United States of America, equal to the cost

to the said defendant of furnishing and transporting the same as aforesaid.

94. That the defendant Pan American Petroleum Company, prior to the date at which receivers of this Court took possession of the lands hereinbefore mentioned, in compliance with and performance of the terms of the documents purporting to be the leases of June 5 and December 11, 1922, expended sums of money in [906] exploration, exploitation and development of the said lands, and in producing and maintaining production of oil, gas and gasoline from said lands, and in making other permanent improvements and facilities upon the lands belonging to the plaintiff, necessary to be made in order to comply with and perform the terms of the said alleged leases; that such expenditures were made economically and without waste or extravagance, and with the knowledge and under the general supervision and inspection of the duly appointed officials of the United States of America, and that the results of the expenditure of the said monies as aforesaid is and will be of benefit and value to the United States of America to an extent equal to the amounts of money so expended, as aforesaid.

Dated, this 11th day of July, 1925.

PAUL J. McCORMICK,
United States District Judge. [907]

(Name of Court and Title of Case.)

DECREE.

This cause came on to be heard at this term and

was argued by counsel, and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) That the contract of April 25, 1922, Exhibit "B" of the amended Bill of Complaint, the contract of December 11, 1922, Exhibit "C" of the amended Bill of Complaint, the lease of June 5, 1922, Exhibit "F" of the amended bill of Complaint, and the lease of December 11, 1922, Exhibit "D" of the Amended Bill of Complaint, are voidable at the option of the United States of America, the plaintiff herein, and that the defendant Pan American Petroleum & Transport Company be and is hereby ordered to deliver up to the plaintiff the contracts of April 25 and December 11, 1922, and that the defendant Pan American Petroleum Company be and is ordered to deliver up to the plaintiff the leases of June 5 and December 11, 1922,—all of the foregoing to be cancelled. [908]

(2) That the contract of April 25, 1922, Exhibit "B" of the amended Bill of Complaint, and the contract of December 11, 1922, Exhibit "C" of the amended Bill of Complaint, are null, void and of no effect, and that the defendant Pan American Petroleum & Transport Company be and it is hereby ordered to surrender the same to the plaintiff, the United States of America, for cancellation.

(3) That the lease of June 5th, 1922, Exhibit "F" of the amended Bill of Complaint, constitutes part of the consideration of the illegal contract of April 25, 1922, Exhibit "B" of the amended Bill of Complaint, and that the lease of December 11, 1922,

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Exhibit "D" of the amended Bill of Complaint, constitutes part of the consideration of the illegal contract of December 11, 1922, Exhibit "C" of the amended Bill of Complaint, that they are therefore illegal and void, and that the defendant Pan American Petroleum Company is ordered to deliver the said leases to the United States of America for cancellation.

(4) The defendants, Pan American Petroleum and Transport Company and Pan American Petroleum Company, be restrained from trespassing upon the lands of the plaintiff, the United States of America, which lands are described in the amended Bill of Complaint, and that the said defendant Pan American Petroleum Company forthwith surrender possession of said lands and all of them to plaintiff, United States of America; and that said defendants and each of them be and they each are enjoined and restrained from operations and activities of any kind on any of the lands mentioned in the amended Bill of Complaint, being the lands in controversy in this action; and that said defendant Pan American Petroleum Company be restrained [909] and enjoined from removing or attempting to remove from said lands any materials, tools, machinery, appliances, structures or equipment which are charged to the plaintiff in the account hereinafter stated.

(5) That based upon the testimony offered by the parties and heard in open court, an account is stated between the defendant, Pan American Petroleum & Transport Company, and the plaintiff, as follows:

“A” The said defendant is debited as follows:

1. All royalty oil, gas and gasoline delivered, or caused to be delivered by plaintiff to said defendant under the provisions of said alleged contracts of April 25, 1922 and December 11, 1922, to and including May 31, 1925, viz. :\$ 7,889,759.21

2. Profit derived by said defendant upon resale of said royalty oil, viz. 791,012.03

3. Interest at seven per centum per annum upon item 1 above to May 31, 1925 calculated upon monthly balances, viz. :.... 684,625.55

4. Interest upon item 2 above at seven per centum per annum to said date, calculated upon monthly balances, viz. : 94,351.36

Total \$ 9,459,748.15

“B” The said defendant is entitled to be credited in said account as follows:

1. The actual cost to said defendant of the storage facilities completed and installed at Pearl Harbor, Hawaii, under said alleged contracts of April 25, 1922 and December 11, 1922, and the construction thereof, viz. :.....\$ 7,350,814.11

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2. Interest on item 1 above at seven per centum per annum to May 31, 1925, calculated upon monthly balances, viz. : 820,922.43

[910]

3. The cost price to said defendant of fuel oil delivered to said tanks so as aforesaid constructed by said defendant, viz. : 1,986,142.47

4. Interest on item 3 above at the rate of seven per centum, per annum to May 31st, 1925, calculated on monthly balances, viz. : 259,569.11

Total \$10,417,448.12

Balance due said defendant ... 957,699.97

(6) That based upon the said testimony, an account is stated between the defendant Pan American Petroleum Company and the plaintiff, as follows:

"C" The said defendant is debited as follows:

1. The value of the total amount of oil, gas and other Petroleum products (other than royalty oil, gas and gasoline belonging to the plaintiff and included in the account stated herein between the plaintiff and the defendant Pan American Petroleum & Transport Company) produced, taken and extracted or

removed from the lands covered by the said lease of June 5, 1922, and the said lease of December 11, 1922, to the date of the appointment of and taking possession by the receivers of this Court, viz.: 1,556,861.17

2. Interest on item 1 above at seven per centum per annum, calculated upon monthly balances to May 31st, 1925, viz.: 170,650.02

Total\$ 1,727,511.19

[911]

“D” The said defendant is credited in the said account as follows:

1. The actual expenditures of the said defendant in drilling, putting on production and maintaining and operating production of all wells drilled under said leases of June 5, 1922, and December 11, 1922, and in making any other useful improvement to the property covered by the said leases, to the date of the appointment of and taking possession by the receivers of this Court, viz.: \$ 1,013,428.75

2. The actual expenditures of said defendant in constructing, maintaining and operating the compressor and absorption plant

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on the Northeast Quarter of Section 3-31-24, less the value of the use of same to said defendant in treating products from lands other than those herein in controversy, and less the gasoline manufactured and sold from gas produced from said lands in controversy to May 31, 1925..... 194,991.01

3. Interest on items 1 and 2 above at the rate of seven per centum per annum to May 31, 1925, calculated upon monthly balances, viz.:.....\$ 161,060.43

Total\$ 1,369,480.19

Balance due Plaintiff.....\$ 358,031.00

(7) The Receivers heretofore appointed by this Court in this cause are hereby directed to forthwith pay over to the defendant, Pan American Petroleum & Transport Company, the sum of \$957,699.97, with interest at seven per cent per annum thereon from May 31, 1925, out of funds in their hands in full settlement and discharge of the balance due to the said defendant upon its account, as hereinbefore stated, PROVIDED, HOWEVER, that there shall be credited and deducted from the sum to be paid as aforesaid the value of all royalty oil, gas and gasoline which may have been delivered by the plaintiff to the said defendant under said contracts of April 25, 1922, and December 11, 1922,

since May 31, 1925, with interest thereon at seven per cent per annum.

(8) The defendant, Pan American Petroleum Company, is hereby directed to forthwith pay over to the plaintiff the sum of \$358,031.00 [912] in full settlement and discharge of the balance due to said plaintiff upon the account as hereinbefore stated, with interest at seven per cent per annum from May 31, 1925.

(9) The receivers heretofore appointed by this Court in this cause are hereby discharged from further custody of the lands, matters and things entrusted to their custody by the order of this Court dated March 17, 1924, and are hereby directed

(a) To turn over and surrender possession of all properties in their possession and control to the United States of America or its proper officers, agents, servants, and employees duly designated for this purpose.

(b) To file forthwith in this court an account exhibiting all the items of charge and discharge having to do with their administration of the said property, and showing the balance of money in their hands at the date hereof; and upon the proper vouching and auditing of said account, to pay any balance remaining in their hands (after having made the payment to the defendant, Pan American Petroleum & Transport Company, set forth in paragraph 7 hereof) unto the plaintiff, the United States of America.

(10) It is further ordered and decreed, in order that equity and fair dealing to all persons inter-

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ested in the property in controversy in this suit may be attained under the facts and circumstances of this suit, that the defendants herein shall respectively retain the same credited to them by the terms of clauses 5 and 6 of this decree (less, as to the Pan American Petroleum Company, the sum of \$358,081.00 with interest thereon at 7 per cent per annum from May 31, 1925), and that payment be made to the Pan American Petroleum and Transport Company by the plaintiff of the additional sum of \$957,699.97 with interest thereon at 7 per cent per annum from May 31, 1925, either in the manner herein in paragraph 7 provided, or otherwise. [913]

(11) The defendants shall pay all costs of this suit.

(12) Exceptions are hereby reserved to plaintiff and defendants to each and every finding and conclusion of the Court, and to each and every provision of this decree, adverse to them, respectively.

Dated this 11th day of July, 1925.

(Signed) PAUL J. McCORMICK,
United States District Judge.

Approved as to form as required by Rule 45.

FRANK J. HOGAN,
Solicitor for Defendants.
OWEN J. ROBERTS,
Solicitor for Plaintiff.

Decree entered and recorded July 11, 1925.

CHAS. N. WILLIAMS,
Clerk.

By Louis J. Somers,
Deputy Clerk. [914]

(Name of Court and Title of Case.)

PETITION FOR ALLOWANCE OF APPEAL.

Filed July 15, A. D. 1925, in the District Court of United States for the Southern District of California, Northern Division.

To the Hon. PAUL J. McCORMICK, United States District Judge for the Southern District of California:

The above-named defendants, Pan American Petroleum Company and Pan American Petroleum & Transport Company, feeling themselves aggrieved by the Decree made and entered in this cause on the 11th day of July, A. D. 1925, do hereby appeal, and each of them separately appeals, from said Decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that their appeals be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said Decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioners further pray that the proper order touching the security to be required of each of them to severally perfect their appeals be made, and desiring to supercede the execution of the Decree, petitioners here tender bonds in such amounts as the Court may require for such purpose, and

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pray that with the allowance of the appeal a supersedeas be issued.

Dated at Los Angeles, California, July 15, 1925.

CHARLES WELLBORN,
OLIN WELLBORN, Jr.,
JOS. J. COTTER,
HAROLD WALKER,
DEAN EMERY,
FREDERIC R. KELLOGG,
FRANK J. HOGAN,
HENRY W. O'MELVENY,
WALTER K. TULLER,

Solicitors for Defendants-Appellants. [915]

[Endorsed]: No. Equity—B-100-M. In the District Court of the United States, for the Southern District of California, Northern Division. United States of America, Plaintiff, vs. Pan American Petroleum Company, a Corporation, and Pan American Petroleum and Transport Company, a Corporation, Defendants. Petition for Allowance of Appeal.

July 15, 1925.

Notice of the presentation of the within petition and service of a copy thereof is hereby acknowledged.

ATLEE POMERENE,
OWEN J. ROBERTS,
Solicitors for Plff-Appellee. [916]

(Name of Court and Title of Case.)

ASSIGNMENT OF ERRORS.

Now come the defendants in the above-entitled cause, by their attorneys, and say that the Final Decree entered in this cause on the — day of July, 1925, is erroneous and unjust to these defendants and they specify and assign the following as the errors asserted, intended to be urged and upon which they will rely on their appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the aforementioned Final Decree entered herein.

The District Court erred on the trial of this cause and in its aforementioned Final Decree entered herein, in the following particulars, to wit:

1. In not adjudging and decreeing upon the pleadings and all the evidence in this cause that the plaintiff's Amended Bill of Complaint be dismissed.

2. In adjudging and decreeing that the contract of April 25, 1922, Exhibit "B" of the Amended Bill of Complaint, the contract of December 11, 1922, Exhibit "C" of the Amended Bill of Complaint, the lease of June 5, 1922, Exhibit "F" of the Amended Bill of Complaint, and the lease of December 11, 1922, Exhibit "D" of the Amended Bill of Complaint, are voidable at the option of the United States of America, the plaintiff in this cause.

3. In ordering Pan American Petroleum & Transport Company to deliver to the plaintiff

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the aforesaid contracts of April 25 and December 11, [917] 1922, to be cancelled.

4. In ordering the defendant Pan American Petroleum Company to deliver to the plaintiff the aforesaid leases of June 5 and December 11, 1922, to be cancelled.

5. In adjudging and decreeing that the aforesaid contracts of April 25, 1922, and December 11, 1922, are null and void.

6. In ordering Pan American Petroleum & Transport Company to surrender the said contracts to the plaintiff, as void, for cancellation.

7. In adjudging and decreeing that the aforesaid leases of June 5, 1922, and December 11, 1922, are illegal and void.

8. In ordering the defendant Pan American Petroleum Company to deliver the aforesaid leases to the United States of America, as void, for cancellation.

9. In enjoining the defendants from going upon the lands of the United States described in plaintiff's Amended Bill of Complaint.

10. In directing the defendant Pan American Petroleum Company to surrender possession of the lands described in the Amended Bill of Complaint to the plaintiff.

11. In enjoining the defendants from carrying on their operations and activities on the lands mentioned in the Amended Bill of Complaint under the aforesaid leases and contracts.

12. In enjoining the defendant Pan American Petroleum Company from moving any of its prop-

erties from the lands held by it under and in virtue of the terms of the aforesaid leases.

13. In stating an account between the plaintiff and the defendants, and each of the defendants, as if the aforesaid contracts and leases were voidable or void and of no effect.

14. In ordering that the defendant Pan American Petroleum & Transport Company account for and pay over to plaintiff profit made by said defendant on resale by it of royalty oil delivered to it by plaintiff in exchange for storage facilities constructed and fuel oil delivered therein at Pearl Harbor, Hawaii, under the aforesaid contracts of April 25 and December 11, 1922, and in ordering said defendant to pay to the plaintiff interest upon the amount of its said profit. [918]

15. In ordering in the final decree in this cause the Receivers theretofore appointed by order of March 17, 1924, to turn over and surrender possession of all property in their possession and control to the plaintiff, and in not charging said Receivers and ordering them to account to and turn over and surrender all property in their possession and control to the defendants.

16. In ordering the said Receivers to pay to the plaintiff any balance of money remaining in their hands after their account is stated, and in not ordering and directing the said Receivers upon approval of their final account to turn over and pay any balance of money remaining in their hands to the defendants.

17. In each and every of its Findings of Fact

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filed in the cause May 28, 1925, and numbered 4, 5, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 61, 62, 63, 64, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90.

18. In each and every of its Conclusions of Law based upon all, or any, of the Findings of Fact as enumerated in the next preceding assignment of error.

19. In each and every of its Conclusions of Law as filed in this cause on May 28, 1925, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13 and 14.

20. In failing and refusing to make and enter each and every of its Findings of Fact as requested by the defendants in their requests for findings filed in this cause, by leave of Court, on the 2d day of January, 1925, which said requests for findings are part of the transcript of record on appeal and are numbered 1 to 16, inclusive.

21. In failing and refusing to state and enter in the cause each and every of the Conclusions of Law as duly requested by defendants in their requests filed in the cause, by leave of Court, on the 2d day of January, 1925, said requests being part of the transcript of record on appeal and being numbered 1 to 7, inclusive. [919]

22. In admitting, over objections of defendants, the testimony of the witness Graham Youngs that he learned from some unidentified person in the banking house of Blair & Company, New York

City, on November 30, 1921, that Mr. E. L. Doheny, Jr., required \$100,000.

23. In admitting, over defendants' objections, testimony of the witness Youngs regarding the drawing by Blair & Company on November 30, 1921, of its check on the First National Bank of New York and the cashing by that company of that check at said bank.

24. In admitting, over defendants' objections, Plaintiff's Exhibit No. 35, being check drawn by Blair & Company November 30, 1921, on the First National Bank of the City of New York, payable to the order of that bank, for the sum of \$100,000.

25. In admitting, over defendants' objections, testimony of the witness Youngs that in the office of Blair & Company in New York on November 30, 1921, he cashed a check drawn on the personal account of Mr. and Mrs. E. L. Doheny, Jr., with Blair & Company, for the sum of \$100,000, and delivered to E. L. Doheny, Jr., that sum in currency.

26. In admitting, over the defendants' objections, the testimony of the witness Charles L. Little regarding entries in, withdrawals from, and deposits in, the personal bank account of Mr. and Mrs. E. L. Doheny, Jr., with Blair & Company, New York City, in the months of November and December, 1921, and January, 1922.

27. In admitting, over defendants' objections, Plaintiff's Exhibits 36, 37 and 38, relating to the bank account mentioned in the last preceding as-

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signment of error, and to deposits therein and withdrawals therefrom.

28. In admitting, over defendants' objections, Plaintiff's Exhibit No. 39, being part of a promissory note dated November 30, 1921, payable on demand to the order of E. L. Doheny, for \$100,000, said exhibit being without signature, and the testimony of the witnesses Hill and Mack with respect thereto.

29. In admitting, over defendants' objections, testimony of the witness J. E. Benton regarding (a) the bank account of Albert B. Fall with the First National Bank of El Paso, Texas; (b) deposit in said bank account made [1920] by one C. C. Chase.

30. In admitting, over defendants' objections, Plaintiff's Exhibit No. 41, being a deposit slip showing a deposit made "for Albert B. Fall (by C. C. Chase)," December 7, 1921, in the sum of \$7500, with the First National Bank, El Paso, Texas.

31. In admitting, over defendants' objections, the testimony of the witness Will Ed Harris (a) regarding a transaction had between Albert B. Fall and the witness and others in El Paso, Texas, December 5, 1921, when a contract was made between said parties relating to the purchase of money in New Mexico; (b) regarding deposits made by the witness in his own bank account of money received by him for the sale of property in which he had an interest; (c) regarding payments received by the witness and A. D. Brown-

field by checks in December, 1921, of moneys due said persons from A. B. Fall on account of purchase from the former by the latter of the above mentioned property.

32. In admitting, over defendants' objections, Exhibits 42 and 43 received in connection with and as part of the foregoing testimony of the said Harris.

33. In admitting, over defendants' objection, the testimony of the said witness George D. Flory (a) that the State National Bank, El Paso, Texas, has an account with "Fall and Chase," said witness testifying that said bank neither has nor had any "account of Albert B. Fall," although it also had, in addition to the account of "Fall and Chase," "an account in the name of C. C. Chase"; (b) regarding the account in said State National Bank of C. C. Chase and deposits made therein and withdrawals made therefrom; (c) Plaintiff's Exhibit 44, being a deposit slip dated December 7, 1921, showing a deposit by C. C. Chase in the personal account of C. C. Chase at the said State National Bank.

34. In admitting, over defendants' objection, the testimony of the said witness Flory (a) that there was opened in said bank on December 28, 1921, an account in the name of Fall and Chase; (b) regarding deposits made in said account of Fall and Chase by transfer from the aforesaid account of C. C. Chase and directly. [921]

35. In admitting, over defendants' objection, Plaintiff's Exhibit No. 45, being a deposit slip

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showing that there was deposited in the account of Fall and Chase on December 28, 1921, the sum of \$36,200.

36. In admitting, over defendants' objection, the testimony of the said witness Flory regarding withdrawals from and deposits in the said account of Fall and Chase.

37. In admitting, over defendants' objection, testimony of the witness W. J. McInnes regarding the accounts of Harris and Brownfield; Will Ed Harris, Executor; and A. D. Brownfield and Mrs. Brownfield, with the American National Bank and Citizens National Bank of Roswell, New Mexico.

38. In admitting, over defendants' objections, Exhibits Nos. 46, 47 and 48 offered and received in connection with the testimony of the said witness McInnes made the subject of the last preceding assignment of error.

39. In admitting, over defendants' objection, testimony of the witness A. D. Brownfield regarding transactions had by him with A. B. Fall and C. C. Chase, and moneys received by him and deposits made by him in his personal bank account.

40. In admitting, over defendants' objection, testimony of the witness Carrie Estelle Doheny, regarding statements made to her by her husband, relating to a loan which her husband, E. L. Doheny, told her he had made Albert B. Fall; regarding her said husband's exhibition to her of a promissory note which he said he had received from Albert B. Fall for said loan; and regarding the separating of the body of the note and the signature.

41. In admitting in evidence, over defendants' objections, the statements recorded in the record of "Hearings Before the Committee on Public Lands and Surveys, United States Senate, Sixty-eighth Congress, First Session," on the subject of "Leases upon Naval Oil Reserves," to have been made before said Committee, on January 24, 1924, and February 1, 1924, by Edward L. Doheny, voluntarily appearing in person before said Committee, during which it is reported that the said Doheny stated that he made a personal loan of the sum of \$100,000 on November 30, 1921, to Albert B. Fall, a long-time friend of said Doheny's, in the circumstances and for the purposes reported to have been stated to said Senate Committee by said Doheny, all as set out in detail in [922] said report of the Senate Committee Hearings.

42. In admitting, over defendants' objection, letter dated January 24, 1924, addressed to "The Committee on Public Lands and Surveys, United States Senate, Washington, D. C.," and signed "Gavin McNab, Attorney for Mr. Doheny."

43. In admitting, over defendants' objections, Plaintiff's Exhibits 49 and 50, being transcript of stenographer's report of the aforesaid Senate Committee Hearings of January 24, 1924, and February 1, 1924, respectively, and the contents thereof, being report of statements made before said Committee by Edward L. Doheny, referred to in assignment of error numbered 41 above, and containing also copy of the letter the admission of which is made the subject of the last preceding assignment of error.

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(This assignment goes to the relevancy, materiality, competency and admissibility against the corporate defendants of the said exhibits and the matter referred to in the two last preceding assignments, and not to the medium of proof.)

44. In admitting, over defendants' objection, Plaintiff's Exhibit No. 51, being paper dated January 27, 1922, addressed "Mr. H. M. Storey, Vice-President, Building," and signed "Oscar Sutro," being latter's opinion rendered to the Standard Oil Company, as its counsel, relating to the legal right of the United States, under then existing laws, to enter into contracts of the nature of those involved in this suit.

45. In admitting, over defendants' objection, testimony of the witness Sutro regarding conversations and discussions with E. C. Finney, First Assistant Secretary of the Interior of the United States, on the subject referred to in the last preceding assignment of error.

46. In admitting, over defendants' objection, Plaintiff's Exhibit No. 55, being letter from B. T. Dyer, for American Oil Engineering Corporation, dated San Francisco, California, August 27, 1921, addressed "To the Honorable Secretary of the Interior, A. B. Falls," and relating to a proposition of said company to operate plaintiff's naval petroleum reserves.

47. In admitting, over defendants' objections, Plaintiff's Exhibits 15, 16, 17, 18, 19, 20, 21, and 22, being, respectively, letters from A. D'Heur [923] to "Lieutenant Commander Landis, U. S. Navy, Post

Office Building, San Francisco, Calif.," dated June 13, 1921; from Lieutenant Commander Landis to The Secretary of the Navy, dated June 22, 1921; from Edwin Denby to Hon. Albert B. Fall, dated June 28, 1921; from Albert B. Fall to Hon. Edwin Denby, dated July 1, 1921; from "Geo. Otis Smith, Director," "Memorandum for Mr. Safford," dated July 7, 1921; to "Mr. A. D'Heur, Vice-President, Pacific Oil Company, San Francisco, California," containing at the foot thereof the notation: "To Secretary, Jul. 7, 1921, for signature G. O. S."; from "Albert B. Fall, Secretary," to Mr. D'Heur, dated July 18, 1921; from Mr. D'Heur to Honorable Albert B. Fall, dated July 26, 1921, being correspondence in no way connected with or brought home to the defendants or either of them.

48. In admitting, over defendants' objection, the testimony of the witness A. L. Weil, relating to his opinion, and the expression thereof, as a lawyer, on the subject of the authority, under the law as it then stood, of the United States in 1922 to enter into contracts of the nature involved in this case.

49. In admitting, over defendants' objections, Exhibits 172 to 236, inclusive, the same consisting of correspondence between officials of the United States and applicants for leases to selected and specified portions of lands in the plaintiff's naval petroleum reserves, and for the award of leases to lands in said reserves, none of which was written by, to, or related to, or was in any way connected with, the defendants in this case; and particularly in admitting papers among said exhibits

not addressed to, not shown to have come to the attention of, and not having been acted upon or written by, the said Albert B. Fall.

50. In overruling each and every motion, separately submitted, to strike out, at the close of all the testimony, the evidence theretofore admitted, over objections of defendants, and referred to in the foregoing assignments of error numbered 22 to 49, inclusive.

51. In other respects apparent of record. [924]

WHEREFORE these defendants-appellants pray that the aforementioned Final Decree of the United States District Court for the Southern District of California, Northern Division, made and entered herein on the — day of July, 1925, sustaining the Plaintiff's Amended Bill, may be reversed and that this cause may be remanded to the said District Court with directions to enter a decree dismissing the plaintiff's said bill, or in such other form as to the said Circuit Court of Appeals for the Ninth Circuit shall seem just.

Dated at Los Angeles, California, July —, 1925.

PAN AMERICAN PETROLEUM COMPANY.

PAN AMERICAN PETROLEUM & TRANSPORT COMPANY.

By CHARLES WELLBORN,
OLIN WELLBORN, Jr.,
JOS. J. COTTER,
HAROLD WALKER,
DEAN EMERY,
HENRY W. O'MELVENY,

WALKER K. TULLER,
FREDERIC R. KELLOGG,
FRANK J. HOGAN,

Attorneys for Defendants-Appellants. [925]

(Name of Court and Title of Case.)

ORDER ALLOWING APPEAL.

In the above-entitled cause the defendants above named, having duly filed their petition for an order allowing them to prosecute an appeal from the Final Decree of this Court, made and entered herein on the 11th day of July, 1925, and having also duly filed their Assignments of Errors.

Now, on motion of Frank J. Hogan, Esquire, solicitor for the above-named defendants, it is

ORDERED, that such appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby allowed to the above-named defendants, and each of them, from the aforementioned Final Decree in this suit entered on the said 11th day of July, 1925. And it is further

ORDERED, that upon the execution by the defendant Pan American Petroleum Company, with approved surety, of a bond in the penalty of Three Hundred and Seventy-five Thousand Dollars (\$375,000.00) and upon the execution by the defendant Pan American Petroleum & Transport Company of a bond, with approved surety, in the penalty of Five Thousand Dollars (\$5000.00), said appeal shall operate as a supersedeas of said Decree and shall suspend the execution thereof until Final Decree on appeal herein. And it is further

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ORDERED, that upon the filing of the said supersedeas bonds a certified transcript of the record and proceedings in this suit, including the statement of the evidence as approved by this Court, be transmitted to and filed in the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the Statutes and the Equity Rules of the Supreme Court of the United States.

Dated at Los Angeles this 15th day of July, 1925.

PAUL J. McCORMICK,

United States District Judge.

(Name of Court and Title of Case).

July 15, 1925.

Service of notice of presentation of the within order acknowledged.

OWEN J. ROBERTS,

SAMUEL W. McNABB,

Solicitors for Plff.-Appellant. [926]

(Name of Court and Title of Case.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Pan American Petroleum Company, a corporation, as principal, and National Surety Company, a corporation, as surety, acknowledge ourselves to be jointly indebted to the United States of America, appellee in the above cause, in the sum of Three Hundred Seventy-Five Thousand Dollars (\$375,000.00), conditioned that, whereas, on the 11th day of July, A. D. 1925, in the District Court of the United States for the Southern District of California, Northern Division, in a suit depending in

that court, wherein the United States of America was plaintiff and Pan American Petroleum Company, and another, were defendants, numbered on the equity docket as B-100-M, a decree was rendered against the said Pan American Petroleum Company, and the said Pan American Petroleum Company having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the 13th day of August, A. D. 1925, next.

Now, if the said Pan American Petroleum Company shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force [927] and virtue.

PAN AMERICAN PETROLEUM COMPANY,

By H. ANDERSON,
President.

NATIONAL SURETY COMPANY,

[Seal] By GEO. D. MANN,
Its Attorney-in-Fact.

Approved July 15, 1925.

(Signed) PAUL J. McCORMICK,
United States District Judge, Southern District of
California.

State of California,
County of Los Angeles,—ss.

On this 15 day of July, in the year one thousand nine hundred and 25, before me, Nadine Girard, a notary public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Geo. D. Marcy, known to me to be the duly authorized attorney-in-fact of National Surety Company, and the same person whose name is subscribed to the within instrument as the attorney-in-fact of said Company, and the said Geo. D. Marcy acknowledged to me that he subscribed the name of National Surety Company thereto as principal, and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] NADINE GIRARD,
Notary Public in and for Los Angeles County, State
of California.

State of California,
County of Los Angeles,—ss.

On this fifteenth day of July, in the year one thousand nine hundred and twenty-five, before me Robert A. Etie, a notary public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared J. C. Anderson, known to me to be President of Pan American Petroleum Company, and the same person whose name is subscribed to the within instrument as the President of said Company, and the said J. C. An-

derson acknowledged to me that he subscribed the name of said Company thereto as principal and his own named as President thereof.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

ROBERT A. ETIE,

Notary Public in and for Los Angeles County, State of California. [928]

(Name of Court and Title of Case.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:
That we, Pan American Petroleum & Transport Company, a corporation, as principal, and National Surety Company, a corporation, as surety, acknowledge ourselves to be jointly indebted to the United States of America, appellee in the above cause, in the sum of Five Thousand Dollars (\$5000.00) conditioned that, whereas, on the 11th day of July, A. D. 1925, in the District Court of the United States for the Southern District of California, Northern Division, in a suit depending in that court, wherein the United States of America was plaintiff and Pan American Petroleum & Transport Company, and another, were defendants, numbered on the equity docket as B-100-M, a decree was rendered against the said Pan American Petroleum & Transport Company, and the said Pan American Petroleum & Transport Company having obtained an appeal to the United States Circuit Court of Ap-

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peals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the 13th day of August, A. D. 1925, next.

Now, if the said Pan American Petroleum & Transport Company shall [929] prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

PAN AMERICAN PETROLEUM &
TRANSPORT COMPANY.

By JOS. J. COTTER,
Vice-President.

NATIONAL SURETY COMPANY.

[Seal]

By GEO. D. MARCY,
Its Attorney-in-Fact.

Approved July 15, 1925.

(Signed) PAUL J. McCORMICK,
United States District Judge, Southern District of
California.

State of California,
County of Los Angeles,—ss.

On this 15 day of July in the year one thousand
nine hundred and 25, before me, Nadine Girard, a

notary public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Geo. D. Marcy, known to me to be the duly authorized attorney-in-fact of National Surety Company, and the same person whose name is subscribed to the within instrument as the attorney-in-fact of said company, and the same Geo. D. Marcy acknowledged to me that he subscribed the name of National Surety Company thereto as principal, and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

NADINE GIRARD,

Notary Public in and for Los Angeles County, State of California.

State of California,

County of Los Angeles,—ss.

On this fifteenth day of July in the year one thousand nine hundred and twenty-five, before me, Robert A. Etie, a notary public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Jos. J. Cotter, known to me to be Vice-president of Pan American Petroleum & Transport Company, and the same person whose name is subscribed to the within instrument as the Vice-president of said Company, and the said Jos. J. Cotter acknowledged to me that he subscribed the name of said Company thereto as principal and his own name as Vice-president thereof.

In witness whereof, I have hereunto set my hand

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and affixed my official seal the day and year in this certificate first above written.

[Seal]

ROBERT A. ETIE,
Notary Public in and for Los Angeles County, State
of California. [930]

(Name of Court and Title of Case.)

PETITION FOR ALLOWANCE OF CROSS-
APPEAL.

To the Honorable the Judges of the Said Court:

The United States of America, the above-named plaintiff, conceiving itself aggrieved by the final decree in the above-entitled cause in so far as the same allows the defendants the credits in the account in said decree set forth, does hereby petition for a cross-appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit; and prays that its cross-appeal may be allowed, and that a transcript of such part of the record, papers and proceedings upon which said decree was made, as the parties to this cause shall by praecipe duly indicate, may be sent, duly authenticated, to the said United States Circuit Court of Appeals.

And it will ever pray, etc.

ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel.

S. W. McNABB,
U. S. District Attorney,
Solicitors for Plaintiff, the United States of
America. [931]

Service of above petition for allowance of a cross-appeal is hereby accepted and acknowledged this 15th day of July, A. D. 1925.

FREDERICK R. KELLOGG,
FRANK J. HOGAN,
Solicitors for the Defendants. [932]

DECREE.

AND NOW, to wit, July 15th, 1925, the prayer of the foregoing petition is granted, and a cross-appeal is this day allowed to the United States Circuit Court of Appeals for the Ninth Circuit.

PAUL J. McCORMICK,
United States District Judge.

Attest: _____,
Clerk of the Court. [933]

(Name of Court and Title of Case.)

ASSIGNMENT OF ERRORS OF UNITED
STATES ON CROSS-APPEAL.

Now comes the plaintiff in the above-entitled cause, by its attorneys, and says that the Final Decree entered in this cause on the 11th day of July, 1925, is erroneous and unjust to the plaintiff and it specifies and assigns the following as the errors asserted, intended to be urged and upon which it will rely on its cross-appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the aforementioned Final Decree entered herein.

The District Court erred on the trial of this cause

and in its aforementioned Final Decree entered herein, in the following particulars, to wit:

1. In its twelfth conclusion of law, which was as follows:

“12. That the defendants should be paid for and allowed credit for moneys which they have actually expended in the construction of the storage facilities for crude oil products which have been furnished at Pearl Harbor, Hawaii, under the alleged agreement of April 25, 1922, Exhibit ‘B’ of the amended bill of complaint, and under the alleged agreement of December 11, 1922, Exhibit ‘C’ of the amended bill of complaint.”

2. In so much of its thirteenth conclusion of law as provides

“In said accounting the defendants will be entitled to be credited with and shall receive payment for the cost price of the storage facilities for crude oil products completed and installed at Pearl Harbor, Hawaii, together with the cost price of such fuel oil contents thereof as have been to the date hereof [934] placed within said storage tankage at Pearl Harbor, Hawaii, under the supervision of officers of the United States of America, and of the navy thereof, and will also be entitled to credit and payment for the actual expenditures of money in drilling and putting on production any wells drilled under the leases of June 5, 1922, and December 11, 1922, to the date hereof, and which

are now being operated by the receivers herein.”

* * *

3. In the final decree entered herein in allowing to defendant Pan American Petroleum and Transport Company credits in the account stated in paragraph (5) of said decree as follows:

1. The actual cost to said defendant of the storage facilities completed and installed at Pearlbor, Hawaii, under said alleged contracts of April 25, 1922, and December 11, 1922, and the construction thereof, viz.:\$7,350,814.11

2. Interest on item 1 above at seven per centum per annum to May 31st, 1925, calculated upon monthly balances, viz.:\$ 820,922.43

4. In the final decree entered herein in allowing to defendant Pan American Petroleum Company credits in the account stated in paragraph (6) of said decree as follows:

1. The actual expenditures of the said defendant in drilling, putting on production and maintaining and operating production of all wells drilled under said leases of June 5, 1922 and December 11, 1922, and in making any other useful improvement to the property covered by the said leases, to the date of the appointment of and

taking possession by the receivers of this Court, viz.: \$1,013,428.75

2. The actual expenditures of said defendant in constructing, maintaining and operating the compressor and absorption plant on the Northeast Quarter, Section 3-31-24, less the value of the use of same to said defendant in treating products from lands other than those herein in controversy, and less the gasoline manufactured and sold from gas produced from said lands in controversy to May 31, 1925.....\$ 194,991.01
3. Interest on items 1 and 2 above at the rate of seven per centum per annum to May 31, 1925, calculated upon monthly balances, viz.: \$ 161,060.43
[935]

5. In the final decree entered herein in paragraph (10) thereof which is as follows:

“(10) It is further ordered and decreed in order that equity and fair dealing to all persons interested in the property in controversy in this suit may be attained under the facts and circumstances of this suit, that the defendants herein shall respectively retain the sums credited to them for the terms of clauses 5 and 6 of this decree (less as to the Pan American Petroleum Company, the sum of \$358,031.00,

with interest thereon at seven per centum per annum from May 31, 1925), and that payment be made to the Pan American Petroleum and Transport Company by the plaintiff of the additional sum of \$957,699.97 with interest thereon at seven per centum per annum from May 31, 1925, either in the manner herein in paragraph (7) provided, or otherwise."

WHEREFORE the plaintiff (cross-appellant) prays that the aforementioned Final Decree of the United States District Court for the Southern District of California, Northern Division, made and entered herein on the 11th day of July, 1925, be so modified as to disallow the credits therein granted to each of the defendants and so as to increase correspondingly the amounts awarded to the plaintiff therein, and that this cause may be remanded to the said District Court with directions to enter an amended decree accordingly, or in such other form as to the said Circuit Court of Appeals for the Ninth Circuit shall seem just.

Dated at Los Angeles, California, July 14th, 1925.

THE UNITED STATES OF AMERICA.

By ATLEE POMERENE,

OWEN J. ROBERTS,

Attorneys for Plaintiff (Cross-Appellant). [936]

(Name of Court and Title of Case.)

PRAECIPE DESIGNATING RECORD ON AP-
PEAL.

The Pan American Petroleum Company and Pan

American Petroleum Transport Company, defendants-appellants in the above-entitled cause, hereby designate the following portions of the record therein to be incorporated into the transcript on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit in this case:

1. Memorandum of fact that original bill of complaint was filed by plaintiff on March 17, 1924.

2. Memorandum that on March 17, 1924, defendants accepted service and entered their appearance in the cause.

3. Memorandum that there was filed in the cause on March 17, 1924, stipulation of the parties transferring the cause for hearing to Los Angeles, California, in the Southern Division of this Court with same force and effect as if heard in Northern Division.

4. Memorandum that on March 17, 1924, the Court duly appointed H. H. Rousseau and J. Crampton Anderson receivers to take possession, hold and operate, *pendente lite*, the properties located in the State of California, in controversy in this suit.

5. Memorandum that on March 24, 1924, the said receivers duly qualified by filing bonds as required by the Court and entered upon their duties.

6. Memorandum that on April 15, 1924, time for defendants to plead was extended. [937]

7. Memorandum that on April 22, 1924, order was entered granting plaintiff leave to file amended bill of complaint.

8. The amended bill of complaint filed April 22, 1924.

9. The answer of the defendants to the amended bill of complaint filed May 8, 1924.

10. Certificate of the clerk giving names and addresses of all witnesses served with subpoenas issued upon orders of plaintiff and defendants, showing date of service in each instance.

11. Notice to solicitors for plaintiff from solicitors for defendants of lodgment in the office of the clerk of statement of evidence, together with acknowledgment of service and waiver therein contained, filed July 15, 1925

12. Statement of evidence lodged in the office of the clerk of this court by solicitors for defendants-appellants, July 15, 1925, together with consent of plaintiff's solicitors to approval, and Court's certificate of approval.

13. Plaintiff's request for findings of fact and conclusions of law filed December 17, 1924.

14. Defendants' request for findings of fact and conclusions of law filed January 2, 1925.

15. Memorandum opinion of Court, filed May 28, 1925.

16. The Court's findings of fact and conclusions of law, filed May 28, 1925, and July 11, 1925.

17. Final decree entered July 11, 1925.

18. Petition for appeal filed by defendants July 15, 1925, with assignment of errors accompanying the same.

19. Order allowing appeal in fixing penalties of supersedeas bonds, entered July 15, 1925.

20. Defendants'-appellants' supersedeas bonds on appeal filed and approved July 15, 1925.

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21. Citation on appeal issued July 15, 1925, and acknowledgment of solicitors for plaintiff-appellee, dated July 15, 1925. [938]

22. This praecipe filed by defendants designating matters to be incorporated in record, filed July 15, 1925.

23. Clerk's certificate.

Dated at Los Angeles, California, this 15th day of July, 1925.

CHARLES WELLBORN,
OLIN WELLBORN, Jr.,
CW.

J. J. COTTER,
HAROLD WALKER,
DEAN EMERY,
FREDERIC R. KELLOGG,
HENRY W. O'MELVENY,
WALTER K. TULLER,
K.

FRANK J. HOGAN,

Solicitors for Pan American Petroleum Company
and Pan American Petroleum & Transport
Company, Defendants-Appellants.

Service of copy of the foregoing praecipe indicating portions of the record to be incorporated into the transcript on the appeal of defendants in the above-entitled cause is hereby acknowledged at Los Angeles, California, this 15th day of July, 1925, and the said designation on the appeal of defendants being satisfactory and complete, the plaintiff-appellee, hereby waives the period of ten days allowed

by the rules within which to file counter designation.

Dated at Los Angeles, California, this 15th day of July, 1925.

ATLEE POMERENE,
OWEN J. ROBERTS,
S. W. McNABB,

Solicitors for the United States of America, Plaintiff-Appellee. [939]

(Name of Court and Title of Case.)

PRAECIPE OF CROSS-APPELLANT DESIGNATING RECORD ON APPEAL.

To the Clerk of the said Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to a cross-appeal allowed to the plaintiff, the United States of America, in the above-entitled cause and to include in such transcript the following portions of the record, namely:

1. Petition of the United States for allowance of cross-appeal.
2. Order allowing cross-appeal.
3. Assignment of errors of the United States as cross-appeal.
4. This praecipe.

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5. Citation on cross-appeal of the United States.

ATLEE POMERENE,

OWEN J. ROBERTS,

Special Counsel for the United States,

S. W. McNABB,

United States District Attorney,

Solicitors for Plaintiff, the United States of
America, Cross-Appellant.

Service of above praecipe accepted and acknowledged this 15th day of July, A. D. 1925.

FREDERIC R. KELLOGG,

FRANK J. HOGAN,

Solicitors for the Defendants-Cross-Appellees.

[940]

In the District Court of the United States, in and
for the Southern District of California, North-
ern Division.

No. B-100-M—EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAN AMERICAN PETROLEUM COMPANY, a
Corporation, and PAN AMERICAN PE-
TROLEUM & TRANSPORT COMPANY,
a Corporation,

Defendants.

**CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.**

I, Chas. N. Williams, Clerk of the District Court of the United States of America, for the Southern District of California, do hereby certify the foregoing typewritten and printed pages, including five photostat copies of exhibits, numbered from 1 to 940, inclusive, to be full, true and correct copies of the following:

Amended bill of complaint;

The answer of the defendants to the amended bill of complaint;

Certificate of names and addresses of all witnesses served with subpoenas issued upon orders of plaintiff and defendants, showing dates of service in each instance;

Notice of lodging in the clerk's office by defendants-appellants of statement of evidence;

Statement of Evidence under Equity Rule 75 (b);

Plaintiff's request for findings of fact and conclusions of law;

Defendants' request for findings of fact and conclusions of law;

Memorandum opinion of Court;

Findings of fact and conclusions of law;

Supplemental findings of fact and conclusions of law;

Decree;

Petition for appeal;

Assignment of errors;

Order allowing appeal;

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Bonds on appeal;

Petition of the United States for allowance of cross-appeal; and

Order allowing cross-appeal;

Assignment of errors of the United States as cross-appellant;

Defendants'-appellants' praecipe for transcript on appeal; and

Praecipe of cross-appellant,—

—and that the same constitute the Transcript of Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit in said cause. Said record also contains the original citations.

I DO FURTHER CERTIFY that the fees of the clerk for comparing, correcting and certifying the foregoing record on appeal amount to \$136.40, and that said amount has been paid me by the appellants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 29th day of July, in the year of our Lord one thousand nine hundred and twenty-five, and of our Independence the one hundred and fiftieth.

[Seal]

CHAS. N. WILLIAMS,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R. S. Zimmerman,

Deputy.

[Endorsed]: No. 4651. United States Circuit Court of Appeals for the Ninth Circuit. Pan American Petroleum Company, a Corporation, and Pan American Petroleum and Transport Company, a Corporation, Appellants and Cross-Appellees, vs. United States of America, Appellee and Cross-Appellant. Transcript of Record. Upon Appeal and Cross-Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed July 31, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Volumes I, II and III. Filed August 20, 1925. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 4651

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAN AMERICAN PETROLEUM COMPANY, a
Corporation, and PAN AMERICAN PE-
TROLEUM AND TRANSPORT COM-
PANY, a Corporation,
Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA,
Appellee and Cross-Appellant.

Upon Appeal and Cross-Appeal from the United States
District Court for the Southern District of
California, Northern Division.

PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.



At a stated term, to wit, the October Term, A. D. 1925, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge, Honorable FRANK H. RUDKIN, Circuit Judge.

No. 4651.

PAN AMERICAN PETROLEUM COMPANY,
a Corporation, and PAN AMERICAN PETROLEUM & TRANSPORT COMPANY,
a Corporation,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA,
Appellee and Cross-Appellant.

ORDER ON HEARING.

ORDERED appeal and cross-appeal in above-entitled cause argued by Mr. Owen J. Roberts, Special Counsel, counsel for the United States, of America, Appellee and Cross-Appellant, and by Mr. Frank J. Hogan, counsel for the Appellants and Cross-Appellees, and continued to tomorrow for further argument.

At a stated term, to wit, the October Term, A. D. 1925, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the sixth day of October, in the year of our Lord one thousand, nine hundred and twenty-five. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge, Honorable FRANK H. RUDKIN, Circuit Judge.

No. 4651.

PAN AMERICAN PETROLEUM COMPANY,
a Corporation, and PAN AMERICAN PETROLEUM & TRANSPORT COMPANY,
a Corporation,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA,
Appellee and Cross-Appellant.

ORDER OF SUBMISSION.

ORDERED appeal and cross-appeal in above-entitled cause further argued by Messrs. Frank J. Hogan and Frederic R. Kellogg, counsel for the Appellants and Cross-Appellees, and Mr. Atlee Pomerene, Special Counsel for the United States of America, Appellee and Cross-Appellant, and

submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1925, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourth day of January, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 4651.

PAN AMERICAN PETROLEUM COMPANY,
a Corporation, and PAN AMERICAN PETROLEUM & TRANSPORT COMPANY,
a Corporation,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA,
Appellee and Cross-Appellant.

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF DECREE.

By direction of the Honorable William B. Gilbert,
William H. Hunt and Frank H. Rudkin, Circuit
Judges, before whom the cause was heard, OR-

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DERED that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk, and that a decree be filed and recorded in the minutes of the court in said cause in accordance with the said opinion.

In the United States Circuit Court of Appeals,
for the Ninth Circuit.

No. 4651.

PAN AMERICAN PETROLEUM COMPANY,
a Corporation, and PAN AMERICAN PETROLEUM & TRANSPORT COMPANY,
a Corporation,

Appellants and Cross-Appellees,
vs.

UNITED STATES OF AMERICA,
Appellee and Cross-Appellant.

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before GILBERT, HUNT and RUDKIN, Circuit Judges.

The United States in a bill in equity against the two corporations named as parties defendant—which herein will be called respectively the Petroleum Company and the Transport Company—alleged that a fraudulent conspiracy was formed between Edward L. Doheny, the chief executive officer of the defendants, and Albert B. Fall, Sec-

retary of the Interior of the United States, to procure for the defendant companies the execution of a contract dated April 25, 1922, a lease of a portion of Naval Reserve No. 1, situated in California, a further contract of December 11, 1922, and a lease for 20 years covering the remainder of Naval Reserve No. 1, dated December 11, 1922. The object of the suit was to rescind and cancel said contracts and leases and obtain a decree for accounting. The bill alleged that between said conspirators an agreement was made prior to November 30, 1921, that if Secretary Fall could bring about the execution of said instruments he was to receive for so doing one hundred thousand dollars from Edward L. Doheny; that on or about November 30, 1921, Doheny, in furtherance of said conspiracy, paid Fall the \$100,000 reward so promised him, and that thereafter Fall in pursuance of said conspiracy awarded the said contract of April 25, and caused to be executed and delivered the said lease of June 5, and caused the said contract and lease of December 11 to be executed. The bill alleged that by the contract of April 25, 1922, made between the Transport Company and the United States by the Acting Secretary of the Interior, it was agreed to exchange crude oil to be produced from Naval Petroleum Reserves Nos. 1 and 2 in the State of California, which oil was unsuitable for fuel for the United States Navy, for fuel oil suitable for the use of said Navy to be delivered by the corporation at the United States Naval Station at Pearl Harbor, Hawaii, the cor-

poration agreeing to furnish 1,500,000 barrels of fuel oil and to deliver the same into storage facilities to be by it constructed according to specifications in consideration of the delivery to the corporation of 5,878,905 barrels of crude oil from said naval reserves, with a further provision that the corporation should be granted by the Government a preferential lease on certain portions of Reserve No. 1 not included in the contract in case the Secretary should decide to lease the same. It was alleged also that the said award of the contract to the Transport Company was made without competitive bidding and that it gave to said corporation a prior right or option to become the lessee of certain portions of Naval Reserve No. 1, and was so drawn purposely and intentionally to secure said right to that corporation to the detriment and in fraud of the rights of the United States and to prevent other persons or corporations from becoming the lessee and to prevent competitive bidding or open competition to any lease on lands in said reserve; that the intention between Fall and Doheny was that the latter's company should become the lessee of the entire reserve; that pursuant to the said unlawful agreement the instruments of April 25, 1922, and December 11, 1922, were executed secretly and privately and without competition and that all the agreements and leases referred to in the bill are illegal and void by reason of said fraud and illegal conspiracy and for the further reason that no authority was lodged

in the officers of the United States who acted therein to execute the same and that they were unauthorized by law. The prayer of the bill was in substance that the contracts and leases be surrendered to be cancelled, that the defendants be enjoined from further trespassing upon the lands of the United States under or by virtue of said instruments, and that the defendants be required to account for all oil received or taken by them under the terms of said instruments.

The answer denied the allegations of fraud, conspiracy and bribery, asserted the validity and legality of the contracts and leases, and alleged in defense that the plaintiff had not tendered to the defendants the amount which they were justly and equitably entitled to receive under said contracts and leases, and had failed to offer to do equity in the premises, and alleged that the bill was without equity.

In substance the findings of fact of the Trial Court are that the Transport Company, a corporation of which Edward L. Doheny was president up to December 7, 1923, owned and absolutely controlled the entire capital stock of its codefendant; and that at all times mentioned in the complaint Doheny directly or indirectly controlled over 50 per cent of the capital stock of the Transport Company and was in fact in effective control of the policies and actions of both said companies. On September 2, 1912, the President made an executive order setting apart a portion of the lands

in Petroleum Reserve No. 2, ordering that they should be held for the exclusive use or benefit of the United States Navy, and on May 31, 1921, President Harding made an executive order authorizing the Secretary of the Interior to lease producing oil wells within any naval petroleum reserves and to permit the drilling of additional wells or to lease the remainder or any part of a claim upon which such wells had been drilled, and directing the Secretary of the Navy to conserve, develop, use and operate by contract, lease or otherwise, unappropriated lands in naval reserves, and committing to the Secretary of the Interior the administration and conservation of oil and gas bearing lands in the Naval Reserves, but providing that no general policy as to drilling or reserving lands in a naval reserve should be changed or adopted except in consultation and co-operation with the Secretary or Acting Secretary of the Navy. The order authorized and directed the Secretary of the Interior to perform any and all acts necessary for the production, conservation and administration of the said reserves subject to the conditions and limitations contained in the order and the existing laws, or such laws as might hereafter be enacted by Congress pertaining thereto. Secretary Fall was very active in procuring the transfer of the naval oil reserves from the Navy Department to the Interior and after the order of May 31, 1921, he dominated the negotiations that eventuated in the contracts and leases in the suit. The Secretary of the Navy was absent

through all said negotiations and took no active part therein but signed the contracts of April 25, 1922, and December 11, 1922, and the lease of December 11, 1922, and the letter of April 25, 1922, under misapprehension and without full knowledge of the contents thereof. On July 8, 1921, Fall wrote to Doheny: "There will be no possibility of any further conflict with naval officials and this department, as I have notified Mr. Denby that I should conduct the matter of naval leases under the direction of the President without calling any of his force in consultation, unless I conferred with himself personally upon a matter of policy. He understands the situation and that I shall handle the matter exactly as I think best, and will not consult with any officials of any bureau in his department but only with himself, and such consultation will be confined strictly and entirely to matters of general policy." Doheny and the defendants understood from and after July 8, 1921, and acted upon the belief, that Fall had authority to make contracts and leases touching royalty oils from land of the naval reserve and they dealt with him accordingly. Between July 8, 1921, and October 25, 1921, Fall and Doheny held personal conferences with regard to the royalties reserved under a lease that had been granted to the Petroleum Company for a strip of land in Section 1, Township 31 South, Range 24 East, in Kern County, California, and between the same dates they held conferences respecting the proposal to be made by the Transport Company

whereby the latter should receive from the United States royalty oil accruing from leases on Naval Reserves No. 1 and No. 2 in California, and in consideration thereof agreed to erect certain storage tank facilities at Pearl Harbor, Hawaii, and fill the same with fuel oil. At said conferences the matter of granting further leases on Naval Reserve No. 1 was discussed and on October 25, 1921, and prior to March 7, 1922, Fall and Admiral John K. Robison, the personal representative of the Secretary of the Navy in naval reserve matters, agreed that the proposed contract for the construction of tankage facilities and filling the same should be kept secret, not for military reasons but in order that Congress and the public might not know what was being done, and in fact the proposed contract was concealed and kept secret until after the award was made on April 18, 1922. At and prior to November 30, 1921, there was pending in the Department of the Interior for action by Fall as Secretary a petition of the Petroleum Company praying for reduction of the royalty of $55\frac{1}{2}$ per cent reserved to the United States in the lease of July 12, 1921, of certain land in Naval Reserve No. 1. At the same time there was pending before the Department of the Interior a proposition by the Transport Company that in consideration of the receipt of royalty oils by said company and the granting of further leases of lands in Naval Reserve No. 1, the company would agree to erect certain storage tank facilities at Pearl Harbor, Hawaii, and fill the

same with fuel oil. On November 28, 1921, Doheny, on behalf of the Transport Company, wrote to Fall that in view of the cost of fuel oil, the cost of delivery of 1,485,000 barrels at Pearl Harbor would be \$2,821,500, which, added to the cost of constructing the necessary tanks to store the same, would make a total of \$3,360,420, and that to pay the contractor for both tanks and oil in royalty accrued oil from the Naval Reserve it would require 2,973,823 barrels. The letter suggests that the matter be turned over to First Assistant Secretary Finney, to arrange the details with Rear Admiral Robison during Secretary's Fall's proposed absence. On the following day Fall wrote to Admiral Robison, submitting to him Doheny's letter and saying: "Should you think best to accept this proposition, then of course it would be necessary in my judgment to turn over to Colonel Doheny if we can do so, leases upon further wells or area in the naval reserve in which he is now drilling. If this is done, it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan American. * * * The two companies named are pumping their wells and so of course they are not making any money, but will experience a loss in the payment of the fifty five per cent royalty to the Government. If you approve the proposition, will you kindly indicate such approval by simple endorsement upon Col. Doheny's letter to myself signed by yourself. Your simple O. K. will be sufficient." On Novem-

ber 30, 1921, Fall was ready and desirous to consummate a contract with the Transport Company along the lines outlined in the two letters just referred to, which letters expressed and implied an understanding and agreement between Fall as Secretary of the Interior, and Doheny as executive and managing officer of the Transport Company, that Fall, upon the execution of the contracts as suggested in the letter of November 28, 1921, would grant to that corporation further and additional leases in Naval Petroleum Reserve No. 1 in consideration of the construction of storage facilities for 1,485,000 barrels of fuel oil at Pearl Harbor and filling of the same with fuel oil in exchange for royalty crude oil due the United States from existing leases and further leases agreed to be made in the naval petroleum reserves.

Prior to November 30, 1921, Fall and Doheny discussed a proposal that Doheny should advance and deliver to Fall the sum of \$100,000 for the personal use of the latter, and Doheny agreed to furnish said sum when Fall should need it, and on that date, Doheny, then being in New York City, did at the request of Fall send to him at Washington \$100,000, not in the usual manner of business transactions but in currency obtained from a bank by the use of the check of Doheny's son. The currency was "carried in a satchel" by Doheny's son from New York to Washington and by him delivered to Fall, but no entry of the withdrawal of said currency appears in the account of Edward L. Doheny with the bank on which the

check was drawn, and no entry of said advance or of any personal transactions connected therewith between Fall and Doheny was ever made a matter of record in the books of the latter or of either of the defendant corporations, but on November 30, 1921, Fall handed to Doheny's son, who delivered the same to his father, a note payable on demand with interest after date in the sum of \$100,000 to said Doheny at New York or Los Angeles, California, value received. No sum, however, either on account of principal or interest has been paid by Fall to Doheny on account of said note or said money so advanced. Within a few weeks after receiving the note Fall's signature was torn therefrom by Doheny and said note remains so torn. The purpose of so tearing the note was that it might not in the hands of third parties be an enforceable obligation against Fall.

On or before December 1, 1921, Fall issued instructions to his subordinates in the Department of the Interior that the Petroleum Company's petition for the reduction of royalties under lease of July 12, 1921, be refused and that instead thereof the company should as relief be granted a lease at regulation Interior Department royalties in Section 1, Township 30 South, Range 24 East, Kern County, California, in Naval Reserve No. 1. From January 27, 1922, to April 15, 1922, Fall knew that the Transport Company would make a bid to construct storage tankage facilities at Pearl Harbor and fill the same with fuel oil in consideration of the delivery to it of royalty oil of the United States and in consideration that it be assured of further

leases in Naval Reserve No. 1, and that the bid to be named by said corporation in construction of storage facilities and filling the same with fuel oil would be at cost, but he knew that the bid would involve the granting to said corporation of further oil and gas leases of the land within the said Naval Reserve No. 1. Aside from certain officers and agents of the United States and those operating the corporation, no others knew that the corporation would bid at cost for the construction and the filling of said storage facilities, nor were any informed by Fall or by any person on behalf of the United States that a bid conditioned upon the assurance to the bidder of further leases in Naval Petroleum Reserve No. 1 or a preferential right to leases therein would be considered.

Due to Fall's interest in furthering a contract with the Transport Company for constructing and filling storage tank facilities at Pearl Harbor and granting such further leases, the said corporation and its engineering representatives were from December, 1921, to April 15, 1922, kept in close touch with the development of the plans for constructing the tankage facilities and had opportunities for conference and advice from the officers and employees of the United States which no other bidder was afforded. The only other oil companies conferred with by the officers of the United States concerning the project at Pearl Harbor and the proposed contract were the Standard Oil Co. of California, the General Petroleum Co., the Associated Oil Co., the Pacific Oil Co., and the Union Oil Co. of California. Prior to April 15, 1922,

Fall knew that the General Petroleum Co. considered the proposed contract illegal and would not submit a bid, accordingly no invitations for proposals were sent to it. Fall also knew that the counsel for the Standard Oil Co. was of the opinion that the proposed contract was illegal and had written an opinion to that effect, and Fall knew that said company would not submit a bid. He knew or could have known prior to April 15, 1922, that the Union Oil Co. of California had not been asked to submit a bid. He knew prior to April 15, 1922, that the Associated Oil Company would not submit a bid except upon condition that authority be obtained from Congress. He knew prior to April 15, 1922, that invitations had been furnished to two construction companies but he was of the opinion and so stated, that it was impossible for construction companies to make bids for the reason that the construction would have to be paid for by delivery of royalty oils belonging to the United States. On April 15, 1922, the bids were opened. The Associated Oil Company's bid was conditioned upon Congressional action approving the contract. A proposal from the Standard Oil Co. of California applied only to the furnishing of fuel oil. Aside from these, the only bids were those of the Transport Company. That company submitted two bids marked "A" and "B." In proposal "B" a smaller lump sum in barrels of crude royalty was named than in proposal "A." It agreed that if the contractor's actual cost of construction were less than a mentioned stipulated amount, any sav-

ing below that stipulated amount would be credited to the Government, and the proposal was conditioned upon the granting by the United States of a preferential right to the bidder to become the lessee in all leases thereafter to be granted by the United States for recovery of oil and gas in Naval Petroleum Reserve No. 1. No other bidder was invited to compete on the terms mentioned in proposal "B," or upon any terms granting preferential rights to leases, and no person or corporation was advised that any bid would be received for doing the construction work at cost.

Fall was not present at the opening of the proposals. When he left Washington on April 13, 1922, he gave instructions to his subordinates that no bid should be accepted and no contract awarded without his first being informed and without his consent thereto. On April 18, 1922, Finney, the Acting Secretary of the Interior, telegraphed to Fall advising him that he and Admiral Robison recommended the acceptance of said proposal "B," and on the same day Fall telegraphed his consent thereto. Finney notified the Transport Company of the acceptance of its proposal "B," but before the contract was executed the vice-president of that corporation stated to Finney that his company did not desire to proceed further unless the United States would agree that within twelve months from the date of the contract it would grant to the corporation a lease or leases on some portion of the lands within Naval Reserve No. 1. On April 20, 1922, Ambrose, chief petroleum technologist of the Bureau of Mines of the Department of the Interior,

was sent with documents and papers relating to the contract to New Mexico to consult with Fall. On April 23, 1922, Fall telegraphed instructions to Finney to execute the contract. One of the matters about which Ambrose was instructed to confer with Fall was the question whether Denby, Secretary of the Navy, should be made a party to the proposed contract, and on April 23, 1922, Fall by telegraph answered in the affirmative. The question whether the Secretary of the Navy should be made a party to the agreement or whether the executive order of May 31, 1921, had any legal force and effect, was originally raised by Cotter, vice-president and attorney of the Transport Company. He refused to permit his company to enter into the contract unless the Secretary of the Navy were made a party thereto and signed the same.

From the inception of negotiations concerning the contract for the erection of storage facilities and filling the same with fuel oil Fall kept in touch with the matter and no question of policy or action of importance was determined without his consent. The condition of proposal "B" touching a preferential right to leases was inserted for the express purpose of preventing any other company from having an opportunity to obtain leases in said naval reserve and so that the said bidder might be able to eliminate competition for such leases as the United States might thereafter decide to make. Before the contract was executed Finney and Denby wrote to Cotter that the Department of the Interior would agree to grant to his company within one year from the date of a contract for the

Pearl Harbor project, leases to drill on the NE. $\frac{1}{4}$ of Sec. 3, T. 31 S., R. 24 E., and the strip of land lying in the E. $\frac{1}{2}$ of S. 34, T. 30 S., R. 24 E., and specifying the rate of royalty that would be charged thereon. The guaranty of certain specified leases in that letter was not necessary nor was it necessary to make the lease of June 5, 1922, to prevent drainage. The purpose of the guaranty of certain leases in the letter of April 25, 1922, was to assure the production of additional royalty oil to be used in payment for the construction of storage tankage facilities at Pearl Harbor and filling the same with fuel oil. The posted field price of crude oil in California declined rapidly after making the contract of April 25, 1922. In the autumn of 1922 Doheny was in consultation with Fall concerning a proposal that the Transport Company should at once become lessee of certain areas in Naval Reserve No. 1 and in consideration thereof should agree to do for the United States certain things mentioned in a written proposition. The proposal was reduced to writing by Doheny and delivered to Fall some time in October or November. Fall delivered it to certain other officers and employees of the United States with his approval. Doheny, in a subsequent written proposal, enlarged his proposition and made further suggestions as to areas to be leased and the consideration which his company would give therefor. He and Fall conferred together concerning the schedules of royalty to be inserted in the proposed lease which was to be made to the Petroleum Company with the result that they agreed upon a schedule of royalties recommended by Fall, and expressed

in the lease of December 11, 1922. That lease was arranged by private negotiation and no competition of any kind was had in the making of it and no other oil company was invited to submit a proposal for a lease, although at least one other oil company would have been interested in the matter. Some time prior to the making of that lease and down to October, 1922, Fall and other officers and employees of the United States, who were in close touch with him in the administration of the naval petroleum reserves, stated to persons making inquiry for leases in the Naval Reserve No. 1 that it was not the intention of the Department of the Interior or of the United States to make any lease or to drill in Naval Reserve No. 1 except for purely defensive purposes, and that no immediate leasing or drilling was in contemplation. So far as Fall was concerned those representations were false and untrue and by him known so to be. In February, 1922, an agreement was made by the United States with the Pacific Oil Co. that no drilling should be done by either party except on six months notice to the other party on certain lands in Sections 27, 28, 29, 30, 31, and on all of Sections 32 and 33 and the W. $\frac{1}{2}$ of 34, T. 30 S., R. 24 E., and on portions of Sections 3, 4, 5 and 6 in T. 31 S., R. 24 E., and in October, 1922, a similar agreement was made as to S. 31, T. 30 S., R. 24 E., and S. 36, T. 30 S., R. 23 E. Both agreements are still in force. There was no necessity on account of threatened drainage, to make the lease of December 11, 1922, at the time when it was made. At that time the plans for construction work at Pearl Harbor had

not been prepared, nor were they prepared until January 7, 1922. The contract of April 25, 1922, is a contract for the construction of a reserve fuel depot at Pearl Harbor and filling the same with fuel oil. The contract of December 11, 1922, contains an agreement for the erection of two reserve fuel depots for the Navy at Pearl Harbor and filling the same with certain petroleum products.

At the time when Doheny paid Fall the \$100,000 it was understood by him and Fall that the latter need not repay said sum or any part thereof to Doheny. Doheny expected that if Fall did not sell or turn over certain ranch land owned by him or to be acquired by him in New Mexico, Doheny would cause the Transport Company to employ Fall at a salary sufficiently large to enable him out of one-half thereof to pay off said amount in five or six years. At the time of said payment to Fall Doheny knew that Fall expected to leave the service of the Government and to accept employment with one of his companies or both, through his, Doheny's procurement. Doheny and Fall acted in co-operation and collusion with respect to the royalties being paid and to be paid on subsequent leases by the defendant corporations, and the royalties stipulated in the leases were fixed, arranged and settled by Fall and Doheny.

By the contracts of April 25, 1922, and December 11, 1922, the Secretary of the Navy surrendered and delegated to the Secretary of the Interior vital, essential and discretionary rights, powers and duties which by the Congress of the United States were

conferred exclusively and solely upon the Secretary of the Navy.

There have been constructed and completed under the direction of the defendants at Pearl Harbor all of the fuel oil storage facilities mentioned in the agreement of April 25, 1922, and there have been constructed and completed under the direction of the defendants much of the additional storage facilities for crude oil products mentioned in the agreement of December 11, 1922, and such projects and property are of benefit and value to the United States and have been constructed economically and without waste or extravagance and are now available for use by the United States, and are on property of the United States at Pearl Harbor, and the money expended for the construction thereof has been expended by the defendants upon the property of the United States and under the supervision and inspection of duly appointed officers of the Navy, and said property so constructed upon the property of the United States should be retained and kept thereon.

At the time of the conclusion of the trial all the additional storage facilities for crude oil products required by the agreement of December 11, 1922, had been completed and there had been delivered into the possession of the United States at Pearl Harbor and into said storage facilities 1,453,274.94 barrels of fuel oil of the quality required by the agreement and the same was accepted by the United States and is retained by it and is of value and benefit to the United States equal to the cost

of furnishing and transporting the same. The Court further found that the lessee in compliance with the terms of the leases of June 5 and December 11, 1922, did expend sums of money in exploration, exploitation and development of the lands referred to therein and in producing and maintaining production of oil, gas and gasoline therefrom and in making permanent improvements and facilities upon said lands necessary to comply with the terms of said leases, and said expenditures were made economically and without waste and with the knowledge and under the general supervision of duly appointed officials of the United States, and the result of said expenditures is and will be of benefit and value to the United States equal to the amount thereof.

From all of said findings of fact the Court drew the following conclusions of law: that the payment of \$100,000 by Doheny to Fall was *contra bonos mores* and against public policy; that it is immaterial whether the directors and stockholders of the Transport Company knew of said payment; that the making of said payment constitutes a fraud upon the United States and renders voidable all contracts and transactions made subsequent thereto between said corporation or its codefendant and the United States; that Doheny and Fall conspired and confederated for the making of certain contracts and agreements of great benefit and advantage to the Transport Company, to wit: the contract of April 25, 1922, Exhibit "B," of the complaint, the contract of April 25, 1922,

Exhibit "E," the lease of June 5, 1922, the contract of December 11, 1922, and the lease of December 11, 1922; that the contract of April 25, 1922, Exhibit "B," was not let upon competitive bidding; that that contract and the contract of December 11, 1922, Exhibit "C," the lease of June 5, 1922, and the lease of December 11, 1922, are voidable at the option of the United States and should be delivered up to be cancelled; that the contract of April 25, 1922, Exhibit "B," and the contract of December 11, 1922, are null and void and of no effect because they constitute unlawful delegation of authority to the Secretary of the Interior contrary to the terms and provisions of the Act of June 4, 1920, and they should be surrendered for cancellation; that the executive order of May 31, 1921, is, in so far as it attempts to transfer the discretionary power of the Secretary of the Navy to the Secretary of the Interior, ineffectual and in excess of the executive power of the President; that the lease of June 5, 1922, was part of the consideration of an illegal contract, to wit: the contract of April 25, 1922, Exhibit "B," and the same should be delivered up for cancellation; that the lease of December 11, 1922, constituted part of the consideration given by the United States for the contract of December 11, 1922, which contract being wholly void and illegal, the said lease also is void and illegal and should be delivered up for cancellation; that the defendants should cease to trespass upon the lands of the United States and forthwith surren-

der possession thereof and be enjoined and restrained from further operations or activities of any kind on said lands and from removing any materials, tools, machinery, etc., therefrom.

In view of the equities between the parties, the Trial Court concluded that the defendants should be paid for and allowed credit for moneys actually expended in the construction of the storage facilities at Pearl Harbor and that a complete account should be taken between the plaintiff and the defendants to determine the total and gross amount of oil petroleum products the defendants have taken from the lands covered by the lease of June 5, 1922, and the lease of December 11, 1922, and the money value of such products so taken, and upon ascertaining the total gross quantity of such products and of the pecuniary value thereof, such sum to be found due, if any, upon such accounting, should be paid by the defendants to the plaintiff, and that in such accounting the defendants be entitled to be credited with the cost price of the storage facilities so completed and installed at Pearl Harbor, together with the cost price of fuel oil contents placed therein and the actual expenditures of money in drilling and putting on production in wells drilled under the leases of June 5, 1922, and December 11, 1922, and that the costs of the suit should be paid by the defendants.

The defendants take their appeal from that portion of the decree which awards the plaintiff equitable relief. The plaintiff takes its cross-appeal from that portion of the decree which

awards the defendants credit for moneys expended under the contracts and leases and directs an accounting.

GILBERT, Circuit Judge, after stating the case:

The defendants assign error to certain of the findings of fact of the Trial Court, certain of the rulings of that court upon the admission of evidence, and certain of the Court's conclusions of law. We find no ground for disturbing the findings of fact which we deem essential to the decision of the case, and while the evidence may be insufficient to support certain contested findings the disputed facts, in view of our conclusions upon the law applicable to the case, become of little importance.

Particular objection is made to the admission in evidence of statements made by Doheny before the Senate Committee. Those statements were offered in evidence after Doheny had been called as a witness for the plaintiff to testify as to the \$100,000 payment to Fall by him and had availed himself of his constitutional privilege by declining to answer on the ground that his testimony might tend to incriminate him. The offer in evidence of the statements so made before the Senate Committee was accompanied with a proffer of proof that Doheny had voluntarily appeared and made the statements before the Committee. Objection was interposed on the ground that the said statements were not shown to have been made as part of any transaction of the defendant corporations or as part of the *res gestae* of any corporate trans-

action or under circumstances showing that Doheny had any express or implied authority to appear before the Senate Committee and speak for said corporations. The Court held that at the time of making the declarations Doheny was acting within the scope of his authority as an agent of his corporations and admitted the testimony. There having been a preliminary showing before the Court that the leases were negotiated by Doheny on behalf of the defendants and as their agent and that those matters were the very matters brought for investigation before the Senate Committee, we are not convinced that the Court's ruling was erroneous. There can be no question but that the declarations of an officer or agent of a corporation, even though they consist of a narrative of past facts, may, under appropriate circumstances, be admitted in evidence against the corporation, nor does the admissibility of such declarations necessarily depend upon the length of time that has elapsed between the occurrences and the declarations. 10 R. C. L. 978. Clearly, if any officer of the defendant corporations was authorized to bind them by declarations after the event, it was Doheny. As president of both companies he had negotiated the agreements and had executed the same. The scheme to pay for tankage facilities construction and fuel oil by Government royalty oil originated with him and Fall. He was the dominating figure and the administrative officer by whom the business of the corporations was conducted and acts done by him within the

scope of the corporate powers were presumably duly authorized. At the time when the declarations were made there were pending transactions between the plaintiff and the defendants to which the declarations were pertinent, for the contracts and leases were in active operation and their validity was being investigated by the Senate Committee. The defendants were interested in vindicating the contracts and it was to their interest to show that the \$100,000 transaction was a purely personal one and in no way related to the procurement of the contracts. The declarations were also against the interest of the declarant and no other means of obtaining the evidence were available to the plaintiff. Among the cases tending to support the ruling of the Trial Court are *Chicago vs. Greer*, 9 Wall. 726; *Xenia Bank vs. Stewart*, 114 U. S. 224; *Fidelity & Deposit Co. vs. Courtney*, 186 U. S. 342; *Joslyn vs. Cadillac Automobile Co.*, 177 Fed. 863; *C. B. & Q. R. R. Co. vs. Kuleman*, 18 Ill. 298. In *Rosenberger vs. H. E. Wilcox M. Co.*, 145 Minn. 408, the Court said: "The fact that this transaction occurred some time after the contract of sale of the stock, and that the statement was an admission as to facts existing when the contract was made, is not decisive. An agent of a corporation, if acting within the scope of his authority, may make an admission in behalf of the corporation as to a past transaction, just as a natural person or his authorized agent may do so."

It is contended that the Act of June 4, 1920, conferred upon the Secretary of the Navy ample

authority to enter into the exchange contracts of April and December, 1922. We cannot think that by the use of the word "exchange" in the act which was a rider to the appropriation bill of June 4, 1920, it was the intention of Congress to bestow upon the Secretary of the Navy power to dispose of the oil products of the naval reserves in the manner in which it was done in the contracts and leases here in question. The act, after giving the Secretary possession of the naval reserve lands, etc., authorized him "to conserve, develop, use and operate the same in his discretion directly, or by contract, lease, or otherwise, and to use, store, exchange or sell the oil and gas products thereof, and those from all royalty oil from lands within the reserves, for the benefit of the United States. * * * Provided further: that such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922." The power to lease, following as it does the authority to conserve, was evidently to be used as a protective measure to prevent drainage of the naval reserve lands from adjacent oil drilling. The power to sell so conferred necessarily carried with it the legal obligation to turn into the Treasury of the United States the proceeds of sales. If anywhere in the act there is authority to justify the execution of the contracts and leases in question here, it must be found in the word "exchange."

The opinion of the Judge Advocate General of the Navy was that the authority thus granted to exchange was "unrestricted," which could only mean that the Secretary of the Navy could exchange all oil in the naval reserve and all royalty oils for any purpose for which he saw fit. The defendants do not go so far as that. They assume that the authority to exchange is limited to exchanges for fuel reserve purposes. We find nothing in the act which imposes such a limitation and we think it clear that the word "exchange" embraces either the broad authority which was found by the Judge Advocate General or that the intention was to limit the exchange by the words of the accompanying proviso "not exceeding \$500,000," and that the exchange intended was an exchange of crude oil for fuel oil for the current use of the Navy, the then existing depots of fuel oil for current use having been authorized by express acts of Congress. The Act of June 4, 1920, bestows no express authority to create fuel depots. If the power to exchange be extended beyond exchange for current fuel oil or facilities for the storage of royalty oils not to exceed \$500,000, there is no limit to it. There can be no middle ground. Either the intention was that the power was thus to be limited, or it was absolutely without limit, and under it the Secretary of the Navy might have exchanged crude oil for battleships or airplanes, or anything else which he deemed to be of benefit to the Navy, and all this in addition to the millions contracted to be expended for the storage facili-

ties at Pearl Harbor and the filling of the same, the total estimate for which, according to the testimony of Admiral Robison, was \$103,000,000. As early as August 31, 1842, Congress, under its constitutional authority to provide and maintain a Navy, enacted that "The Secretary of the Navy may establish in such places as he may deem necessary suitable depots of coal and other fuel for the supply of steamships of war." Rev. Stats. 1552. On March 4, 1913, 37 Stats. 893, on account of the establishment of fuel depots by the Secretary of the Navy which had subsequently been abandoned, Congress, on the recommendation of the House Committee on Naval Affairs, "in the interest of economy" repealed Section 1552, R. S., and at the same time made an appropriation for the completion of a coaling plant and oil tanks at Pearl Harbor. Thereafter annual appropriations were made for fuel oil storage at various points, the largest appropriation for that purpose being \$200,000. For the year 1921 an appropriation of \$1,000,000 for storing oil at Pearl Harbor was requested by the Chief of the Bureau of Yards and Docks of the Navy, but the request was denied, and no appropriation for that purpose was made for that year. Nor was any made for any subsequent year, obviously for the reason that none was applied for.

It is not conceivable that by the rider to the appropriation bill Congress intended in that casual way to surrender its legislative functions as to the control and disposition of the naval oil reserves

and the establishment of fuel oil depots for the Navy, to revolutionize the established method of transacting the public business of the United States, and to repeal, so far as they relate to the oil reserves, Sections 3732 and 3733, Rev. Stats., and Sections 6884, 6885, 6886 and 6873, Compiled Stats. of 1918, which forbid the making of contracts to bind the Government beyond the amount appropriated therefor unless otherwise specifically provided, and Section 3709, Rev. Stats., which makes competitive bidding and advertising indispensable to the making of all such contracts, and Sections 3617 and 3618 of Rev. Stats., which make it obligatory to turn into the Treasury of the United States all proceeds of sales of royalty oils as was done prior to June 4, 1920, and as was expressly provided by the Act of February 25, 1920. If such had been the intention it is but reasonable to assume that it would have been expressed in terms so clear as to exclude all doubt. The construction placed upon the act by the officers of the Government to whom were delegated the powers conferred thereby is of no value as indicating the meaning of the act. The evidence is that the Secretary of the Interior and the representatives of the Department of the Navy, who were most interested and active in furthering the Pearl Harbor scheme, were doubtful of their authority to engage in it and intentionally refrained from giving out information concerning the same and withheld from members of Congress knowledge of their action through fear that they

would encounter trouble from Congress. Clearly any such contract is illegal unless made in pursuance of authority previously given by Congress. It is no answer to these considerations to say that the contracts were beneficial and that the United States received full value for every dollar expended thereunder. Said the Court in *Filor vs. United States*, 76 U. S. 45: "The officers at Key West did not represent the United States except in their military capacity, though assuming to do so. In signing the agreement and in taking possession of the premises claimed by the petitioners they acted on their own responsibility. Their unauthorized acts cannot estop the Government from insisting upon their invalidity, however beneficial they may have proved to the United States. If the petitioners are entitled to compensation for the use of the property, they must seek it from Congress."

The defendants, referring to the fact that the record contains no finding that the contracts or leases were harmful or that the Government was damaged thereby, contend that the suit may not be maintained without proof of pecuniary damage to the United States. To that we cannot agree. As indicating pecuniary damage the Trial Court directed attention to the fact that the Government had for a period of fifteen years parted with possession of the oil and petroleum products of its naval oil reserves and had been deprived of its right to make more valuable contracts and leases than those which were made with the defendants and to obtain the

benefits of competition for leases, and passing by those considerations as not necessarily pertinent to the case, the Court based its decree upon the right of the United States to be restored to the use and possession of its naval oil reserves, which through fraud, undue favoritism and misconduct of its officers had been relinquished to private enterprises. We think the ground so taken by the Trial Court was justified. Applicable to this question are the authorities cited later in this opinion on the question of the obligation of the United States to accord the defendants equity. In *Heckman vs. United States*, 224 U. S. 413, 439, upon the right of the United States to invoke the equity jurisdiction of its courts, the Court said: "It was not essential that it should have a pecuniary interest in the controversy." In *United States vs. Carter*, 217 U. S. 286, it was held that the fact that the United States had suffered no pecuniary damage from a fraud committed against it did not prevent recovery. In *Hammerschmidt vs. United States*, 265 U. S. 182, 188, the Chief Justice said: "To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the

overreaching of those charged with carrying out the governmental intention."

We are unable to affirm the court below in holding that the United States, in order to obtain the relief which it sought, is required to credit the defendants with the sums which they expended under the leases and contract, and in holding applicable to the case the maxim that he who seeks equity must do equity. That maxim is as old as equity itself and is of almost universal application. It means that he who seeks the aid of an equitable court subjects himself to the imposition of such terms as the settled principles of equity require. But the maxim is only a guiding principle and not an exact rule governing all cases. *Hanson vs. Keating*, 8 Jur. 949. In that case the Vice-Chancellor said: "It is a rule which *per se* can by no possibility decide what the rights of the defendant are. It only raises the question what equity, if any, the defendant has against the plaintiff in the circumstances of the case to which the rule is sought to be applied." And it is held that the maxim is restricted to cases where the plaintiff is wholly without remedy at law and is entirely dependent upon a suit in equity for relief. *Gilliat vs. Lynch*, 2 Leigh, 493; *Scott vs. Scott*, 18 Gratt. 150; *Dranga vs. Rowe*, 127 Cal. 506. Here the plaintiff had a remedy at law but resorted to equity to avoid a multiplicity of suits. It is well settled also that the maxim is not applicable in the case of a suit by the United States to vindicate its dominion over the public lands and to avail itself of substantial rights under statutory provisions.

In *United States vs. Trinidad Coal Co.*, 137 U. S. 160, 170, Mr. Justice Harlan said: "It the defendant is entitled, upon a cancellation of the patents fraudulently and illegally obtained from the United States, in the name of others for its benefit, to a return of the moneys furnished to its agents in order to procure such patents, we must assume that Congress will make an appropriation for that purpose, when it becomes necessary to do so. The proposition that the defendant having violated a public statute in obtaining public lands that were dedicated to other purposes, cannot be required to surrender them until it has been reimbursed the amount expended by it in procuring the legal title, is not within the reason of the ordinary rule that one who seeks equity must do equity; and if sustained would interfere with the prompt and efficient administration of the public domain." In *Heckman vs. United States*, 224 U. S. 413, 447, Mr. Justice Hughes, answering the contention that there should be equitable restoration before enforcement of the law in a case involving the violation of statutory restrictions on the alienation of Indian lands, said: "The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute." In *Causey vs. United States*, 240 U. S. 399, 402, Mr. Justice Van Devanter, after observing

that the public lands are held in trust for all the people and that in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry under restrictions, said: "And when a suit is brought to annul a patent obtained in violation of these restrictions the purpose is not merely to regain the title, but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded." In line with the foregoing decisions are *Washington Sec. Co. vs. United States*, 234 U. S. 76; *United States vs. Poland*, 251 U. S. 221, and *Diamond Coke & Coal Co. vs. Payne*, 271 Fed. 362.

To the proposition that the equitable claims of the Government appeal to the conscience of a chancellor with no greater force than do those of private citizens under like circumstances, the defendants cite among other cases, *United States vs. Stinson*, 197 U. S. 200, and *United States vs. The Thekla*, 266 U. S. 328. In the first of these cases a suit was brought by the United States to set aside patents alleged to have been fraudulently acquired. The decision was that in such a suit the

Government is subjected to the same rules as is an individual respecting the burden of proof, quantity and character of evidence, and presumptions of law and fact, and that in a case of that kind equity will protect the rights of an innocent purchaser for value and without notice. In the second case a libel had been filed by the owners of the "Luckenbach" against the bark "Thekla" for damages resulting from a collision. The owners of the bark filed a cross-libel. The United States became a party libellant as owner *pro hac vice* of the "Luckenbach" and made claim thereto and filed a stipulation to pay any amount awarded against that vessel by the final decree. Concerning the effect of the claim and the stipulation the Supreme Court said: "When the United States comes into Court to assert a claim it so far takes the position of a private tutor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it." The propositions involved in those cases are not in dispute here. But the defendants cite also cases such as *United States vs. Debell*, 227 Fed. 775, and *United States vs. Midway Northern Oil Co.*, 232 Fed. 619, which apply the equitable maxim to the United States when it resorts to equity in suits of the kind there involved. There can be no doubt that where a patent to public land has been acquired by fraud and the patentee has conveyed the land to an innocent purchaser for value the remedy

of the United States is to resort to a suit in equity to set aside the patent, the patent having been issued, in due and proper form and under authority of law as attested by the action of the officials of the Land Office. In so doing the Government being required to seek equitable relief, must as incident thereto deal equitably with defendants who in good faith have acquired title from the patentee and there can be no doubt that in a suit brought by the United States for accounting against trespassers who entered upon public lands in good faith through a mistake of law and in the belief that they could acquire title under the mineral laws, the plaintiff will be required to do equity. But in the present case, although the suit is in form a suit to cancel leases of the public domain, the United States is not seeking equity. It is but fulfilling its duty to protect the public domain and to compel compliance with fundamental laws of the United States. To do what the defendants here claim to be equity would be to require the Court to exercise functions which belong to the legislative branch of the Government, to legalize demands founded upon violation of the laws of the United States and to make judicial disposition of the public resources of the United States.

To hold in the present case that the defendants have equities which demand the protection of the Court would be to ignore the fundamental distinction between cases brought to determine rights as between the United States and citizens depending upon contracts made under the authority

of the laws of the United States and cases in which the contracts have been made without authority of law or in violation thereof. In *The Floyd Acceptances*, 74 U. S. 666, 680, it was said: "Our statute books are filled with acts authorizing the making of contracts with the Government through its various officers and departments, but, in every instance the person entering into such a contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law." That doctrine is exemplified in numerous decisions: "*Whiteside vs. United States*, 93 U. S. 247; *Hooe vs. United States*, 218 U. S. 322; *Chase vs. United States*, 155 U. S. 489; *Sutton vs. United States*, 256 U. S. 575.

Credit for moneys expended by the Petroleum Company in drilling and operating oil wells and making improvements on Naval Reserve No. 1 could be allowed only on the theory that said corporation committed innocent trespass upon the naval reserve and in good faith expended said money and made said improvements. The *mala fides* of the trespasses however, follows from the findings of the court below. That such credits could lawfully be decreed only in a case where the trespass upon the lands was innocently made in good faith is well established. *Pine River Logging Co. vs. United States*, 186 U. S. 279; *Wooden Ware Co. vs. United States*, 106 U. S. 432; *Union Naval Stores vs. United States*, 240 U. S. 284.

The decree of the court below, so far as it awards affirmative relief to the United States in ordering

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the cancellation of the leases and contracts and commands the defendants to surrender possession of the lands mentioned in the bill of complaint and enjoins them against trespassing thereon or removing property therefrom, is affirmed. That portion of the decree which directs that the defendants be credited with the cost price of the storage facilities for crude oil products at Pearl Harbor and the cost price of the fuel oil contents thereof and the actual expenditures of money in drilling and putting on production any wells drilled under the leases is reversed, and the cause is remanded to the court below for further proceedings in accordance with the foregoing opinion.

[Endorsed]: Filed Jan. 4, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 4651.

PAN AMERICAN PETROLEUM COMPANY, a
Corporation, and PAN AMERICAN PE-
TROLEUM & TRANSPORT COMPANY,
a Corporation,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA,

Appellee and Cross-Appellant.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal and cross-appeal from the District Court of the United States for the Southern District of California, Northern Division.

This cause came on to be heard on transcript of the record from the District Court of the United States for the Southern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause, so far as it awards affirmative relief to the United States in ordering the cancellation of the leases and contracts and commands the defendants to surrender possession of the lands mentioned in the bill of complaint and enjoins them against trespassing thereon or removing property therefrom is affirmed. That portion of the decree which directs that the defendants be credited with the cost price of the storage facilities for crude oil products at Pearl Harbor and the cost price of the fuel oil contents thereof and the actual expenditures of money in drilling and putting on production any wells drilled under the leases is reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

[Endorsed]: Filed and entered January 4, 1926.
F. D. Monekton, Clerk. By Paul P. O'Brien,
Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1925, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the first day of February, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable FRANK H. RUDKIN, Circuit Judge.

No. 4651.

PAN AMERICAN PETROLEUM COMPANY, a Corporation, and PAN AMERICAN PETROLEUM & TRANSPORT COMPANY, a Corporation,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA,

Appellee and Cross-Appellant.

ORDER DENYING PETITION FOR A RE-HEARING.

On consideration thereof, and by direction of the Honorable William B. Gilbert, William H. Hunt and Frank H. Rudkin, Circuit Judges, before whom the cause was heard, ORDERED that the petition, filed on January 26, 1926, on behalf of the appellants

and cross-appellees for a rehearing of the above-entitled cause be, and hereby is denied.

Before the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 4651.

PAN AMERICAN PETROLEUM COMPANY, a
Corporation, and PAN AMERICAN PE-
TROLEUM & TRANSPORT COMPANY, a
Corporation,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA,
Appellee and Cross-Appellant.

STIPULATION RE STAY OF MANDATE, ETC.

Counsel for the above-named parties

HEREBY CONSENT AND STIPULATE that
in the event that the petition for rehearing pre-
sented to the United States Circuit Court of Ap-
peals for the Ninth Circuit by above-named ap-
pellants and cross-appellees be denied, the issue of
the mandate of the said Court to the District Court
for the Southern District of California, Northern
Division, upon the appeal and cross-appeal decided
by the above-mentioned court on or about January
4th, 1926, be stayed until forty-five days after the
expiration of the five days after the determination
of such petition fixed by Rule 32 of the said Court;
and that an order may be entered by the said Court

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accordingly without further motion or other proceedings on the part of counsel.

FURTHER STIPULATED that the said order thus entered, shall provide that the said stay is granted on condition that a petition for certiorari be docketed within the said time in the office of the Clerk of the United States Supreme Court; and that in that event the issue of the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, be further stayed until after the Supreme Court of the United States shall pass upon and dispose of such petition for certiorari.

Dated, January 27th, 1926.

ATLEE POMERENE,

OWEN J. ROBERTS,

Solicitors for the Appellee and Cross-Appellant.

FREDERIC R. KELLOGG,

FRANK J. HOGAN,

Solicitors for the Appellants and Cross-Appellees.

JOS. J. COTTER.

HENRY O. MELVENY.

WALTER K. TULLER.

CHARLES WELLBORN.

OLIN WELLBORN, Jr.

DEAN EMERY.

HAROLD WALKER.

[Endorsed]: Stipulation Re Stay of Mandate, etc. Filed Feb. 3, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 4651.

PAN AMERICAN PETROLEUM COMPANY, a
Corporation, et al.,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA,

Appellee and Cross-Appellant.

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. Frederic R. Kellogg, counsel for the appellants and cross-appellees, and good cause therefor appearing, IT IS ORDERED that the issuance of the mandate of this Court under Rule 32 in the above-entitled cause be, and hereby is stayed until the petition to be made on behalf of the appellants and cross-appellees to the Supreme Court of the United States for the issuance of a writ of certiorari herein be disposed of, on condition that the said petition be docketed in the said Supreme Court on or before March 22, 1926.

WM. B. GILBERT,

Senior United States Circuit Judge.

Dated: San Francisco, California, February 1,
1926.

[Endorsed]: Filed Feb. 1, 1926. F. D. Monckton,
Clerk. By Paul P. O'Brien, Deputy Clerk.

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United States Circuit Court of Appeals for the
Ninth Circuit.

No. 4651.

PAN AMERICAN PETROLEUM COMPANY, a
Corporation, and PAN AMERICAN PE-
TROLEUM & TRANSPORT COMPANY, a
Corporation,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA,

Appellee and Cross-Appellant.

CERTIFICATE OF CLERK U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT TO RECORD CERTIFIED
UNDER RULE 35 OF THE REVISED
RULES OF THE SUPREME COURT OF
THE UNITED STATES.

I, F. D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three volumes, numbered Vols. I, II, III, consisting of one thousand five hundred and nineteen (1,519) pages, numbered from and including 1 to and including 1,519, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants and cross-appellees, and certified under Rule 35 of the Revised Rules of the Supreme Court of the United States,

vs. United States of America.

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as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 5th day of February, A. D. 1926.

[Seal]

F. D. MONCKTON,

Clerk.

By Paul P. O'Brien,

Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 22, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1926.

No. 305.

PAN AMERICAN PETROLEUM & TRANSPORT COMPANY and
PAN AMERICAN PETROLEUM COMPANY,
PETITIONERS (Defendants below),

v.

THE UNITED STATES OF AMERICA,
RESPONDENT (Plaintiff below).

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

Official Reports of the Opinions Below:

The opinion of the District Court (R. v. III, 1250-1393) is reported in 6 Fed. (2d) 43.

The opinion of the Circuit Court of Appeals (R. v. III, 1478-1514) is reported in 9 Fed. (2d) 761.

**Statement of the Grounds on which the Jurisdiction
of this Court is invoked:**

(1) The decrees to be reviewed are those of the District Court, dated July 11, 1925 (R. v. III, 1528-36), and of the Circuit Court of Appeals, dated January 4, 1926 (R. v. III, 1515).

The petition for writ of certiorari was filed February 24, 1926, and the writ was granted March 22, 1926 (R. v. III, 1522).

(2) The jurisdiction of this Court is based upon Section 240 of the Judicial Code as amended by the Act of

February 13, 1925 (43 Stat. 936; Fed. Stat. An. 1925 Supp. p. 84).

See *Lutcher & Moore Co. v. Knight*, 217 U. S. 257.

Statement of the Case.

This case is here on certiorari, allowed March 22, 1926, to the United States Circuit Court of Appeals for the Ninth Circuit to review decree of that Court in part affirming and in part reversing a decree entered by the District Court, Southern District of California, in a suit in equity wherein the United States was plaintiff and the Pan American Petroleum & Transport Company and Pan American Petroleum Company were defendants. Herein we shall refer to the first of these defendants as the Transport Company and the second as the Petroleum Company; also we shall refer to the parties as plaintiff and defendants.

On March 17, 1924, the United States, being the proprietor of a large tract of oil land in California, known as Naval Petroleum Reserve No. 1, instituted this suit in equity against the two defendant companies in the District Court for the Southern District of California. The plaintiff prayed the cancellation of two contracts and two leases, temporary and permanent injunctions, receivership, and accounting (R. v. I, 23-24).

The bringing of this suit was directed, and its character explicitly specified, by the provisions of a special act of Congress (43 Stat. 5; "Joint Resolution directing the President to institute and prosecute suits to cancel certain leases of oil lands and incidental contracts, and for other purposes," approved February 8, 1924), by which, with express reference to the contracts and leases here involved, "the President" was "authorized and directed immediately to cause suit to be instituted and prosecuted for the annulment and cancellation of said leases and contract and all contracts incidental or supplemental thereto, to enjoin the further extraction of oil from the said reserves under

said leases or from the territory covered by the same," and "to secure any further appropriate incidental relief."

Despite the rather confusing references which will be found in the record to a number of contracts and leases, the only ones in suit, and hence the only ones with which we are here concerned, are four in number, entered into under authority of Act of Congress approved June 4, 1920 (41 Stat. 812; plaintiff's bill, R. v. I, 10-11). These contracts dated April 25th and December 11, 1922, and leases dated June 5 and December 11, 1922, are briefly described as follows:

1. Contract between the United States and the Transport Company dated April 25, 1922 (R. v. I, 27-40), whereby the latter agreed to furnish and deliver, "at the United States naval station at Pearl Harbor, Territory of Hawaii" (ib. 28), 1,500,000 barrels of fuel oil, according to United States navy specifications, and to deliver said fuel oil into storage facilities constructed and erected by the contractor at the United States naval station at Pearl Harbor according to Navy Department specifications attached to and made part of the contract. This contract recites that "It is the intention of the parties hereto to effect an exchange of crude oil which is unsuitable for fuel for the United States Navy, and which is produced from naval petroleum reserves Nos. 1 and 2, in the State of California, said crude oil being the property of the Government, for fuel oil suitable for the use of the United States Navy," to be delivered as aforesaid (R. v. I, 28).

In consideration of the undertaking above described the Government agreed—

First: To deliver to the Transport Company that number of barrels of crude oil from the California naval reserves, which, in accordance with the terms of the contract, would represent the equivalent of the number of barrels of fuel oil furnished, plus the equivalent of the cost of construction of the storage facilities therefor; but in no event, regardless of that cost,

was the Transport Company to receive more than a fixed amount (R. v. I, 35). In other words, a maximum cost was specified beyond which the Government was not obligated but in the event the actual cost was below that maximum the benefit thereof was to be the Government's.

Second: To give the Transport Company a preferential right to any "future leases" which "during the life of this contract shall be granted by the Government within" a described "portion of California naval petroleum reserve No. 1," provided, in the event the Government determined to grant any such future leases, the contractor agreed to meet such drilling conditions and to pay such royalties as the Secretary of the Interior prescribed. It was further provided that "In the event of the failure of the contractor to agree to the conditions and royalties as proposed by the Secretary of the Interior, then said lease or leases may be offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in said bidding" (R. v. I, 34-35). This "preferential right" was to exist "during the life" of the contract (R. v. I, 34), which was fixed at 500 days (Ib. 36).

This contract of April 25, 1922, was signed:

"The United States of America, By Edward C. Finney, Acting Secretary of the Interior. By Edwin Denby, Secretary of the Navy.

For and on behalf of the United States of America" (R. v. I, 36).

Under that contract everything required of the Transport Company had been entirely completed and had been finally accepted as a complete project by the Navy Department by December 15, 1923, three months before this suit was filed (R. v. II, 575, on which page "1922" is typographical error and should be read "1923"; R. v. III, 1201), and all of the crude oil which the Transport Company was entitled to receive from the Government under the terms of this contract in ex-

change for fuel oil and storage facilities therefor has been received by the Transport Company (R. v. III, 1198).

2. "Lease of Oil and Gas Lands Under the Act of June 4, 1920," dated June 5, 1922, between the United States and the Petroleum Company, of a quarter section of land in Naval Reserve No. 1.

This lease, signed on behalf of the United States by the First Assistant Secretary of the Interior, was made pursuant to agreement contained in letter to J. J. Cotter, Vice-President of the Transport Company, dated April 25, 1922, signed by the Secretary of the Navy and the Acting Secretary of the Interior, definitely agreeing to lease within one year two small tracts of land in Naval Reserve No. 1 "in order that the Government may take advantage of a contract embodying terms outlined in Proposal B" of the Transport Company, which, it was stated, was considered most advantageous to the Government. This letter is Exhibit E to plaintiff's bill (R. v. I, 65-68), and the lease dated June 5, 1922, of one of the pieces of land referred to in said letter is Exhibit F to plaintiff's bill (R. v. I, 68-83). This lease, originally made to the Transport Company, was shortly after its date "with the consent of the United States" assigned to the Petroleum Company (R. v. I, 432).

3. Contract between the United States and the Transport Company dated December 11, 1922, the purpose of which, as stated in it, was to provide, "in accordance with the plans of the General Board of the Navy," for the prompt filling with fuel oil of the tanks provided for in the April 25, 1922, contract, as they were individually completed, "and also to procure for the Navy additional amounts of fuel oil and other petroleum products in storage at Pearl Harbor, T. H., and elsewhere," as set forth in a letter of the Secretary of the Navy dated November 29, 1922, to the Secretary of the Interior, requesting the latter "to arrange for such additional fuel oil and other petroleum products

in storage through exchange therefor of additional royalty crude oil belonging to the Government in said California naval reserves" (R. v. I, 41-42). By this contract the Transport Company obligated itself to do the following things:

(1) Construct additional storage facilities at the Naval Station at Pearl Harbor and fill with 2,700,000 barrels of fuel oil and other petroleum products, including Diesel oil, lubricating oil, aviation and other gasoline. This was to be done at actual cost.

(2) Keep in storage at all times, during fifteen years, at the Transport Company's own cost and expense and in its own storage facilities, at designated points on the Atlantic, a minimum of 3,000,000 barrels of its own fuel oil, which shall be subject to the demand of the Navy at any time upon notice as specified in the contract.

(3) Furnish without charge, for a period of fifteen years, storage for 1,000,000 barrels of fuel oil at Los Angeles, California, and place same in the custody of the Government.

(4) Fill the last mentioned storage, after it had been compensated for the Pearl Harbor project, with 1,000,000 barrels of fuel oil for the Navy, and keep that quantity always in storage for fifteen years.

(5) Bunker Navy ships at Los Angeles Harbor for a period of fifteen years at cost.

(6) Construct a pipeline from Naval Reserve No. 1 in Kern County to tidewater, and convey, free of charge, the Navy's oil through that pipeline.

(7) For fifteen years to sell to the Navy its requirements on the Pacific Coast of petroleum products at 10 per cent below current market prices.

(8) Furnish petroleum products and storage facilities at points to be designated by the Government at any time after the contracting company had been reimbursed in crude oil for fuel oil, other specified petroleum products, and facilities at Pearl Harbor.

In consideration of the above described undertakings the Government agreed—

(1) To deliver to the Transport Company as and when produced from Naval Reserves Nos. 1 and 2, California, crude oil at the posted field price thereof in amount equal to the cost of the construction of the storage facilities, without profit, and the market price of the oil delivered into those facilities, plus transportation at going rates.

(2) To lease to the Petroleum Company the then unleased portion of Naval Reserve No. 1, with a restriction against the drilling by the lessee of the western half of that reserve until the Government consented.

In addition to the above considerations moving to the Government there was a further consideration of royalties in crude oil to be rendered to the Government according to a schedule set forth in the lease.

The contract of December 11, 1922, was signed on behalf of the United States by Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy. It is Exhibit C to the bill of complaint (R. v. I, 41-50). All of the construction work under that contract has been entirely completed and accepted by the Navy Department (R. v. III, 1197; 1201). At the time decree in this suit was entered in the District Court the Transport Company had received from the Government the greater part of the crude oil which it was entitled to receive under the terms of this contract (R. v. III, 1198-9).

4. "Lease of oil and gas lands under the act of June 4, 1920," dated December 11, 1922, between the United States and the Petroleum Company. This is for a term of twenty years and so long thereafter as oil or gas is produced in paying quantities from the lands described in the lease, which lands include all of the theretofore unleased lands belonging to the Government in Naval Petroleum Reserve No. 1, subject, however, to the provision that no drilling shall be done by the lessee without the consent of the lessor in an area comprising lands in twenty-seven sections and con-

stituting, practically, the Western half of Naval Reserve No. 1 (see Exhibit XXX, R. v. III, 1209-10; v. I, 57; v. II, 791). Substantially, this lease is in the usual form of Government oil and gas land leases, and after providing for the obligation of the lessee in respect of well drilling it is stipulated that the lessee will yield the lessor royalty of $12\frac{1}{2}$ to 35 per cent of all oil produced of 30 degrees Baumé or over, and from $12\frac{1}{2}$ to 30 per cent of all oil produced of less than 30 degrees Baumé. The lessor reserves the right to take the royalties in kind or accept payment therefor.

The lease is signed for the United States of America by Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, and will be found in full as Exhibit D to plaintiff's bill (R. v. I, 50-65).

GROUNDS UPON WHICH CANCELLATION AND ACCOUNTING
SOUGHT.

The Government invoked the jurisdiction of a court of equity to cancel these contracts and leases on two grounds:

(1) That they were fraudulently made by Albert B. Fall, Secretary of the Interior, purporting to act on behalf of the United States, as a result of conspiracy between himself and E. L. Doheny, the chief executive officer of defendant companies, and that they were executed and caused to be executed by Secretary Fall in consideration of a bribe promised to and received by him under the express agreement that upon that consideration he would make these contracts and leases.

(2) That, in any event, there was no lawful authority to be found in any act of Congress for the execution by any officer of the Government of contracts and leases of the character here in suit.

In addition to cancellation plaintiff prayed that the Transport Company be required to account for the value of all royalty crude oil and gas delivered to it in exchange, as aforesaid, by the United States, and that the Petroleum Company be required to account to

plaintiff for the value of all oil and gas obtained by it from the leased lands. The bill also prayed for injunction and receiver.

THE DECREE OF THE DISTRICT COURT.

Upon the filing of the bill receivers were appointed to take possession of, hold and operate, *pendente lite*, the leased lands, and an order was entered enjoining defendants *pendente lite* from operating the same (R. v. I, 6).

After trial the District Court filed a memorandum opinion (R. v. III, 1250-1393); findings of fact, 94 in number (ib. 1393-1421; 1427-8), and conclusions of law (ib. 1422-1427), and on July 11, 1925, entered decree (a) granting plaintiff's prayers for cancellation of the aforesaid contracts and leases, (b) stating an account between the plaintiff and the Transport Company by which the latter was allowed credit for the value, at cost, of the fuel oil and storage facilities furnished by it at Pearl Harbor, and charged for the crude oil it had received from the Government; (c) stating an account between the Petroleum Company and plaintiff by which the former was allowed credit for its expenditures in drilling, putting on production, and maintaining and operating wells drilled under the leases of June 5 and December 11, 1922, and was charged with the value of all oil and gas taken from the lands covered by said leases (R. v. III, 1428-36).

The action of the District Court in granting cancellation of the contracts and leases was based on the following grounds:

First, that the contracts and leases were fraudulently made by Secretary of the Interior Fall pursuant to a conspiracy between him and E. L. Doheny (R. v. III, 1366; 1390);

Second, that while there was ample power under the Act of June 4, 1920, for the Secretary of the Navy to have made the contracts and leases, he did not make them, but they were in fact made by the Secretary of

the Interior, who had no authority under the law to make them (R. v. III, 1367) ;

Third, that the contracts contained unlawful delegations of authority to the Secretary of the Interior which rendered them void (ib. 1390-1) ;

The District Court discussed the law of June 4, 1920, very fully in its opinion (R. v. III, 1366-1386) and held that this law gave the Secretary of the Navy power to make the exchange contracts in question, and that in the absence of fraud and of the delegation of authority just referred to "the contracts and leases in suit would be authorized and would be binding obligations upon the United States of America under the Act of June 4, 1920" (R. v. III, 1390-1).

The action of the District Court in allowing credits to the two defendants in the account stated as aforesaid was based on the rule that "He who seeks equity, must do equity," and on the fact that the expenditures at Pearl Harbor by the Transport Company and upon the leased lands by the Petroleum Company were found by the Court to have been made in compliance with and in performance of the terms of the contracts of April 25 and December 11 and of the leases of June 5 and December 11, 1922, and to have been of value and benefit to the United States equal to their cost (R. v. III, 1391-2; 1421; 1427-8).

From the decree of the District Court defendants prosecuted an appeal to the Circuit Court of Appeals, Ninth Circuit, assigning 51 grounds of error (R. v. III, 1437-52) ; and plaintiff prosecuted cross-appeal assigning as error the allowance to defendants of credit for cost of storage facilities and fuel oil contents thereof at Pearl Harbor and for the actual expenditures in connection with the drilling and operation of wells on the leased land (R. v. III, 1458-63).

OPINION AND DECREE OF THE CIRCUIT COURT OF APPEALS

In its opinion the Circuit Court of Appeals—

(a) Did not discuss the facts involved in the ques-

tion of fraud, conspiracy or public policy, saying that "while the evidence may be insufficient to support certain contested findings the disputed facts, in view of our conclusions upon the law applicable to the case, become of little importance" (R. v. III, 1499);

(b) Disagreed with the District Court's view as to the scope and interpretation of the law of June 4, 1920, and held that the Secretary of the Navy had no power to make contracts and leases such as those attacked (ib. 1501-5);

(c) Held that the District Court erred in allowing the companies the respective credits hereinbefore alluded to (ib. 1508-13).

By its decree, entered January 4, 1926, the Circuit Court of Appeals—

(a) Affirmed the decree of the District Court so far as it awards affirmative relief to the United States in ordering the cancellation of the leases and contracts;

(b) Reversed that portion of the District Court's decree which directs that the defendants be credited with the cost price of the storage facilities for crude oil products at Pearl Harbor and the cost price of the fuel oil contents thereof and the actual expenditure of money in drilling and putting on production wells drilled on the leased lands (R. v. III, 1515).

HISTORY OF THE NAVAL RESERVES AND LAWS AND ORDERS RELATING THERETO

Preliminary to a statement of the facts, we here present the legal status of the naval petroleum reserves.

Prior to 1909 all public lands containing petroleum or other mineral oils had been declared by Congress to be "free and open to occupation, exploration and purchase by citizens of the United States . . . under regulations prescribed by law." 29 Stat. 526 (see 236 U. S., 466).

On September 27, 1909, the President of the United States issued an order providing that in aid of proposed legislation affecting the use and disposition of

the petroleum deposits on the public domain, all public lands in accompanying lists were temporarily withdrawn from location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws. (236 U. S., at page 467.)

This was one of a series of withdrawal orders promulgated in 1909 and 1910. A list attached to the foregoing order described an area aggregating 3,041,000 acres in California and Wyoming—though, of course, the order only applied to the public lands therein, the acreage of which was not shown. The lands involved in this suit were included in that acreage.

There was doubt, entertained by the President and expressed by him in a message to Congress, as regards the validity of these orders. In *United States v. Midwest Oil Co.*, 236 U. S. 459, that doubt was resolved in favor of validity.

The act approved June 25, 1910 (c. 421, 36 Stat. 847), frequently referred to as the Pickett Act, authorized the President, at any time in his discretion, to temporarily withdraw from settlement, location or entry any of the public lands of the United States and reserve the same for any public purposes "to be specified in the orders of withdrawal, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress." The act provided for the protection of the rights of bona fide occupants or claimants of oil or gas bearing lands and also provided that all such withdrawals should be reported to Congress.

Following this, on July 2, 1910, by executive order the President confirmed and ratified the outstanding withdrawals and withdrew lands subject to the conditions and limitations of the Act. Thereafter, on September 2, 1912, the President, under the authority of the Act of June 25, 1910, issued an order providing that certain of the lands withdrawn on July 2, 1910, from settlement, location, sale or entry "shall hereafter, subject to valid existing rights, constitute Naval Petro-

leum Reserve No. 1, and shall be held for the exclusive use or benefit of the United States Navy until this order is revoked by the President or by act of Congress." These lands included all involved in this suit. The Secretary of the Interior, compliant to the requirement of the act of June 25, 1910, reported the foregoing withdrawal to Congress at the next session after September 2, 1912. Hence it will be seen that the Pickett Act was strictly complied with in that the public purpose of the withdrawal was "specified" in the order of the withdrawal, namely, "for the exclusive use or benefit of the United States Navy," and the withdrawal and the purpose thereof were duly reported to the Congress.

Later in the same year, December 13, 1912, the President promulgated a precisely similar order of withdrawal constituting Naval Reserve No. 2 in California "for the exclusive use or benefit of the United States Navy," and this was reported to Congress.

From 1912, when the aforementioned executive orders were issued, until 1920, there was constantly before the Congress and its appropriate committees proposed legislation relating to the withdrawn oil and gas bearing lands. The entire subject received the greatest consideration and was during a period of nearly eight years exhaustively debated. There resulted, first, the Act approved February 25, 1920, known as "The Leasing Act," and, second, the Act of June 4, 1920, governing the naval petroleum reserves.

In argument hereinafter we shall discuss the Act of February 25, 1920. Suffice it here to note that it committed the administration of oil and gas bearing public lands to the Secretary of the Interior; provided for permits to prospect for oil and gas upon specified areas of public lands, and for the leasing thereof, and also for the leasing within the naval reserves of producing wells to claimants under the prior placer mining law; authorized restricted area leases by the President of naval reserve lands comprised in any such claim; and authorized the Secretary of the Interior to

retain for use or sell royalty oils accruing to the United States from leases made under the Leasing Act.

Neither the Secretary of the Navy, nor any bureau in or officer of the Navy Department, had any authority or power under the Act of February 25, 1920.

The authority given the Secretary of the Interior "in his judgment" to "retain for use" oils reserved as royalty was of no practical importance since he had at his disposal no storage in which the oil could be retained and since the crude oil could not be used except in the course of some exchange, for which there was no authority of law.

Oil produced from the naval petroleum reserve lands could only be sold.

When sold, the proceeds of the sale went into the miscellaneous funds of the Treasury.

Neither the oil nor the proceeds of the sale of the oil was available to the Navy.

Obviously if there were to be petroleum reserves "for the exclusive use or benefit of the Navy," further legislation was essential.

The Secretary of the Navy submitted to the Chairmen of the Senate and the House Naval Affairs Committees a draft of a proposed law having for its purpose the turning over to the Navy Department possession of the naval petroleum reserves with full authority over the same and over the products thereof (House Doc. 101, 68th Cong. 1st Sess. 603 et seq.). The legislation thus recommended was,—with two changes in the draft, the first of which omitted authority to "refine" and the second providing protection for claimants under the Leasing Act or other existing laws,—attached as a rider to the then pending naval appropriation act, enacted into law, and is referred to in this case as the Act of June 4, 1920. By this Act it is provided:

"That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves as are or may become subject

to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled 'An Act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain,' or pending applications for United States patent under any laws; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States; And provided further, That the rights of any claimant under said act of February 25, 1920, are not affected adversely thereby; And provided further, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922; Provided further, That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct."

All of the contracts and leases involved in this case were made under the authority of this last quoted legislation.

The Act of June 4, 1920, conferred upon the Secretary of the Navy broad and comprehensive powers in respect of naval petroleum reserve lands on which there were no accrued rights or pending claims or applications for permits or leases under the provisions of the Act of February 25, or any other law. Resort by the Navy to the Interior Department for assistance was therefore imperative.

On May 31, 1921, the President of the United States, in circumstances hereinafter stated, promulgated an

executive order relating to the administration of the naval petroleum reserves, which order is set forth in full as Exhibit A to plaintiff's bill (R. v. I, 25-6).

Statement of Facts.

Albert B. Fall became Secretary of the Interior and Edwin Denby became Secretary of the Navy on March 5, 1921.

In the previous administration "antagonisms" had existed between officials of the two departments "with respect to these matters" (R. v. I, 311).

Beginning October 30, 1919, the Standard Oil Company of California had drilled 18 wells across the southern end of Section 36, owned by it, immediately adjoining the north line of Section 1 of Naval Reserve No. 1 (R. v. III, 1148). The location of these wells with reference to the aforesaid Section 1, and wells subsequently drilled in the latter section, is shown on Exhibit E-5, page 1214, volume III of the record, and the relation of said sections, and the wells drilled therein, to the entire reserve, is shown on Exhibit XXX, page 1210. The Standard Oil wells had had a large daily initial production and large quantities of oil had been produced therefrom (R. v. III, 1148-9).

In April, 1921, the Secretary of the Navy by circular addressed to a number of companies and individuals in the oil business invited proposals for a lease of a strip of land in Section 1 of Naval Petroleum Reserve No. 1 on which lessee was to be required to drill 22 wells. In response to this invitation a number of proposals were received by the Navy Department (R. v. I, 460-9). The Navy Department was anxious to promptly lease this land and to get under way the drilling of 22 wells thereon (R. v. I, 313-15). But there was at the time an unsettled placer mining claim of the United Midway Oil Land Company to this land, with an appeal for a lease or leases in settlement of that claim, under the provisions of the Act of February 25, 1920, pending before the President of the

United States. On April 20, 1921, five days before the opening by the Navy Department of bids invited as aforesaid, the President referred to the Secretary of the Interior for report this United Midway Company claim (R. v. I, 454). Previously the claimant's attorney had called the claim to the attention of Secretary Fall, and Assistant Secretary Finney had reported thereon (R. v. I, 451-4). Differences arose between officials of the Navy and the Secretary of the Interior on the subject of the United Midway claim (R. v. I, 472-3). The conflicts and antagonisms between the two departments quite apparently still existed (R. v. I, 471).

While the matters just referred to were pending, the Secretary of the Navy suggested to the President that the Secretary of the Interior should be placed in charge of administration of the laws relating to the naval reserves (R. v. I, 311; Sen. Doc. No. 191, 67th Cong. 2d Sess., p. 3). First Assistant Secretary Finney of the Interior Department rendered an opinion to the effect that under existing laws the Secretary of the Navy could request the Secretary of the Interior to handle for the Navy the conservation, development and operation of the lands in the naval reserves and that this would avoid "the duplication, antagonisms and divisions of authority which existed under the past administration with respect to these matters" (R. v. I, 309-11). Mr. Finney prepared a draft of an executive order to accomplish this purpose and a letter transmitting it to the Secretary of the Navy (R. v. I, 311-12; 459-60).

The proposed executive order as drafted in the Interior Department was the subject of discussion and consideration among naval officers and the Assistant Secretary, and between the latter and the Secretary of the Navy; was amended in the Navy Department and in amended form approved by Secretary Denby; in that form was personally presented by Assistant Secretary Roosevelt to Secretary Fall, who approved

the same, and was taken by the Assistant Secretary of the Navy to the President and by the latter promulgated May 31, 1921 (R. v. II, 943-949). It reads as follows (R. v. I, 25-26):

“Under the provisions of the Act of Congress approved February 25, 1920 (41 Stat. 437), authorizing the Secretary of the Interior to lease producing oil wells within any naval petroleum reserve; authorizing the President to permit the drilling of additional wells or to lease the remainder of any part of a claim upon which such wells have been drilled, and under authority of the Act of Congress approved June 4, 1920 (41 Stat. 812), directing the Secretary of the Navy to conserve, develop, use, and operate, directly or by contract, lease, or otherwise, unappropriated lands in naval reserves, the administration, and conservation, of all oil and gas bearing lands in naval petroleum reserves Nos. 1 and 2, California, and naval petroleum reserve No. 3 in Wyoming and naval shale reserves in Colorado and Utah, are hereby committed to the Secretary of the Interior subject to the supervision of the President, but no general policy as to drilling or reserving lands located in a naval reserve shall be changed or adopted except upon consultation and in cooperation with the Secretary or Acting Secretary of the Navy. The Secretary of the Interior is authorized and directed to perform any and all acts necessary for the protection, conservation, and administration of the said reserves subject to the conditions and limitations contained in this order and the existing laws or such laws as may hereafter be enacted by Congress pertaining thereto.

WARREN G. HARDING.

The White House, May 31, 1921.”

Following promptly upon the promulgation of this order the Acting Secretary of the Navy, Admiral McVay, transmitted to the Interior Department bids which had been received for lease of land in Section 1, Naval Petroleum Reserve No. 1, on which 22 wells were to be drilled, with request for action thereon, consulta-

tion to be had with the Secretary of the Navy before final action on these bids, as provided by the executive order (R. v. I, 313-15). Assistant Secretary of the Interior Finney in the presence of officers of the Navy and others opened the bids and turned them over to Dr. Mendenhall of the Geological Survey for analysis, advising Secretary Fall of this action (ib. 315; 460-470). Officials of the Navy Department desired that lease be entered into with the Pan-American Petroleum Company. The situation was complicated by the United Midway claim to the land. Secretary of the Interior Fall requested E. L. Doheny, the then President of the Petroleum Company, the highest bidder, to accept lease on a strip sufficient for the drilling of 14 wells to the end that by granting a lease on the remainder of the strip to United Midway Oil Land Company, the pending claim of that Company might be settled. Petroleum Company agreed. A lease on precisely the same terms for a strip on which eight wells were to be drilled was made with the United Midway Company, and the claim of that Company thereby settled. This entire transaction was fully reported under date of July 8, 1921, to the President of the United States (R. v. I, 470-6), and was approved by President Harding (R. v. I, 476).

On the same date, July 8, 1921, Secretary Fall wrote Mr. Doheny and expressed appreciation of the latter's action in surrendering a portion of the lease in Section 1; quoted from his (Secretary Fall's) letter to the President on the subject, and stated that there would be no possibility of further conflict between Navy officials and the Interior Department as Secretary Fall had notified Secretary Denby that the former should conduct the matter of naval leases under the direction of the President without calling any of Denby's force in consultation unless he conferred with the Secretary of the Navy personally upon matters of policy; that the Secretary of the Navy understood the situation as therein stated (R. v. I, 133-135).

Mr. Doheny replied to Secretary Fall's letter of July 8, 1921, by a letter dated July 18, 1921, protesting that he had done nothing more than any one in the circumstances would have done in the matter of relinquishing right to lease to part of the land in Section 1, but expressing his appreciation of Secretary Fall's complimentary references to Mr. Doheny's action in the Secretary's letter to the President. The remainder of the Doheny letter is of a personal nature indicating the close friendship of the two men and their families. No reference to Secretary Fall's statement respecting future handling of naval reserve leases is contained in Mr. Doheny's letter (R. v. III, 1154-5).

TRANSACTIONS PRIOR TO THE NEGOTIATIONS RESULTING
IN CONTRACT OF APRIL 25, 1922.

Between July, 1921, and April, 1922, leases covering several strips of land in Naval Reserve No. 1 were entered into. These leases while signed by the Assistant Secretary of the Interior were directed to be made by the Secretary of the Navy under the authority conferred upon him by the Act of June 4, 1920. The validity of none of these leases is involved in this suit. As a result of them, stipulated percentages of crude petroleum produced from wells on the naval reserve lands were accruing to the Government as royalty. This was also true under a large number of leases covering lands in Naval Reserve No. 2, California. The Navy Department desired that this royalty crude oil, unsuitable for its use, should be exchanged for fuel oil suitable for naval use, the fuel oil to be stored until actually used on war vessels. In this way alone, according to officers of the Navy, could the reserves be made of use and benefit to the United States Navy. Of importance was the question how to provide storage for fuel oil from the time of acquisition to the time of use. In the Navy Department there was a body known as the "Navy Council", composed of the Secretary,

the Assistant Secretary, the Admiral of the Navy, the Rear-Admirals serving as chiefs of the various Navy bureaus, and the Major-General commanding the Marine Corps. In 1921, prior to the first of October, Rear-Admiral Griffin was Chief of Engineering and Commander Stuart, of Admiral Griffin's bureau, was in charge of the Navy fuel office dealing with the petroleum reserves. The first recorded mention of a plan to acquire fuel oil and storage facilities therefor in exchange for royalty crude oil is found in the minutes of a meeting of the Navy Council held June 30, 1921 (R. v. II, 977-8). On that occasion, when there arose a discussion regarding oil, Secretary Denby expressed the opinion that it would be a comparatively easy matter to include in the cost of oil the cost of storage thereof, the question being whether a contract including in the price [of oil] the tankage should be made so that "nothing" [apparently an error in transcribing, evidently should read "everything"] would come out of the royalty. Admiral Griffin showed that he had discussed this subject with Secretary Fall when he stated, in substance, in response to Secretary Denby's remarks, that Secretary Fall had said he would obtain information on that subject (R. v. II, 978).

On July 23, 1921, Secretary Fall addressed a letter to the Secretary of the Navy asking to be advised what arrangements the Navy desired for the handling and disposition of its royalty oil accruing from wells in the naval reserves. Attention was called to the fact that persons acquiring that oil would take care of it only for a limited period and there was suggested the desirability of effecting an exchange of royalty crude oil for an equivalent of fuel oil to be stored without expense to the United States by the other party to the exchange, preferably the exchange to be of crude oil for fuel oil in storage, title to both the fuel oil and tanks to be vested in the Navy as a result of the exchange. Mr. Fall stated that if the plan met Secretary Denby's

approval and the latter desired the former to undertake to consummate the arrangement, he would be glad to do so (R. v. I, 136).

This letter was referred to Rear-Admiral Potter, Chief of the Bureau of Supplies and Accounts of the Navy, who under date of July 9, 1921, in a memorandum to Secretary Denby, "strongly recommended that the plan suggested by the Secretary" of the Interior "be accepted," as it would be of great benefit to the Navy to have the royalty crude oil exchanged for fuel oil at tidewater, and, in view of the lack of appropriation to pay for the cost of construction of tank storage, "the acquisition of tanks by exchange for crude oil from Naval Reserve wells will be most acceptable" (R. v. II, 941-2).

Thereupon, on July 29, 1921, Secretary Denby wrote a letter to Secretary Fall, which is a paraphrase of Admiral Potter's recommendation, requesting that the consummation of the plan be undertaken (R. v. I, 137-8). The concluding paragraph of Secretary Denby's letter (ib. 138) shows that the fuel oil in storage which it was then contemplated to obtain by exchange of crude oil was for current use.

Secretary Fall left Washington July 31st for the Pacific Coast and before returning he wrote, September 24, 1921, to the President, reporting that he had visited San Francisco and consulted with the officer representing the Navy there in the matter of naval oil reserves and the representative of the Bureau of Mines; that after these consultations he took up with Mr. Shoup, of the Pacific Oil Company, and other representatives of the large operators, the question of providing storage for oil for the Navy, and secured a promise from the operators, particularly Mr. Shoup, to enter into a contract with the United States to construct two large concrete reservoirs, each of 750,000-barrel capacity, on the California Coast, at places to be selected by the Navy, where ships could be readily fueled; the Secretary informed the President that

these tanks would be constructed for the United States and be paid for in oil at current prices; that he had an offer from one or two other companies to do the same thing, and therefore the assurance that the Navy could at any time when it desired to do so procure storage capacity for at least 1,500,000 barrels at one or more places on the Coast, the Navy to select the location. The Secretary of the Interior concluded his letter to President Harding thus: "This will obviate the necessity of asking Congress for authority to expend money in such construction as we have now authority to exchange crude oil for fuel oil and the companies will construct the tanks and fill them with fuel oil, we paying in crude oil for both fuel oil and the tanks in which it is stored" (R. v. II, 482-3).

Secretary Fall remained in the West until late in October, 1921.

Meantime, on October 1, 1921, upon recommendation of Secretary Denby, the President appointed John K. Robison Chief of the Bureau of Engineering of the Navy with the rank of Rear-Admiral (R. v. II, 951). At that time the Chief of the Bureau of Engineering was not in charge of, and had no duties relating to, the naval petroleum reserves, which under the Secretary of the Navy were being handled in the Navy Department by Commander Stuart, a subordinate officer of the Engineering Corps (R. v. II, 955.) Admiral Robison knew Messrs. E. L. Doheny, Sr., and Jr., having become acquainted with them when the latter served under Robison's command aboard the U. S. S. Huntington during the World War, at which time on an occasion when the father visited the son a casual conversation regarding the naval oil reserves had taken place in which Mr. Doheny expressed the opinion that by reason of drainage of oil from under the naval reserves through wells operated by owners of adjacent lands the Navy, in his opinion, would in course of time lose its oil and gas (R. v. II, 953). This acquaintanceship ripened into a friendship which has continued (ib. 954).

Neither of the Dohenys had any connection with Admiral Robison's designation as Chief of the Bureau of Engineering nor, so far as Robison knew, did they know of it until the Admiral in a personal note dated October 6, 1921, informed the elder Doheny of his promotion (ib. 954; v. I, 145-6). At that time Admiral Robison had no duties in connection with the naval petroleum reserves, his first official duties in that connection beginning October 8, 1921, by orders received directly from Secretary Denby (R. v. II, 954). Subsequently, at a meeting of the Navy Council on October 18, 1921, the Secretary of the Navy stated that unless there was objection he would transfer the fuel oil activities to the Bureau of Engineering. No objection was voiced (R. v. I, 123), and on that date Secretary Denby issued a written order transferring the fuel oil office under the Secretary to the Bureau of Engineering, the latter to have charge of all the activities performed under that office (R. v. I, 114; v. II, 955).

Admiral Robison promptly took up the duties assigned him by the Secretary of the Navy in connection with the naval petroleum reserves and familiarized himself with their status, examining all the records and files on the subject (R. v. II, 956). He concluded that the Navy, under conditions theretofore existing, was getting little benefit from the reserves; that oil to the value of millions of dollars had been lost by drainage through wells on privately-owned adjacent lands; he discussed questions pertaining to the reserves with Secretary Denby right along; he had conferences with Commander Stuart of his Bureau; Director Bain of the Bureau of Mines, Interior Department; Mr. Ambrose, Chief Petroleum Technologist of that Bureau; First Assistant Secretary Finney and Secretary Fall of the Department of the Interior (R. v. II, 957-960). Out of these conferences there was evolved a plan which was set forth in a letter from the Secretary of the Navy to the Secretary of the Interior dated October 25, 1921,

thereafter referred to by Admiral Robison and Secretary Denby as the "policy letter" (R. v. II, 960-1; v. I, 146-9). This letter sets forth plan for drilling the California Naval Reserves; for exchanging royalty crude oil derived therefrom for fuel oil to be delivered to the Navy on the Pacific Coast; for devoting so much of the royalty oil as is not used by the Navy to the construction of oil storage at Pearl Harbor, Hawaii, and at other points to be thereafter designated by the Navy Department; for the exercise by the Interior Department of its best efforts to obtain for the Navy as large royalty and as favorable terms as practicable by public competition or otherwise; for the submission to the Navy Department for approval of qualities, deliveries, engineering and other features of the terms for conversion of crude oil at the well for fuel oil at tidewater and in tanks to be provided by lessees; for the arrangement and consummation of all leases and contracts, except as last mentioned, by the Interior Department, copies to be furnished the Navy Department as a matter of information and record only; for the making by the Interior Department of every effort to expedite the solution of the problem so that fuel oil at Pacific tidewater in exchange for royalty crude might be delivered as soon as possible to naval vessels and the erection of suitable storage facilities for 1,500,000 barrels of fuel oil undertaken and expedited. It is stated in the policy letter that the general intent of the arrangement therein outlined is to transform royalty oil into either (a) fuel oil for current naval use, or (b) fuel oil stored where required by the Navy as a reserve, the storage to be naval property and to accord with naval requirements (R. v. I, 147-8). Admiral Robison drafted that letter in rough and before its final drafting went over it with Secretary Denby who approved it (R. v. II, 960-1) and who inserted the words "or otherwise" in the paragraph providing that the Interior Department should exercise its best efforts to obtain for the Navy as large royalties and as

favorable terms as practicable by public competition, when Admiral Robison informed Secretary Denby that Secretary Fall recommended it (R. v. II, 965; v. III, 1111-13); Secretary Denby wanted in the policy letter the paragraph that provided that leases would be consummated by the Interior Department, copies to be furnished the Navy Department as a matter of information and record only, in order to be relieved of specific approval of each of the leases in the case of areas that were under the law controlled by the Interior Department and not have to investigate or pass upon problems that were, he believed, entirely within the purview of that Department (R. v. II, 965-6).

According to Admiral Robison, from the time he assumed the duties assigned to him by the Secretary of the Navy in connection with the naval petroleum reserves he saw Secretary Denby on the subject every time he saw Secretary Fall, Director Bain, Chief Petroleum Technologist Ambrose, or other officials of the Interior Department; he consulted the Secretary of the Navy, sometimes before, and always after, conferences with Interior Department officials; he made himself genuinely a personal representative of the Secretary of the Navy and had to inform himself of Mr. Denby's ideas and plans in order to accomplish that; he always made known to the Secretary of the Navy the subject of any conference, and plans under consideration were discussed before conferences relating thereto took place (R. v. II, 961).

Under date of October 30, 1921, Secretary Fall acknowledged Secretary Denby's October 25th policy letter, stated that he entirely agreed therewith, that the policies therein set forth would be carried out to the best of his ability, and that "of course" should any new matter come up at any time he would unhesitatingly and immediately consult Secretary Denby personally or through Admiral Robison (R. v. I, 149).

There was in the Navy Department a conflict of ideas respecting the use to be made of oil accruing

from the naval reserves: (a) One idea was to use it currently in naval vessels, and the plan involved in following that idea was to acquire, in exchange for royalty crude oil, fuel oil and storage therefor at points where naval vessels could readily bunker; (b) the other idea also involved the exchange of royalty crude oil for Navy fuel oil and storage facilities therefor, but contemplated that the oil would be held in storage as a reserve until the national defense required its use. At the time of the writing of the policy letter of October 25, 1921, it was thought that there would be sufficient royalty crude oil to carry out both plans so far as to provide fuel oil for current use and provide reserve storage for 1,500,000 barrels of fuel oil at Pearl Harbor. Admiral Robison discussed this subject with Secretary Fall in November, 1921, and in that discussion there was considered the cost of Navy specification storage tanks as compared with tanks conforming to commercial standards. Secretary Fall criticised the cost of naval storage facilities and expressed the opinion that they could be obtained for less. Admiral Robison requested Mr. Fall to get him some figures showing at what cost such tanks could be obtained, and Mr. Fall stated he would get them. On November 29, 1921, Secretary Fall received from Mr. Doheny, then president of the Transport Company, letter dated November 28, 1921 (R. v. I, 162-3). In this letter Mr. Doheny stated that along the lines of the Secretary's suggestion the writer had made inquiries regarding the cost of constructing tanks for storage of 1,500,000 barrels of fuel oil at Pearl Harbor, and found that the best price obtainable for these tanks, the Government to stand the cost of transporting the material from ship's side to tank site, and the cost of grading and otherwise preparing the tank site, was \$19,960 per tank; he stated the then prevailing crude and fuel oil price per barrel and the total which 27 tanks containing 1,485,000 barrels of fuel oil would cost and that "were we to

construct the tanks and furnish the oil on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserve and to be leased to us," it would require a stated number of barrels of oil. Mr. Doheny concluded that he supposed the matter would be referred to Assistant Secretary Finney who with Rear Admiral Robison might arrange the details of it during Mr. Fall's absence, and as he, Doheny, also expected to be absent, he was confidentially furnishing Mr. Cotter (Vice-President of the Transport Company) with the information so that the latter could intelligently discuss the matter with Mr. Finney.

There was pending in the office of the Secretary of the Interior at this time application, presented to Assistant Secretary Finney by representatives of the Petroleum Company and the United Midway Oil Company, for relief from the high royalties reserved in the July, 1921, leases because of the small initial production shown by wells drilled thereunder; Judge Finney had taken this up with Secretary Fall; it had been determined not to grant a reduction in the royalties reserved in the July leases but to enter into additional leases in Reserve No. 1 with the same lessees at lower royalties, which would perhaps enable them to make up the losses on the first wells. Under this plan the United Midway Company was to have an additional lease of a strip lying south of the eight-well strip covered by its July lease and the Pan American Company was to have a lease on the remainder of Section 1, lying outside of the other leased areas (R. v. I, 322-3). This was the only lease which in November, 1921, the Petroleum Company was to get and it was in fact executed December 14, 1921, by Assistant Secretary Finney for the Government and Vice-President Cotter for the company, having been authorized by Secretary Denby (R. v. I, 322-3; v. II, 488-9; v. III, 1047-8).

On November 29, 1921, Mr. Cotter called on Secretary Fall and the latter addressed to Admiral Robison, and sent by the hand of Cotter, letter bearing that date by which there was transmitted the above mentioned letter which Mr. Doheny had written Mr. Fall. Secretary Fall stated to Admiral Robison that should the latter think best to accept the proposition contained in Mr. Doheny's letter it would be necessary, in the Secretary's judgment, to turn over to Mr. Doheny, "if we can do so, leases upon further wells or area in the naval reserve in which he is now drilling. If this is done it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan-American. The gas pressure is lessening to such a degree that the output of the wells of the two latter companies, as well as of other companies drilling in this neighborhood, is decreasing and is very disappointing. The two companies named are pumping their wells and of course they are not making any money, but will experience a loss in the payment of the fifty-five per cent royalty to the Government." This royalty was fixed in the leases between the Government and the Midway and Pan-American Companies entered into in July, 1921. Secretary Fall concluded with a request that if Admiral Robison approved the proposition he should indicate his approval by endorsement upon Mr. Doheny's letter, stating that the Admiral's simple O. K. would be sufficient (R. v. I, 163-4).

The two last mentioned letters were received by Admiral Robison immediately proceeding a Navy Council meeting which was held November 29, 1921 (R. v. II, 970-1), at which meeting there was a full attendance (ib. 971), and during which Admiral Coontz, Chief of Operations, brought up the subject of fuel oil, calling on Admiral Robison for a statement regarding the oil situation and on Admiral Latimer, Judge Advocate General of the Navy, for an opinion as to the legal right to use oil from the reserves. Admiral

Robison stated to the Council that the Navy had assurance from the Interior Department of a supply of fuel oil either for current use or reserve; he stated the quantities that would be available; he expressed the view that the policy should be to transform "this unavailable, more or less intangible naval fuel oil reserve into a tangible reserve to be located as in accord with our plan for national defense. The first step was to provide at Pearl Harbor storage for 1,500,000 barrels fuel oil. The tanks for containing this would be entirely paid for by the royalty on the oil." Referring to the letter of November 28, 1921, from Mr. Doheny to the Secretary of the Interior, and to Secretary Fall's letter of November 29th to Admiral Robison, the latter stated at the Council meeting that he had a definite proposition to supply the fuel oil in storage at Pearl Harbor (R. v. II, 971-2; 976); Secretary Denby stated that the subject had been discussed at the Cabinet meeting that morning and that in his mind there were two questions: First, the legal right, and, second, the desirability of using the oil currently; he expressed the view that to store it would conform to the reserve theory. In the ensuing discussion Admiral Robison referred to the information in Secretary Fall's letter to the effect that the gas pressure in the reserve was decreasing; the Judge Advocate General commented on the broad authority given the Secretary by the law; the Secretary expressed the view that to use the oil [currently] would be a subterfuge and that he wanted things like that to go to Congress, and when Admiral Robison requested instructions about the tanks at Pearl Harbor the Secretary announced that he would have to go into the matter further, that it constituted a matter of national policy which he did not want to decide until after he had seen the President and that he would probably take it up again with Congress. He expressed, after the Judge Advocate General read at the Council meeting the Act of June 4, 1920, the view that power existed to adopt the Pearl

Harbor fuel oil in storage policy, but directed Admiral Robison not to go ahead until the Secretary had seen the Congressional Committee (R. v. II, 974-5).

Mr. Doheny's letter of November 28, 1921, was thereupon returned to the Interior Department, where it came into the possession of Dr. Bain, of the Bureau of Mines, without comment or instructions (R. v. II, 719). The only purpose it served there was to inform Director Bain that Mr. Cotter had been placed in charge of its subject matter; Dr. Bain kept it in his office, with other papers relating to the subsequently developed and consummated Pearl Harbor oil project, it being, in his estimation, an engineer's preliminary estimate on the probable cost (R. v. II, 719); there was no official action ever taken on Mr. Doheny's November 28th letter, and it was kept in the files of the Bureau of Mines where the original remained at the time of the trial of this suit. Admiral Robison on November 29th, the day the letter reached him, announced at the Navy Council meeting that he was going to look into the matter to see whether the tanks referred to in Mr. Doheny's letter were specification tanks; subsequent to that time he did nothing with reference to that letter; no action was ever taken in the way of accepting that proposition or any official action on it (R. v. II, 992). He told Director Bain that " 'We could not take any such proposition as that,' and let it drop at once" (ib. 992-3). There is no evidence that Secretary Fall ever thereafter inquired about that letter, referred to it, or showed any interest in it.

Secretary Fall left Washington for the West December 1, 1921. When he left the status of the question, whether or not the Navy desired royalty crude oil exchanged (a) for fuel oil for current use, (b) for fuel oil in reserve with storage facilities therefor, had not been determined by the Secretary of the Navy and was in the position stated by him at the Navy Council meeting on the 29th of November as above set forth (R. v. II, 974-5). Before leaving Washington Secre-

tary Fall directed the issuance of instructions, which under date of November 30, 1921, were issued by Assistant Secretary Finney to the effect that local representatives of the Bureau of Mines in California were directed to send all crude oil certificates representing the Government royalty oils under leases in naval petroleum reserves, California, directly to the Secretary of the Navy, Washington, D. C., sending copies thereof to the Bureau of Mines, Department of Interior; that under an arrangement already made by the Bureau of Mines for exchanging the crude oil for fuel oil during November and December, 1921, papers evidencing the amounts of fuel oil to which the Navy would be entitled for those months would be delivered to the Secretary of the Navy, and copies sent the Secretary of the Interior; that as it appeared that the Bureau of Mines was negotiating contracts for the exchange of crude for fuel oil for the year 1922, it was directed that no such contract be consummated, but pending negotiations might proceed, the matter to be taken up with and by the Navy at a later time (R. v. I, 325-6).

Thus stood the matter of the handling of the naval reserves and oil produced therefrom when Secretary Fall left Washington December 1, 1921 (R. v. I, 324). Mr. Fall did not return to Washington until January 27, 1922 (R. v. I, 174). There is no evidence of any action taken or communication written by him between these dates.

DECISION OF SECRETARY OF NAVY TO EXCHANGE ROYALTY
CRUDE OIL FOR FUEL OIL AND STORAGE FACILITIES
THEREFOR AT PEARL HARBOR, HAWAII.

On November 30, 1921, Admiral Robison addressed two letters to the Judge Advocate General of the Navy. In the first, opinion was requested as to whether it would be legal to exchange royalty crude oil from naval petroleum reserves Nos. 1 and 2 for fuel oil in storage at Pearl Harbor or other points to be later

designated by the United States Navy, the tanks to be provided by the lessee of oil wells, and the oil in storage at Pearl Harbor, as well as the tanks and appurtenances, to become the property of the United States (R. v. II, 697-8). By the second of these letters opinion of the Judge Advocate General was requested as to the legality of the Navy's using currently oil accruing for its account from the reserves (R. v. II, 981-2).

The questions thus propounded were considered by the Judge Advocate General, his assistant, the Solicitor of the Navy Department, and an attorney in that office, and under date of December 2, 1921, a written opinion was rendered that under the provisions of the Act of June 4, 1920, the Secretary of the Navy had legal power (a) "to exchange the royalty crude oil for fuel oil in storage at Pearl Harbor or other points to be designated by the Secretary of the Navy under arrangements whereby the exchanged oil shall be stored in tanks provided by the lessees of the oil wells, such tanks and their appurtenances to become the property of the United States"; and (b) "to use the royalty oil on board vessels of the United States Navy and if so used, it should be expended at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct, and should be debited at the rate so fixed by the Secretary to the appropriation, 'Fuel and Transportation' " (R. v. II, 698-702).

December 5, 1921, Admiral Latimer, Judge Advocate General, and Admiral Robison discussed with Secretary Denby the Judge Advocate General's opinion, which the Secretary had gone over in detail and approved. Secretary Denby at that conference stated that it seemed necessary for the Navy to go ahead without waste of time to the accomplishment of the Pearl Harbor project and he instructed Admiral Robison to prepare the necessary order from the Secretary of the Navy to the Chief of the Bureau of Engineering to put that project into effect. Upon Admiral

Robison's stating that it would be sufficient for the Secretary to indicate his instructions on the Judge Advocate General's opinion, Secretary Denby affixed, over his signature, his approval to the opinion (R. v. II, 982-3; 702), and, opposite paragraph (a) above, in his own handwriting wrote, "Do this. E. D. Dec. 5th, 1921." (ib. 702; 983) as a definite order upon which Admiral Robison proceeded thereafter in the matter that resulted in the contracts and leases in suit. At the time that the Secretary of the Navy gave the foregoing instructions the importance thereof was discussed (R. v. II, 982-3).

Admiral Robison requested the Bureau of Yards and Docks to proceed with the work of preparing plans which had been started in a preliminary way a year before (R. v. II, 983).

Admiral Robison then by telephone informed Acting Secretary Finney of the Department of the Interior that the Navy Department wanted to go ahead with the Pearl Harbor project, and would not thereafter use any of the royalty oil for current purposes, adding that the Judge Advocate General and Solicitor of the Navy had rendered an opinion that this would be a legal procedure (R. v. II, 989). Mr. Finney called attention to the conflicting instructions received by the Interior Department from the Navy Department and asked that his Department be definitely advised in writing the plan the Navy desired followed (R. v. II, 989). Subsequently this was the subject of correspondence between Acting Secretary Finney and the Navy Department (R. v. I, 331-3; 335-7).

When Admiral Robison, on December 5th or 6th, informed Acting Secretary Finney of the opinion of the Judge Advocate General and the Navy's plan (R. v. I, 328; v. II, 509), Mr. Finney, without requesting or awaiting any instruction from Secretary Fall, informed the Director of the Bureau of Mines that the Secretary of the Navy had directed the making of arrangements

for the exchange of royalty oil for fuel oil for the Navy and for storing same "under arrangements with oil companies, which will build the tanks, taking oil in payment therefor, such tanks to become the property of the United States." Mr. Finney revoked the order given by direction of Secretary Fall to the Director of the Bureau of Mines on November 30, 1921, and instructed the Director of the Bureau of Mines to proceed with the plan above mentioned (R. v. I, 326-7; v. II, 509-10). Before sending these instructions to the Bureau of Mines Mr. Finney did not in any way communicate with Secretary Fall; the basic reason for his action was the direction of Admiral Robison, who told him that the Secretary of the Navy had approved that procedure. Following this Mr. Finney by telegraph briefly informed Secretary Fall of the Navy Department's request that the Interior Department proceed as originally planned with reference to exchange of oil and securing storage, and stated he had advised the Bureau of Mines thereof (R. v. I, 329). There is no evidence of any reply from Mr. Fall or of any action taken by him at the time.

The Navy Council met December 8, 1921. At the meeting there was discussed the aforementioned opinion of the Judge Advocate General, and draft of a letter prepared in the Bureau of Yards and Docks to be sent the Interior Department requesting its assistance in the negotiations for the exchange of crude oil for fuel oil and storage facilities at Pearl Harbor was presented, the Secretary of the Navy disapproving reference therein to any question of power under the law, a point which it was stated he had settled, about which he had no question, and which should not be made part of a letter to be sent the Interior Department. It was suggested that the letter be recast, and the Secretary of the Navy directed that anything going to the Secretary of the Interior must go through him (R. v. II, 983-8).

The last mentioned letter was redrafted and under

date of December 9, 1921, was sent, over the signature of Acting Secretary of the Navy Roosevelt, to the Secretary of the Interior, being received by the Acting Secretary of that Department, in the absence of Secretary Fall (R. v. II, 988; v. I, 329). By this letter the Navy Department informed the Interior Department of the preparation of plans for the storage of 1,500,000 barrels of fuel oil in steel tanks at Pearl Harbor, to be constructed and filled with fuel oil in connection with the exchange of royalty oil obtained from the naval petroleum reserve; plans and specifications were enclosed and it was stated that in preparing the project for bidders the Navy Department would render any assistance possible; attention was called to the fact that the character of the tanks differed from the standard type of construction on account of the military features of the project and the fact that the tanks were to be used for storing fuel oil for long periods of time; it was stated that the technical force of the Navy could be of material help and suggested that an officer would be detailed. It was requested that as the project was embodied in the war plans of the Navy Department all matters in connection therewith be regarded in as confidential a manner as possible (R. v. I, 329-31). Acting Secretary Finney, on December 10, 1921, acknowledged to the Secretary of the Navy the foregoing communication, advised that the matter would be promptly taken up by the Bureau of Mines, requested a copy of the Solicitor's opinion, called attention to the conflicting instructions thus far received from the Navy, and the desirability of a definite understanding (ib. 331-3). Secretary Denby under date of December 14, 1921, replied to Acting Secretary of the Interior Finney's letter of December 10th, confirmed the fact that it was his desire that the Interior Department proceed to handle oil and make exchanges for fuel oil and storage according to plans set forth in Navy Department letters of October 25 and December 9, 1921, furnished ex-

tract of the Judge Advocate General's opinion, stated the Secretary of the Navy's desire that all royalty crude oil should until further notice be used to pay for tankage for the Navy and for filling said tankage with fuel oil for storage, expressed the desire that the Interior Department proceed as soon as practicable to make a contract for the storage tanks at Pearl Harbor, and advised that he had designated Admiral Robison as his representative to handle all details in connection with petroleum reserve questions (R. v. I, 339-42).

Thereupon the Bureau of Mines of the Interior Department undertook in conjunction with Admiral Robison and the Bureau of Yards and Docks of the Navy the preliminary work and negotiations prefatory to the inviting of bids for the Pearl Harbor fuel oil project.

STEPS TAKEN BY GOVERNMENT TO OBTAIN COMPETITION ON PEARL HARBOR PROJECT.

Acting Secretary of the Interior Finney turned over to Director Bain of the Bureau of Mines the Navy's letters of December 9 and 14, 1921. Taking up the matter of conferences with prospective bidders, Dr. Bain knew from Mr. Doheny's letter to Secretary Fall dated November 28, 1921, that Mr. Cotter would handle negotiations for the Transport Company and requested Secretary Finney to write Mr. Cotter, which Secretary Finney did under date of December 16, 1921 (R. v. II, 718; v. I, 342). This was the only action ever taken on the Doheny letter of November 28th (R. v. II, 719-20; 506). It was then filed (ib. 720).

Mr. Doheny, Jr., visited Admiral Robison December 12, 1921, on behalf of a former shipmate of both of them who was then a naval reserve officer. The visit had nothing to do with any oil matter (R. v. II, 993). After the subject of the visit had been concluded, Admiral Robison brought up oil matters, and did not tell Doheny, Jr., anything about the details of the Pearl Harbor plan. He discussed naval oil reserve drainage

and requested the young man to ask his father for some advice Admiral Robison desired on the subject. Mr. Doheny, Jr., dined with Admiral and Mrs. Robison at their residence in Washington, returned to New York, and wrote the Admiral under date of December 14th (R. v. II, 993-4; v. I, 343-4). Admiral Robison replied, stating he would make an effort to be in Washington when Doheny, Sr., visited the following Saturday and would be glad to talk over with him the oil situation (R. v. I, 344).

December 17, 1921, Admiral Robison and Mr. Doheny, Sr., had a long conversation in the former's office at Washington on the subject of the Pearl Harbor project (R. v. II, 994-6). Mr. Doheny stated that he had already considered the project, but that his people were against it and that he had made up his mind to turn it down (ib., 996); that his company had no such considerable interest in California as, in the opinion of the rest of the company, would justify the large expenditure that would be required and that he had made up his mind to stay out of it (R. v. III, 1116-17). Admiral Robison urged Mr. Doheny not to stay out and appealed to him to help in the accomplishment of the security of the country, representing that as at stake. The naval needs and the meaning and results of war were dwelt upon. In view of the situation depicted by Admiral Robison Mr. Doheny pledged his company to bid on the Pearl Harbor construction without profit (R. v. II, 994-6).

Prior to having Acting Secretary Finney write Mr. Cotter, vice-president of the Transport Company, asking him to call on Director Bain, the latter by long distance telephone and telegrams requested that a representative of the J. G. White Engineering Company, well known to him, call at the Bureau of Mines for consultation on the subject of the Pearl Harbor project, and on December 16th (the day Mr. Cotter was written by Mr. Finney) Mr. Gano Dunn, president of the White corporation, telegraphed Dr. Bain that he would

be glad to come to Washington and a meeting was arranged for, and took place, December 23, 1921 (R. v. II, 722-3). Beginning then the President of the White corporation was frequently and fully consulted, his company was invited to compete, and he was helpful. The White Company and defendants were then strangers (R. v. II, 723-4; v. I, 349-50; 357-8; 366-7; 371-2; v. II, 931-2, and v. II, 889-934). With this as a beginning, Dr. Bain and the Bureau of Yards and Docks were occupied in December, 1921, in preparing the necessary data upon which to base the presentation of the Pearl Harbor project to other parties who might be expected to be interested in making bids. When this data had been placed in fairly complete form, Dr. Bain started for California (R. v. II, 726, et seq.). Before leaving for the West Dr. Bain by letter dated December 23, 1921, addressed to Secretary Fall, then in Three Rivers, N. M., advised that he was going west primarily to consult, with the Standard and such other companies as might be determined in conference should be taken into account, with regard to the tankage plant of the Navy; that he had seen Mr. Cotter, of the Transport Company, who was getting together additional data and had had preliminary conferences with the J. G. White Company, which had done a large amount of construction work for the Navy and was also dealing in oil; that he planned to stop at Three Rivers en route to Los Angeles and expected by that time to be able to give the Secretary some idea of the character of the contract which should be made in this case; that the Navy had given the Interior a free hand to go ahead (R. v. I, 345). Dr. Bain left Washington December 28, 1921 (R. v. I, 345; v. II, 724). He had previously, pursuant to an appointment made at his request, discussed the Navy plan with Mr. Cotter, whom he knew well (R. v. II, 720), with Mr. Dunn of the White Engineering Company (ib. 722), frequently with Admiral Robison (from whom he about this time learned that Admiral Robison

had secured a definite promise from Mr. Doheny that his company would bid on a plan of this kind if it could be reduced to a working basis) (ib. 721), with Commander Sherman, project manager of the Bureau of Yards and Docks, Navy Department (ib. 721), with Chief Petroleum Technologist Ambrose of the Bureau of Mines (ib. 725), and with Acting Secretary Finney. Dr. Bain introduced Mr. Dunn and Mr. Cotter to each other. Mr. Dunn had no previous knowledge of the Pan-American Company or acquaintanceship with its officers (R. v. II, 724; 899).

Mr. Cotter, in charge of the matter for the Transport Company, learning that Dr. Bain was going to the Pacific Coast, decided to go there to be present at conferences and he and Dr. Bain were on the same train from Washington as far as Three Rivers. (R. v. II, 837.)

When Dr. Bain left Washington he took with him a large roll of maps and plans covering the first Pearl Harbor project; his destination was Los Angeles and San Francisco; he stopped en route at Three Rivers, N. M., staying there overnight with Secretary Fall; he told the Secretary of the plans which had been developed in rough outline, and what he, Bain, thought it would be feasible to do, and secured the Secretary's approval in general terms subject to the working out of the contract. Dr. Bain told Mr. Fall that he was on his way to California to consult the large marketing companies there and see how many of them would be agreeable to entering into the arrangement contemplated. The Secretary approved what was being done. He told the Secretary what companies he intended to see in California, he having received no instructions from the Secretary on that subject; the government then had oil exchange arrangements with four big companies in California and they were naturally selected to be asked to consider and compete for contract for the Pearl Harbor exchange project; and Dr. Bain had determined in his own mind to see the officers of those

companies and so told Secretary Fall (R. v. II, 725-6). Dr. Bain remained in Three Rivers twenty-four hours and on January 2, 1922, he discussed the Pearl Harbor subject with Messrs. Doheny, Anderson, Bridge, Danziger and Cotter, officers of the Pan-American Company in Los Angeles; he left a set of the Navy plans and a copy of the Judge Advocate General's opinion and asked that the matter be taken up for decision as to whether that company would be prepared to offer a bid covering what the plans then showed. Dr. Bain had impressed upon Mr. Dunn, of the White Company, the confidential character of the Pearl Harbor project, and he referred to that in his conference with the Pan-American officials (R. v. II, 727) as he thereafter did to every one he consulted. Proceeding to San Francisco, Dr. Bain placed the project before officials of the Standard Oil Company, of the engineering firm of Ford, Bacon & Davis, of officers of the General Petroleum Company, and of the Associated Oil Company and the Pacific Oil Company, in each instance presenting a set of the plans and other data similar to that which had been left with the Pan-American Company officials and giving the representatives of each company the same opportunity to make a bid, and asking them if they would be willing to do so if the plan could be worked out on a business basis. In each instance Dr. Bain asked for advice from these business men as to the form in which the project could be worked out on a business basis. He informed the representatives of each company the names of the others that the matter had been placed before, and he treated them all alike in every respect. He received preliminary estimates from some of them (R. v. II, 727-37). Returning to Los Angeles Dr. Bain further presented the matter to officers and counsel of the General Petroleum Company in that city and to officers of the Union Oil Company there (ib. 740-1). On this second trip to Los Angeles he again saw Messrs. Doheny, Anderson and Cotter, and perhaps

other officials in the Pan-American Company (ib. 742). Dr. Bain returned to Washington January 22 or 23, 1922. At San Francisco and on the second visit to Los Angeles he had been accompanied by the Petroleum Technologist, Ambrose, and the latter returned to Washington with the Director. The result of Dr. Bain's interviews with the representatives of the oil companies in California was: he understood that Union Oil Company would not be interested in competing as they did not want to take part in a construction program (ib. 741-2); the General Petroleum Company would not compete because its counsel did not believe that the law authorized such an exchange arrangement (ib. 740); the Pan-American Company would offer a bid on the project when ready (ib. 742); the Standard Oil Company would be interested in the exchange of oil, but did not want to do any construction work for the Government and believed that a plan under which the construction work should be contracted to an engineering firm and the exchange of oil contracted to an oil company was a correct one (ib. 729); Ford, Bacon & Davis, an engineering firm, had substantial dealings with Standard Oil and that firm would give the matter consideration and decide whether it could make a bid (ib. 729-30); the Standard Oil would keep the matter under consideration; the Associated Oil Company (affiliated with the Pacific Oil Company) would have its engineer make for Dr. Bain's information a preliminary estimate of cost, would suggest changes in the plans thought to be advantageous, and take under consideration submitting a proposal (R. v. II, 731-8; 743).

After his return to Washington, Dr. Bain reported to Secretary Fall and Admiral Robison the result of the various conversations he had with the representatives of the above named companies (R. v. II, 743-4). There was then undertaken the work of getting up final plans in the Bureau of Yards and Docks on which bids could be made and the draw-

ing up of conditions of proposals, which was done in conjunction with officers of the Navy (ib. 744). Before sending out invitations for proposals Dr. Bain had a further talk with Secretary Fall, and frequently saw Assistant Secretary Finney. The Secretary was informed of the substance of the proposal which was being prepared and the persons to whom it would be sent, and expressed his approval (ib. 745). Prior to February 15, 1922, Secretary Fall told Mr. Finney and Director Bain to go ahead and handle this Pearl Harbor project matter, that he was going to be busy on other things. (R. v. II, 512; 745).

The directors of the White Engineering Company having decided they did not want a contract involving compensation in crude oil, the company's president, Gano Dunn, effected an arrangement to combine with the Transport Company, the latter to bid for the contract and, if successful, to have the White Company, as its representative, do the construction work (R. v. II, 893; 899-900; 908; 909-10). Similar arrangements were made between other oil and engineering companies (R. v. II, 773).

On February 15, 1922, Director Bain sent from his office in Washington to the Standard Oil Company, Ford, Bacon & Davis, the Associated Oil Company, the Pan American Company, and the J. G. White Engineering Company letter of invitation for proposals, with accompanying plans, specifications and conditions, the matter sent to each of these addressees being identical (R. v. II, 745-6; v. I, 350). The companies addressed were invited to submit bids March 1, 1922, for the exchange of royalty crude oil, accruing under leases in the naval reserves, for storage facilities to be provided at Pearl Harbor and 1,500,000 barrels of fuel oil to be delivered into said facilities (R. v. I, 350-3). There followed correspondence and consultations, resulting in the preparation of more complete plans and detailed specifications and a revised form of invitations for

bids, because of the Navy Department's objection to the receipt of bids on a "cost plus" basis which the invitation of February 15th contemplated.

Under date of March 7, 1922, there was sent, over the signature of Assistant Secretary Finney, to the same addresses to whom the letter of February 15th had been sent, the revised invitation for proposals for the "exchange of naval royalty oil for fuel oil in storage at Pearl Harbor," conditioned for the submission of bids April 15, 1922. Detailed plans and specifications and information for bidders, together with conditions under which proposals were to be received, were transmitted (R. v. I, 374-383).

Dr. Bain conducted a correspondence with Mr. McLaughlin, vice-president, Associated Oil Company, in which that company was urged to submit proposals on the Pearl Harbor project (R. v. II, 751-9). Mr. McLaughlin came to Washington prior to the opening of bids and held conferences with the Department on the subject. Mr. Dunn of the White company and Mr. Cotter of the Pan American Company, and representatives of the Foundation Company, of the Pittsburgh & Des Moines Steel Company, and others, did likewise (ib. 769-771). All of these concerns were furnished sets of plans, specifications, and conditions for bidding.

Conferences between Government officials and prospective bidders are usual, customary and even necessary on complicated projects like this (R. v. II, 564; 911-12; 751). Nothing occurred in this respect different from procedure in connection with other government projects (R. v. II, 912; 751).

During March, 1922, the Navy Department, through the Bureau of Mines, sent to all concerns invited to bid a list of firms considered acceptable as bidders on sub-contracts in connection with the Pearl Harbor project (ib. 760-1).

In addition to the work being done by Admiral Robison, the Chief of the Bureau of Yards and Docks,

Admiral Gregory, was in constant touch with Robison and Bain and in consultation with prospective bidders (R. v. II, 541-582). The Bureau, under Admiral Gregory's supervision, prepared all plans and specifications sent to prospective bidders (ib. 564).

The Foundation Company, one of the large engineering and construction companies of the country (ib. 770), stated in writing that it had an assurance of a source of disposal of crude oil, to be received in exchange on the project, and desired plans and specifications with a view to making a formal tender thereon (ib. 771). Bids were expected from the Foundation Company and the Pittsburgh & Des Moines Steel Company and not until bids were opened was it known that these companies would not submit proposals (ib. 770-1).

The time fixed for receiving bids was April 15, 1922. A few days previous to this date Secretary Fall had a conversation with Dr. Bain and Mr. Finney at which time he asked them how the proposed Pearl Harbor matter was getting on; being informed that bids would not be opened until April 15th he expressed disappointment, stating that he desired to close the Teapot Sinclair matter and this at about the same time; he was apparently impatient of the delay in the Pearl Harbor matter; Dr. Bain and Mr. Finney explained that the delay had been occasioned by various changes in the specifications and that the last invitation for bids had fixed the date of opening for bids for April 15th, before which they could not be opened. The Secretary did not make any suggestion as to any other way of closing the matter up than by waiting until the bids came in and were opened (R. v. I, 392; v. II, 772). At this time Secretary Fall was informed that bids from the Pan American, Associated and Standard Oil Companies were expected, that the Foundation Company and Pittsburgh & Des Moines Steel Company, engineering concerns, would probably bid on parts of the work,

while the White Engineering Company and Ford, Bacon & Davis were expected to bid in connection with the Pan American and Associated Companies, respectively (R. v. II, 772-3).

Secretary Fall contemplated leaving Washington prior to April 15th. Under date of April 12th he wrote to the Secretary of the Navy on the subject of the difficulty and delay in connection with the Pearl Harbor project, stating that one reason was that construction companies had no use for oil and oil companies were not engaged in construction work, and recommended that the Secretary of the Navy submit to Congress for inclusion in the then pending naval appropriation bill a provision to the effect that storage of fuel oil from naval reserves might be provided, either by the exchange of oil for such storage or by the sale of royalty oil and the use of the proceeds thereof for payment for storage facilities. Mr. Fall expressed the opinion that if Secretary Denby would present the matter to Congress he was confident Congress would enact the proposed additional legislation (R. v. I, 393-4). This was three days before bids were scheduled to be received. The Secretary of the Navy took no action on this suggestion but determined to await the receipt of bids and then to decide, in the light of what was disclosed by that event, whether or not it was necessary or advisable to follow Secretary Fall's suggestion (R. v. II, 1001-2).

Secretary Fall left Washington April 13, 1922 (R. v. I, 392), and did not return until some time after May 12th (R. v. II, 784).

Prior to leaving Washington the only instructions given by Secretary Fall regarding the prospective bidding on the Pearl Harbor project was that Assistant Secretary Finney should receive and open the bids and the Bureau of Mines should cooperate with Mr. Finney in the study thereof (R. v. II, 516; 774-5).

BIDS ON THE PEARL HARBOR PROJECT.

April 15, 1922, in the office of Acting Secretary of Interior Finney, bids were received and publicly opened and read in the presence of Acting Secretary (Finney), the Director of the Bureau of Mines (Bain), the Petroleum Technologist of that Bureau (Ambrose), Messrs. Tough and Campbell of the Bureau of Mines, and representatives of the Transport Company, the White Engineering Corporation, Associated Oil Company, Pittsburgh & Des Moines Steel Company, and W. R. Grace & Co. The proceedings were stenographically minuted (R. v. I, 406-8).

Four bids were received, one from the Standard Oil Company of California for the exchange of royalty crude petroleum produced in Naval Reserves Nos. 1 and 2 for fuel oil delivered into Government tankage at Pearl Harbor and/or into tank ships of the Government at stipulated California ports (R. v. I, 408-10); one from the Associated Oil Company offering—"subject to ratification and/or confirmation by Congress of the authority of the Secretary of the Interior and/or the Secretary of the Navy," to exchange oil produced in the naval petroleum reserves for storage facilities and appurtenances,—to construct the fuel oil storage plant called for by the plans and specifications "to be located at the United States naval station, Pearl Harbor," and to furnish 1,500,000 barrels of fuel oil into said storage, in exchange for 6,201,903 barrels royalty crude oil from Naval Reserve No. 2 (R. v. I, 410-11; 413). Two bids were received from the Transport Company, designated as Proposal A and Proposal B. This was decided upon by Mr. Cotter, in consultation with Mr. Dunn, of the White Company, two or three days before April 15th (R. v. II, 909-10). By Proposal A the Transport Company proposed to construct the storage facilities as specified and to fill the same with fuel oil, all in exchange for 6,092,709 barrels of royalty crude oil; and by Proposal

B the Transport Company proposed the same thing in consideration of 5,878,905 barrels of royalty crude oil (213,804 barrels less than stipulated by Proposal A, representing at the time a difference in money value of \$235,184.44), provided, further, that if the actual cost to the Transport Company of constructing the storage facilities turned out to be less than the cost represented by the number of barrels of crude oil estimated in this proposal for that part of the undertaking, the Company would give to the Government the benefit of the saving by crediting such saving in barrels of basic crude on account of the proposal sum (R. v. I, 40; 411-12; 413, 417). Proposal B was conditioned upon the contract containing a clause giving to the Transport Company a preferential right to lease from the Government any land within Naval Petroleum Reserve No. 1 which the Government might decide to lease (ib. 40).

A comparative table of the bids, prepared by Mr. Ambrose of the Bureau of Mines, will be found on page 413, volume 1 of the record, and an analysis and comparison of the bids, also made by Mr. Ambrose, will be found on pages 412-17. As the Standard Oil Company confined its bid to the exchange of royalty crude oil for fuel oil at Pearl Harbor on an exchange basis according to prices at the date of delivery of crude oil, and made no offer for the storage facilities, there is no basis for comparing its bid with the others received (R. v. I, 414). Transport Company's Proposal A called for 109,193 barrels of the Navy's royalty crude oil less than the quantity called for by Associated Oil Company's bid, representing, at the then prevailing prices, a money difference of \$120,113.20, by which amount the Transport Company's Proposal A was lower than Associated Oil Company's proposal, without any regard to the condition respecting congressional ratification found in the Associated Company's bid. Transport Company's Proposal B called for 213,804 barrels of Navy royalty crude oil less than Transport Company's Pro-

posal A, representing a money value of \$235,184.44, by which sum Proposal B was less than Proposal A. Transport Company's Proposal B called for 322,998 barrels of crude oil less than the Associated Company's bid, representing a difference of \$355,297.80, by which sum Transport Company's bid B was lower than that of Associated Company, the only other bidder proposing for the entire project. The Navy Department had estimated the cost of the project. Transport Company's Proposal B exceeded the Navy Department's estimate by less than one-half of one per cent (R. v. I, 413).

Immediately following the opening of bids Acting Secretary Finney announced that they would be carefully considered and that the bidders would be advised of the conclusions of the Department later (R. v. I, 408). He thereupon turned the bids and accompanying papers over to Mr. Ambrose and Dr. Bain of the Bureau of Mines with directions to study them and submit a report and recommendation (R. v. I, 412; v. II, 775). Admiral Robison was notified the same day and he, after going into the matter of the bids and the analysis thereof, went over it with Secretary Denby, taking to him every bit of information that he had (R. v. II, 1002-3).

Acting Secretary Finney at that time had no instructions whatever from Secretary Fall as regards what consideration any of these bids should receive or what recommendation should be made respecting them. When Secretary Fall left Washington, April 13, 1922, he left in the hands of Mr. Finney and Dr. Bain the matter of opening these bids and giving them consideration without any restrictions at all being placed on either (R. v. II, 515-16).

Acting Secretary Finney's only instructions to Dr. Bain and Mr. Ambrose, when he turned over to them the proposals which had been received and opened, were to examine them carefully, make an abstract of

them, and return them to Secretary Finney with report and recommendation. No instructions were given to Dr. Bain and Mr. Ambrose on the date the bids were opened or at any time prior thereto as to what the report thereon should be (R. v. II, 515; 775-6).

Dr. Bain instructed Mr. Ambrose in examining the bids to obtain information from the Navy Department about technical details but he did not, nor did any one else, give any instructions in regard to whose bid should be recommended (R. v. II, 776).

Prior to the time when Secretary Fall left Washington on April 13, 1922, he did not say anything to Admiral Robison about whom the Pearl Harbor project contract was to be awarded to, nor did any one in the Interior Department say anything to Admiral Robison before the opening of bids regarding whom the contract would be awarded to (R. v. II, 1009).

There is no evidence of any communication on the subject of the first Pearl Harbor project from Secretary Fall to Secretary Denby except as contained in documents hereinbefore set forth. Prior to the decision of Secretary Denby that contract should be awarded to the Transport Company in accordance with the terms of its Proposal B, there was no communication of any kind on the subject of the bid or the award between Admiral Robison or Secretary Denby and Secretary Fall (R. v. II, 1008-9).

The Chief Petroleum Technologist, with the assistance of Lt. Keating of the Navy Department, Mr. Tough, Chief Supervisor of Oil Leasing, Bureau of Mines, and Mr. Campbell of that Bureau, studied the bids and discussed them with Dr. Bain (R. v. II, 776-777).

During the period while the bids were being examined, considered, and report and recommendation thereon drafted, Secretary Fall was not communicated with nor did he communicate with any one concerned (R. v. II, 777).

April 17, 1922, Mr. Ambrose submitted to Secretary

Finney his report which analyzed the bids, compared them, and recommended acceptance of Transport Company's Proposal B as the lowest and most advantageous to the Government. Mr. Ambrose detailed his reason for so recommending. He recommended that clause giving preferential right to future leases to be inserted in the contract should be clearly outlined and stated how that should be done, limiting the scope of the "preferential right" in its terms and in the acreage to be covered thereby (R. v. I, 412-19).

When Mr. Finney received the foregoing report he went into conference thereon with Mr. Ambrose and Admiral Robison (R. v. I, 419).

Admiral Robison took the matter directly to Secretary Denby and went over with him the terms of the bids which had been received, recommending to Secretary Denby the acceptance of Pan American Bid B and giving Mr. Denby every bit of information the Admiral had; the reasons for recommending Pan American bid B as the best one were placed before the Secretary by Admiral Robison; its terms were discussed; the preferential right to future leases was discussed by Secretary Denby and Admiral Robison and they exchanged their conclusions with regard to its effect (R. v. II, 1003-4). Admiral Robison took the matter up with Secretary Denby immediately he got information concerning the different bids from Ambrose and before Secretary Fall was communicated with and prior to the receipt of telegram hereinafter referred to from Secretary Fall (R. v. II, 1004-5). Secretary Denby instructed Admiral Robison to go ahead with bid B and the Admiral informed Secretary Finney of that on April 17th (R. v. II, 1005; 1099).

After receiving Mr. Ambrose's report on the bids and discussing the matter with Ambrose and Admiral Robison, Acting Secretary Finney, April 17th, sent the following telegram to Secretary Fall, then at Three Rivers, N. M. (R. v. I, 419-20):

"California reserve bids received and opened Saturday. Standard bid was for exchange only. Associated bid for oil in number two reserve only, six million two hundred and one thousand nine hundred barrels. Pan American bid oil from both reserves, six million, ninety-two thousand seven hundred barrels, with an alternative Pan American bid, five million eight hundred and seventy-eight thousand and nine hundred barrels, if given preference for drilling required by government in future in reserve number one. Pan American bid also advantageous, in that it provides for reduction in cost in case storage facilities erected for less money than estimated. In opinion Ambrose, Robison and myself, Pan American alternative bid best offered and should be accepted.

Referring telegram Safford and myself this morning, regarding Kendrick resolution. Similar demand for report had been made upon Secretary Denby. Denby desires complete publicity Navy Department's part in opening naval reserves. Suggest you authorize closing contract with Pan American. Details will require approximately three or four days to arrange. On conclusion this contract suggest you publish complete information concerning opening of all reserves. In any event, suggest you telegraph your desires to Secretary Denby at once.

If you agree with recommendation regarding California reserves, why not authorize me by wire to make award, and yourself immediately make public the entire disposition of all naval reserve contracts, with reasons therefor."

Mr. Safford, who joined in the foregoing, was at the time Administrative Assistant to the Secretary of the Interior.

April 18th Secretary Fall replied by telegram thus (R. v. I, 420-1):

"Telegram Number Two reference California bids, if Admiral Robison and Secretary Navy think best close immediately on basis Pan American deal and if authorized by Denby proceed immediately award and close contract and make public entire policy in fullest and completest manner. * * *"

As above shown, Secretary Denby had directed that *contract* be made on the basis of Transport Company's Proposal B and Admiral Robison had so informed Secretary Finney on April 17th (R. v. II, 1005; 517; v. III, 1099).

On April 18th Secretary Finney in writing advised the Transport Company of award of contract in accordance with the terms of its Proposal B and stated that formal contract was being prepared for execution (R. v. I, 421-2).

On the same day, April 18, 1922, Mr. Finney, Admiral Robison and Director Bain prepared a memorandum for the press which, after it was approved by Secretary Denby, was that day released for immediate newspaper publication as a statement authorized by the Secretary of the Navy (R. v. II, 518; 1005), which published statement contained, among other things, this:

"NAVAL RESERVES IN CALIFORNIA.

"Proposals from a number of oil companies for the handling and exchange of crude oils in the Naval Reserves in California for fuel oil in storage at Pacific Coast points designated by the Navy, were received by the Department of the Interior Saturday, and an award of contract was today authorized to the Pan American Petroleum Company, the best and lowest bidder. This involves the exchange of the Navy's royalty oil from the reserves for fuel oil in storage at points designated by the Navy on the Pacific Coast, in storage, of the type selected by and approved by the Navy Department" (R. v. II, 519; 522-23).

April 19th Finney and Safford telegraphed Fall that contract had been awarded "lowest and best bidder" and would be ready for execution "tomorrow" (R. v. II, 524).

In the Interior Department, in virtue of the President's Executive Order of May 31, 1921, Acting Secretary Finney was having drafted a form of contract with the Transport Company to be ex-

ecuted on behalf of the United States by the Acting Secretary of the Interior. Mr. Cotter, representing the Transport Company, insisted that the Secretary of the Navy should be specifically a party, both in the body of the contract and by way of the signature at the end. Mr. Finney agreed with this view (R. v. I, 424; v. II, 778; 1006). Admiral Robison told Secretary Denby of Mr. Cotter's request, which the Secretary of the Navy agreed to (R. v. II, 1006). Assistant Secretaries Finney and Safford on April 20th telegraphed Secretary Fall that the Transport Company thought the Secretary of the Navy should be made specifically and directly party in and to the contract and Mr. Fall replied on the 22nd that he thought it very well to make the Secretary of the Navy and the Secretary of the Interior both directly parties to the contract (R. v. II, 525-6).

After the approval of the recommendation of Mr. Ambrose regarding the character of the clause granting preferential right to future lease to be embodied in the contract, and the sending on April 18, 1922, of the letter of award to the Transport Company, there was immediately started the preliminary work of getting up the contract, this being done in the Bureau of Mines in conjunction with the Navy (R. v. I, 422). Mr. Cotter, the Transport Company's vice-president, said that the preferential right clause, as it was proposed to put it in the contract, which clause was drafted in the Petroleum Division of the Bureau of Mines, did not give his company anything (R. v. II, 782). Between April 18th and 23rd there was a conference in Acting Secretary Finney's office at which were present Mr. Finney, Mr. Cotter, Admiral Robison and Mr. Ambrose, and at which the terms of the proposed contract and the clause granting preferential right for leasing "certain areas" were discussed. Mr. Cotter wanted some definite understanding or stipulation written into the contract as to the areas which would be leased and the time

limit fixed. Without some definite agreement respecting the future leasing to the Transport Company of some land Mr. Cotter stated his wish that the Government should not accept his company's Proposal B as the company would not be getting anything at all for the reduction which that proposal represented as compared with Proposal A, and Mr. Cotter said he wished the Government had not accepted bid B; that he would prefer to have Proposal A accepted (R. v. II, 779; 1006; v. III, 1100). This was discussed among Mr. Ambrose, Admiral Robison and Judge Finney and it was finally tentatively agreed that within one year from the date of the contract the Government would award lease to the northeast quarter of Section 3, Naval Reserve 1, 160 acres, and to a strip of the east half of Section 34, in the same reserve, covering 140 or 150 acres, at royalties running up from $12\frac{1}{2}$ to 35 per cent (R. v. I, 422-3). Dr. Bain expressed to Admiral Robison the opinion that these strips of land should be leased as a protection against drainage by outsiders (R. v. II, 1007). Those strips in the judgment of the Bureau of Mines would need to be leased sometime within not to exceed a year (R. v. II, 780). The strips were selected by the Government and not by Mr. Cotter or any other representative of defendants (R. v. II, 781; v. III, 1101). The royalties on which the Government would agree to lease the strips were arrived at by the Bureau of Mines and were not royalties asked by Mr. Cotter, who sought a lower schedule and was told that those lands would not be leased on the royalty be requested (R. v. II, 781). Mr. Cotter wanted some definite assurance in writing. The contract had been drafted and therefore the assurance was embodied in a letter which Mr. Finney dictated in the presence of Mr. Ambrose and Admiral Robison, dated April 25th, and signed by Mr. Finney and Mr. Denby (R. v. I, 423; 65-68).

The letter, accomplished simultaneously with the execution of the contract between the Government

and the Transport Company, was in substance an agreement providing for the leasing within a year of two small tracts of land in Sections 3 and 34 in Naval Reserve No. 1 at royalties set forth in the letter. This was agreed to because in the judgment of the Navy and Interior Departments it was to the advantage of the Government to accept Transport Company's Proposal B, and to include in the contract the clause regarding preferential right to future leases in the form recommended by Mr. Ambrose and drafted in the Bureau of Mines, and the agreement for some definite leasing was to induce the Transport Company to enter into such a contract (R. v. I, 65-68).

Draft of the proposed contract having been made, Admiral Robison obtained it from the Interior Department and went over it with Mr. Neagle, the Solicitor of the Navy Department, who gave Admiral Robison advice with respect thereto. The Admiral then took the draft of the contract to Secretary Denby and they read it over and made several changes in it, after which Secretary Denby approved it and instructed Admiral Robison to "go ahead and put it through" (R. v. II, 1007-8).

The contract in final form having been prepared and letter agreeing to make leases to the above mentioned specified tracts at specified royalties having been decided upon, Mr. Finney thought it advisable to advise Secretary Fall as to the matter and as to all details relating to the proposed contract and on April 20, 1922, he sent Mr. Ambrose to Three Rivers to acquaint Secretary Fall therewith. Mr. Ambrose took with him a copy of his report on the bids dated April 17th, the proposed form of contract, and either a copy of the letter regarding the leases to be made within a year or information respecting the contents thereof (R. v. I, 423-4). It is in testimony that Ambrose was also instructed to ask Secretary Fall as to the joining of Secretary Denby in the contract (ib. 424)

but the contemporaneous written record of telegraphic correspondence, which it was stipulated by counsel for plaintiff and defendants actually took place at the times indicated on the exhibit evidence thereof (R. v. II, 527), shows that on the morning of April 20, 1922, prior to Mr. Ambrose's departure for Three Rivers, the matter of Secretary Denby's being made "specifically and directly party in and to the contract" was made the subject of a telegram from Assistant Secretaries Finney and Safford to Secretary Fall (R. v. II, 525), and that on April 22, 1922, the day before the arrival of Mr. Ambrose at Three Rivers where he saw Mr. Fall, the latter had by telegraph informed Messrs. Finney and Safford that he thought it very well to make the Secretary of the Navy and Secretary of the Interior both directly parties to the Pan American contract (R. v. II, 526). Every question with respect to the awarding of the contract and the parties thereto had been settled in the telegraphic correspondence before Mr. Ambrose arrived at Three Rivers on April 23rd (R. v. II, 528). Mr. Ambrose, after the above mentioned telegraphic correspondence had been concluded, arrived in Three Rivers, N. M., April 23, and on that date Secretary Fall telegraphed Acting Secretary Finney "Ambrose arrived. Have consulted reference all contracts. As to both contracts, go ahead. New appointment to be made by you." (R. v. II, 526-7). Mr. Finney, in testifying, expressed the opinion that the Secretary of the Interior could have unsettled what had been settled and his wishes would have been followed and that the matter was not settled until he, Secretary Finney, received the "Go ahead" telegram of April 23rd, but testified as a fact that that changed nothing that had theretofore been decided (ib. 528-9).

Admiral Robison did not know that Mr. Ambrose was leaving for Three Rivers, carrying documents and information; he did not give Ambrose any instructions or requests, before the latter left; nor did

he communicate to Secretary Fall by Mr. Ambrose, nor send the Secretary any message about the Pan American contract through Ambrose or by or through anybody else (R. v. II, 1008-9). Admiral Robison was directly and personally handling for Secretary Denby every phase of the matter (ib. 1005).

EXECUTION OF CONTRACT OF APRIL 25, 1922, BETWEEN
UNITED STATES AND TRANSPORT COMPANY.

On behalf of the Transport Company this contract was executed by J. M. Danziger, its vice-president (R. v. I, 35). Secretary Denby, as above shown, had been over the first draft of contract with Admiral Robison, after it had been examined by the Solicitor of the Navy Department, had indicated desired changes thereon, and had approved it (R. v. II, 1007-8). When in final form Admiral Robison took the contract to Secretary Denby, and at the same time took to the Secretary the letter of April 25, 1922, by which the Government agreed to award the Transport Company specified leases within a year (R. v. I, 65-68), and they were both accomplished at the same time. Secretary Denby, when the contract was presented to him by Admiral Robison for signature, asked whether it included the changes they had made, and was shown that it did and that it was exactly as he wanted it, and, having been further assured that there were no other changes included therein, the Secretary of the Navy signed it (R. v. II, 1009-10; v. I, 36). It was also signed by Acting Secretary of the Interior Finney (R. v. I, 36; 424-5). On or about its date the contract and the accompanying letter of April 25, 1922, were formally delivered (ib. 425).

THE CARRYING ON AND COMPLETION OF PROJECT PROVIDED
FOR BY THE TERMS OF CONTRACT OF APRIL 25, 1922.

The work under this contract was entirely completed, the tanks having all been filled with oil, and finally accepted December 15, 1923 (R. v. II, 575).

Admiral Gregory, Chief of the Bureau of Yards and Docks of the Navy, considered the value of these fuel oil storage facilities to be fully that of the lump sum price provided for in the contract, but there was a saving represented by the actual cost of the work below that price, estimated by Gregory at the trial as between \$300,000 and \$400,000 (R. v. II, 569), actually \$466,000 (ib. 923), which the Government got.

The Transport Company has received from the Government crude oil equivalent to the full cost incurred under the April 25th contract, that cost and the receipt of its equivalent in crude oil being undisputed (R. v. III, 1198).

As the facts regarding the operations under the April 25th contract are the same as those relating to operations under the December 11th contract, and shown by the same evidence, those facts are stated hereinafter.

EXECUTION OF LEASE OF JUNE 5, 1922, AND OPERATIONS THEREUNDER.

This is the second of the four documents the validity of which is in issue in this suit.

By letter dated April 25, 1922, signed by Secretary of the Navy Denby and Acting Secretary of the Interior Finney (R. v. I, 68), addressed to Vice-President Cotter of the Transport Company (ib. 65), it had been agreed that within one year there would be granted to the Transport Company leases to drill wells on the northeast quarter of Section 3 and on a strip in Section 34 of Naval Reserve No. 1, on a schedule of royalties set forth in that letter (ib. 67). Secretary Fall took no part in the negotiations for this letter and was not in Washington at the time. There is no evidence that Secretary Fall ever saw this letter, the testimony leaving in doubt whether or not a copy was sent to him in New Mexico. Mr. Ambrose, who arrived at Three Rivers, N. M., on April 23, 1922, knew what was to go in the letter and was instructed to talk the

matter over with Secretary Fall (R. v. I, 413-4). There is no evidence as regards what Mr. Ambrose said to Secretary Fall, Ambrose having been subpoenaed by order of plaintiff's counsel as a witness on behalf of plaintiff but not having been called to testify (R. v. I, 103). On May 29, 1922, Vice-President Cotter of the Transport Company applied for lease on north-east quarter of Section 3, Naval Petroleum Reserve No. 1, pursuant to the letter of April 25, 1922 (R. v. I, 432). Under date of June 5, 1922, lease under the Act of June 4, 1920, of that land was executed between the United States and the Transport Company. It was signed for the Government by First Assistant Secretary of the Interior Finney, and for the Transport Company by Vice-President Cotter (R. v. I, 68-83). Shortly thereafter this lease was with the consent of the United States assigned to the Petroleum Company which assumed all the obligations and rights of the original lessee thereunder (R. v. I, 432).

Operations under this lease are covered by the same evidence as relates to the December 11, 1922, lease, set forth hereinafter (R. v. III, 1197; 1199-1200).

ACTS OF THE NAVY DEPARTMENT WHICH EVENTUATED IN
NEGOTIATIONS RESULTING IN EXECUTION OF
CONTRACT OF DECEMBER 11, 1922.

"The plan to enlarge the Navy's fuel oil storage plant facilities, by whatever name called, after the April 25 contract had been made, was brought about as a result of a decision of the General Board, approved by the Secretary of the Navy, which in turn resulted in directions to the Bureau of Yards and Docks, to proceed to plan this second project; as at that time there was under way the first project, from an engineering construction standpoint, it would not be a satisfactory or practical way of carrying forward the work, to have the second project taken up by an independent or new contracting firm, because the extended work is

really to be so integrally connected with the original work, by reason of the piping, the electrical connections, the fire-fighting connections, and all that, as to make a separate contract with a separate party to involve, undoubtedly, a great deal of expense, and it would not be considered a practical way of going at it. The only logical way is to make it an extension of the first contract." (R. v. II, 581-2.)

After the contract of April 25th was signed, there arose in the Navy Department question of more oil storage facilities at Pearl Harbor than were covered by that contract and instructions were given by the Secretary of the Navy increasing the quantities and establishing a new limit as to the proper amount for that locality (R. v. II, 1111-12). About May, 1922, Admiral Robison called the attention of those responsible for adequate preparation of the Navy for active service to what constituted the entire reserve of petroleum products up to that time, aside from what was required for current use. He invited the attention of the head of the War Plans Section to the necessity of a complete study of requirements. This was done, and the result of it was an increase in the amount of fuel oil set to be carried in Pearl Harbor. In this connection, there was discussed the question how long, in the event the Navy was called into active service on the Pacific, 1,500,000 barrels of oil would last the Fleet; these discussions began in the spring of 1922 (R. v. II, 1012).

On November 20, 1922, Admiral Robison informed the Secretary of the Navy, through the Chief of Naval Operations, that the storage for 1,500,000 barrels of fuel oil at Pearl Harbor under the April 25th contract was nearing completion and stated the desirability at that time of information as to what further disposition should be made of the royalty oil accruing from Naval Petroleum Reserves Nos. 1 and 2. He requested instructions as to

the quantity and location of reserve storage facilities to be provided on the west coast, including the Hawaiian Islands (R. v. II, 611). The Chief of Operations forwarded this last mentioned communication to the Secretary of the Navy recommending that the next project to be undertaken in disposing of the royalty oil accruing from Reserves 1 and 2 be increasing the totals of the reserves of all petroleum products at Pearl Harbor to figures which are set forth in the communication. This was approved (R. v. II, 612-13). On November 21, 1922, the Secretary of the Navy in a communication to the Board for the Development of Navy Yard Plans stated that he had that day approved a change in the amount of reserve of fuel oil to be provided at Pearl Harbor from 250,000 tons to 625,000 tons, and that in order to secure storage space for the 625,000 tons of fuel oil at Pearl Harbor it would be necessary to use certain described land of the naval station there. The Board was directed by the Secretary to prepare, for the consideration of the Department, a new plan showing the location of the tanks necessary to accommodate such portion of the 625,000 tons of fuel oil as could be accommodated on the land under the control of the Navy Department at Pearl Harbor, and also showing such other changes in the then existing approved plan as might be necessitated by this increase in the fuel oil reserve. (R. v. II, 608-610.) On November 22nd Admiral Robison having seen the Secretary of the Navy's approval of the increase in the amount of reserve fuel to be held at Pearl Harbor (R. v. II, 1014), addressed a communication to the Bureau of Yards and Docks stating that the Bureau of Engineering, of which he was Chief, had recently been informed that the approved war plans provided for increased storage facilities for petroleum products in the Hawaiian Islands, according to a list set forth in the communication, the quantities being the same as set forth

in the above mentioned communication from the Chief of Naval Operations to the Secretary of the Navy. Admiral Robison requested that his Bureau be informed whether or not these facilities could be provided within the limits of the naval station at Pearl Harbor. He further requested that, if there was available space for these facilities, the Bureau of Yards and Dock should see to the preparation of the necessary plans. Admiral Robison showed that the fuel oil storage facilities available at Pearl Harbor prior to the April 25th contract provided a capacity for 426,000 barrels; that the newly approved war plans called for a capacity of 2,450,000 barrels in addition to the fuel storage existing before and that provided under the April 25th contract (R. v. II, 614-5).

The Navy's plans for additional fuel oil and other petroleum products in storage at Pearl Harbor having been thus formulated and approved, the Secretary of the Navy informed Admiral Robison of that approval and gave the Admiral oral instructions upon which the latter dictated letter from the Secretary of the Navy to the Secretary of the Interior dated November 29, 1922, which letter he took in person to the Secretary of the Navy and went over its subject with him, the Secretary thereupon signing it (R. v. II, 1023-4). By this letter the Secretary of the Interior was informed of the desire of the Navy for additional fuel oil and other petroleum products and storage therefor at Pearl Harbor and it was requested that steps be taken to modify the April 25th contract to the end that the desired increase should be added to the present plan for the Pearl Harbor development and that as much fuel oil in storage as practicable be ordered for the benefit of the Navy (R. v. II, 616-8). This letter will be referred to more in detail hereinafter. Admiral Robison may have mentioned the plan for additional facilities at Pearl Harbor to Secretary Fall prior to November 29, 1922, but he does not think he did (and

there is no evidence that it was known to Secretary Fall prior to that time); Secretary Fall had not said anything to Admiral Robison on the subject or asked him to get up that sort of an application. "This plan originated in the Navy Department and was based upon necessities." (R. v. II, 1024.)

ACTIVITIES OF OFFICIALS OF DEFENDANTS BETWEEN JUNE
5 AND NOVEMBER 29, 1922.

Prior to the middle of November, 1922, as hereinafter narrated, no officer of defendant companies had any information respecting the consideration by the Navy Department of plans for an increase of oil in storage at Pearl Harbor, as above set forth (R. v. II, 1022).

In the summer of 1922 a phenomenal production of oil from newly discovered pools in California resulted in a marked reduction in prices. This directly affected the Government as royalty crude oil was then being applied to payment for work being done at Pearl Harbor on the basis of the current published prices. The reduction in those prices increased the number of barrels required to satisfy the terms of the April 25th contract. Vice-President Cotter of the Transport Company addressed the Secretary of the Interior on this subject and requested that during the period of flush production from the newly discovered pools, and pending the development and submission of a plan to bring better prices than contemplated by the Transport Company, authority be given to suspend operations in the naval reserves (R. v. II, 582-4). By telegram of July 28, 1922, Secretary Fall instructed Mr. Campbell, representative of the Bureau of Mines at Bakersfield, California, to cooperate with lessees in Naval Reserves Nos. 1 and 2 to reduce production, in view of the then existing prices, by shutting off partially or entirely where possible without danger of loss through incursions of water or from drainage (R. v. II, 586-7). On

the same date by telegram to Mr. Doheny Secretary Fall acknowledged Mr. Cotter's letter, and stated that the Government was prepared to accede to the request for curtailment of production and desired such policy to be followed in both the California naval reserves where results would not be disastrous because of water incursions or immediate danger of drainage. Mr. Doheny was informed that Mr. Campbell, the representative of the Bureau of Mines at Bakersfield, was being instructed to carry out the curtailment program and was advised to have his company's representative consult with Mr. Campbell (R. v. II, 580-5). This program was confirmed by letter of July 28, 1922, from Secretary Fall to Mr. Doheny (ib. 585-6). There followed correspondence on the subject of cutting down production with other operators in reserves 1 and 2 (ib. 587-597). Mr. Doheny, owing to absence in Alaska, did not receive the above mentioned telegram and letter of July 28th until September 6, 1922, when, after his return from Alaska, he acknowledged the same (R. v. III, 1155; note: December 6, 1922, is misprint, should be read September 6, 1922). In this letter Mr. Doheny stated his pleasure at noting that the authority to curtail production had worked some good in connection with the temporary flood of oil which had increased the production beyond the capacity of the refineries in California; that this was undoubtedly the cause for the decrease in the price of oil; that in connection with that situation he had developed some ideas which he desired to place before Secretary Fall, and which he thought would work out to the advantage of the Government and the oil producers, generally, in California; that he was preparing a statement of the situation and of the plan which he would like, under certain conditions, to undertake to carry out, which would give relief of a substantial character and provide additional market for the flush unrestricted production of the oil fields there (R. v. III, 1155-6). The remainder of the

letter is devoted to the Alaska trip from which the writer had just returned, to a description of that trip and of the country visited; the letter indicates the friendly personal relationship of the Doheny and Fall families (ib. 1156-8).

In the fall of 1922 Mr. E. L. Doheny submitted to representatives of the Navy and the Interior Departments, to Admiral Robison of the Navy, and to Secretary Fall of the Interior, an undated memorandum on the subject of the oil situation in California (R. v. II, 597). Admiral Robison and Secretary Fall had a talk about the subject of this memorandum, Secretary Fall stating that Mr. Doheny was much concerned over the state of the oil market in California, and had some sort of a proposition to advance looking toward the stabilization of prices that might be made to the Government's advantage, as well as to his own. Secretary Fall was favorably disposed toward it. Admiral Robison stated that anything to the Navy's advantage was of interest to him; he does not remember the details of the conversation, but there was no question that it was a matter for naval decision (R. v. II, 1020, 1021-2). Secretary Fall turned the copy of this memorandum which had been sent to him over to Dr. Bain, Director of the Bureau of Mines (R. v. II, 597). When Secretary Fall handed the memorandum to Dr. Bain, sometime in October, 1922, the Secretary said, take it up with Admiral Robison, and said nothing more on the subject at the time. Dr. Bain and Admiral Robison discussed the subject of the memorandum, and the latter stated he intended to discuss it with his associates and with the Secretary of the Navy (R. v. II, 789). Late in October or early in November, Mr. Cotter, of the Transport Company, called on Dr. Bain and mentioned this memorandum and asked what had been done with it. Dr. Bain told Mr. Cotter that the Secretary had given it to him to take up with the Admiral, that he had taken it up with the

Admiral, and that nothing more would be done unless the Navy wanted something done. Mr. Cotter was told, if he wanted to push the matter, or have any further information about it, to go to the Navy (R. v. II, 789-90).

October 27, 1922, Mr. Doheny called at the office of Admiral Robison of the Navy Department at Washington and there was discussed the California oil situation, the effect on the value of the Government's oil resulting from the flush production and the great decrease in price which, to that time, had cut the value of the Navy's royalty oil in half. It was noted that the price of fuel oil, such as used by the Navy, had been reduced very little; a decrease in the output of the naval reserves was observed, as was the fact that the decrease in the price of crude oil meant that it would take the Navy twice as long to pay for the Pearl Harbor development as would have been the case on the basis of the price of that commodity at the time the contract of April 25th was made. Mr. Doheny expressed to Admiral Robison the belief that the cut in the price of crude oil had already been excessive and that it should in no case have exceeded the cost of storage. He stated that he was prepared to furnish 1,000,000 barrels of fuel oil in storage at San Francisco, to be available for Navy use on demand, maintenance cost, cost of delivery to tankers, and cost of transportation from the reserves to tidewater to be paid by his company; that, further, in case the Navy desired to use fuel oil to a greater extent than would be paid for by accrued royalties, he would guarantee the delivery of such oils at 10 per cent below the market price. In return for these concessions, Mr. Doheny informed Admiral Robison he desired a lease upon certain areas of Naval Reserve No. 1 not yet developed, those areas not to include that portion of the reserve that it would be profitable to leave in the ground. At the time Mr. Doheny contemplated the erection of a refinery and the construction of pipe-

lines from the naval reserve to the refinery and stated that in order that this could be done safely an assured supply of crude oil was required. He expressed the opinion that the mere announcement of the erection of a refinery, and of the entering of his company into the market for crude oil, would increase the price of such so that the ratio between it and the price of refined products would change to the advantage of himself and the Government. Admiral Robison stated to Mr. Doheny that the Government would be unable to purchase over any period of time naval requirements of oil, but that there was nothing to prevent its acquiring the right to obtain such products as suggested by him at a price of 10 per cent below the market rate; that the general plan for the utilization of the naval reserves involved the transformation of the reserves of crude oil under the ground into definite amounts of fuel oil and other crude oil products located at strategic points for naval use when, as and if required. Admiral Robison suggested that Mr. Doheny's proposition would be of most interest to the Navy if it involved the maximum amount of fuel oil held in storage by defendant companies for the Navy's account, and called attention to various stations on the Atlantic Coast where it was desirable to have fuel oil in storage for the account of the Navy with a guarantee of its continued reservation. In response to this Mr. Doheny indicated the amount of fuel oil he could guarantee to be kept in reserve for naval account in tanks at Atlantic coast points. At the conclusion of the conference Admiral Robison informed Mr. Doheny that he desired further details for consideration which Mr. Doheny stated he could not furnish at the moment but that he would have gotten together the information the Admiral wanted and within a few days would furnish a general memorandum in which would be embodied his suggestions for a proposed contract with the Navy Department.

Immediately at the close of this conference Ad-

miral Robison dictated a memorandum of the substance of what had taken place, and his views on the proposition which he characterized as attractive to the Navy, but did not measure by any means all that the Navy could get; from his view the proposition appeared sound, subject to the condition that the amount of fuel oil in storage by the Transport Company should be made as great as the Navy could possibly secure (R. v. II, 1015-21). Admiral Robison reported to Secretary Denby the whole story of this interview with Mr. Doheny (ib. 1015). The memorandum setting forth what was said at the interview, and Admiral Robison's conclusions and comments thereon, was made a part of the Navy Department's files (ib.).

Nothing was said, in this conversation between Admiral Robison and Mr. Doheny on October 27, 1922, by either with regard to an increase in the Pearl Harbor project; the Pearl Harbor subject was not mentioned at all except in connection with so much thereof as was then under construction under the April 25th contract (R. v. II, 1022).

Under date of November 6, 1922, Mr. Doheny wrote a letter to Admiral Robison enclosing additional memorandum concerning the advantages which were offered to the Government in connection with the acquisition of additional territory for drilling purposes on Naval Reserve No. 1, and expressed the hope that this additional memorandum was of the nature which Admiral Robison required, and the assurance of his companies' desire to aid the Government in every way and to make such changes in the proposition as they might be able to do at the Navy's suggestion (R. v. II, 598).

The memorandum enclosed with the last mentioned communication referred to the situation in California produced by the flooding of the market with oil following the discovery of three oil areas so located as to require rapid and close drilling, resulting in a reduction in oil prices with a consequent loss to the

Government on royalty oil from wells operated by its lessees in California. A remedy was suggested under a plan providing for the construction of storage facilities for from 2,000,000 to 5,000,000 barrels at some California seaport; the construction of a refinery with an initial daily capacity of 10,000 barrels, to be increased to 20,000 when the situation justified, and the construction of pipelines from the naval reserves to the refinery. It was suggested that the storage to be provided under the plan would result in arresting the downward tendency of prices. The memorandum sets forth that this new venture would necessitate the expenditure of approximately \$10,000,000 and could only be undertaken upon assurance of sufficient supply of oil to keep the refinery operating. The naval reserves were referred to as reliable sources of such supply and it was stated that if a contract could be made under which the Government's royalty crude oil could be acquired for a period of ten years after the completion of the April 25th Pearl Harbor contract, that would become a valuable adjunct to the suggested new enterprise. There would further be required, in order to carry on the enterprise, the assurance that certain designated lands in Naval Reserve No. 1 should when leased be leased to the company establishing such an enterprise, the development of such lands to be done when and as rapidly as required by the Government to protect its lands from depletion by drilling on adjoining territory, and the royalty on such lands to be the regulation royalty required by the Government. There were set forth in the memorandum benefits which it was said could be guaranteed to the Government under the suggested plan, including the transportation of Government royalty oil from the reserves to the refinery at San Pedro or San Francisco; the providing to the Government free storage for 1,000,000 barrels of fuel oil adjacent to the refinery at tidewater; the bunkering of Government ships at cost at the docks of the new enterprise without profit; the

giving to the Navy of the privilege of purchasing any additional fuel which it might require, above the amount to which it would be entitled in exchange for royalty crude, at 10 per cent less than the market price at tide-water, as such price was determined by current Navy contracts for fuel oil; the furnishing to the Navy of manufactured products of petroleum, such as gasoline, kerosene, lubricating oil, greases, etc., at 10 per cent below the market prices, as determined by current Navy contracts; and the carrying, subject to the requirements of the Navy, for a period of 15 years, of 3,000,000 barrels of fuel oil at such places along the Atlantic Seaboard as might be desired. Arguments to show the advantage of the plan were set forth and the drainage from the Government reserves referred to (R. v. II, 598-607). There were appended to the foregoing memorandum seven sheets, each listing a certain number of sections in reserve No. 1 ranging from a minimum of 4 to a maximum of 19, representing different ideas as to the number of sections to be leased in the event of action by the Government on the proposition contained in the memorandum. The sheet listing four sections as the number to be leased indicated that if that number only were leased the lessee would not undertake the construction of the pipelines. The handwriting appearing upon these sheets was that of J. C. Anderson, president of the Petroleum Company (R. v. II, 607-8).

Copy of the foregoing memorandum of November 6th was transmitted to the Secretary of the Interior, and it reached Dr. Bain through the Secretary's office. In connection with the subject matter of that memorandum Secretary Fall instructed Dr. Bain to do nothing except as the Navy wanted it done, saying that it was Navy business (R. v. II, 790). The Interior Department did not take the matter up with the Navy, but waited for the Navy, and Admiral Robison of the Navy Department almost immediately took up the subject with the Director of the Bureau of Mines. Admiral

Robison told Dr. Bain that the subject was being discussed by the officials of the Navy and that he thought that the Navy would decide to go ahead. This was prior to November 29, 1922, and at that time nothing was said about Pearl Harbor (R. v. II, 790-1).

About the middle of November, 1922, Mr. J. J. Cotter, Vice-President of the Transport Company, and Mr. J. C. Anderson, President of the Petroleum Company, called at the office of Admiral Robison and brought up the subject of Mr. Doheny's proposition of November 6th. At this time Admiral Robison informed Messrs. Cotter and Anderson of the Navy's need for about 2,500,000 barrels more of oil in Pearl Harbor and stated that he wanted everything that Mr. Doheny offered and this additional 2,500,000 barrels, together with storage facilities therefor (R. v. II, 1022-3). In this conversation the leasing of all of Naval Reserve No. 1 was not discussed, nor had anything been said about any such action during the conversation between Admiral Robison and Mr. Doheny in the former's office on October 27th. Prior to the negotiations hereinafter narrated neither Mr. Doheny nor anybody representing the defendant companies made any application for a lease of all of that reserve (ib. 1023).

NAVY DECISION TO CONTRACT FOR INCREASED FUEL OIL AND
OTHER PETROLEUM PRODUCTS IN STORAGE AT PEARL
HARBOR AND TO LEASE ADDITIONAL AREAS IN NAVAL
RESERVE NO. 1.

November 29, 1922, Secretary Denby addressed to the Secretary of the Interior a letter, hereinbefore briefly referred to, stating that the Navy's need for storage for fuel oil and other petroleum products at Pearl Harbor involved a considerable extension of filled storage beyond that existing or provided for in the contract of April 25, 1922; that it had been suggested that if the preferential privilege for leasing areas in the reserve then possessed by the Transport Company under the terms of the above mentioned con-

tract should be immediately put into operation over such areas of that reserve as would naturally be opened up at once, and as would not be part of a natural reserve which could be maintained more or less indefinitely, the Transport Company would be glad to undertake the construction and filling of the additional storage required at Pearl Harbor; the quantity of additional fuel oil and other petroleum products required at Pearl Harbor was listed; it was stated that the Navy Department desired, in addition, storage for fuel oil and other petroleum products along the Atlantic and Pacific Coasts and at the Panama Canal and that it would be a national advantage to have considerable commercially owned fuel oil storage at Honolulu; that it had been suggested that the contract with the Transport Company could be revised so as to provide for free transportation of Navy royalty oil from the sources of supply to a refinery at deep water, and it was stated that that free transportation would, of course, be a considerable Navy asset and that it would further be an asset for the Navy to have stored for any considerable period, such as fifteen years, any large quantity of privately owned fuel oil to be subject to the requirements of the Navy. The letter continued that it appeared to the Navy Department that the royalty oil accruing to the Navy from additional leases in Reserve No. 1 should be a sufficiently great proportion to the total production as in itself would justify the granting of the leases. The Secretary of the Navy had theretofore requested the Secretary of the Interior to act as agent of the Navy Department in this matter, and now requested the latter to take steps to modify the existing contract with the Transport Company for the production and filling of fuel oil storage at Pearl Harbor (or enter into a new contract, if such was found more desirable) to the end that as much fuel oil in storage as practicable might be ordered for the benefit of the Navy. Secretary Denby concluded that he had instructed Admiral Robison to confer with the

Secretary of the Interior, as his (Denby's) direct representative, and that the Secretary of the Navy would be pleased directly, or through Admiral Robison, to furnish the Secretary of the Interior any information or assistance that might be required, if the latter saw fit to undertake the accomplishment of the request. It was requested that the amounts of storage projected be treated as confidential (R. v. II, 616-18). The circumstances attending the writing of this letter have been hereinbefore set forth (R. v. II, 1023-4). The Secretary of the Navy's letter of November 29, 1922, was referred, through the office of the Secretary of the Interior, to the Director of the Bureau of Mines, without any instructions from Secretary Fall on the subject (R. v. II, 791).

NEGOTIATIONS FOR THE CONTRACT OF DECEMBER 11, 1922,
AND THE LEASE BEARING THE SAME DATE.

These are the third and fourth documents the validity of which is in issue in this suit. The negotiations for both were carried on simultaneously and will therefore be here treated under one head. The contract was made with the Transport Company and the lease with the Petroleum Company and under appropriate heads hereinafter the operations under each will be separately stated.

Following the transmittal of the Secretary of the Navy's letter of November 29th Admiral Robison telephoned the New York office of the Transport Company and asked that some one be sent down to Washington. Conferences were promptly begun, some of which took place in Admiral Robison's office and most of which took place in the office of the Director of the Bureau of Mines. These conferences were participated in by Admiral Robison, Dr. Bain and Mr. Ambrose for the Government, and Mr. Cotter and Mr. Anderson for the defendant companies, Mr. Doheny being present at the first and last of the meetings. Neither Secretary Denby nor Secretary Fall was personally present at

any of the conferences. Admiral Robison kept Secretary Denby informed and also had one or two or perhaps more conferences with Secretary Fall. Dr. Bain saw Secretary Fall, as hereinafter stated (R. v. III, 1025; v. II, 791). At the first meeting, which Mr. Doheny attended, there was a general discussion, following which he left, and through a series of days there were discussions participated in mainly by Mr. Anderson and Mr. Cotter, on the one side, and Mr. Ambrose, Dr. Bain, and Admiral Robison on the other (R. v. II, 792). Admiral Robison conferred, during this period, with Messrs. Bain and Ambrose when representatives of defendants were not present and throughout the officials of the Bureau of Mines supported the position taken by Admiral Robison as they were acting in the matter for the Navy (ib. 793). During the early part of these negotiations the leasing of the entire unleased portion of Naval Reserve No. 1 came up and Admiral Robison was the first one who mentioned the matter of making a lease to all of that reserve (R. v. II, 1023; v. III, 1025-6). He stated to the Bureau of Mines officials that the Navy would lease the whole reserve if they got enough for it; that he was anxious to have drilling restricted so far as could be done, compatible with making the kind of a bargain that the Navy wanted, and the matter as to what part of the reserve should be subject to restrictions came up later (R. v. II, 791). Admiral Robison told Dr. Bain and Mr. Cotter that he thought the Navy could afford to lease the whole reserve if by so doing the benefits the Navy would get out of the deal would be increased (R. v. III, 1026). The conferences were a continuous set of negotiations during which Admiral Robison was endeavoring to get for the benefit of the Navy as many of the advantages, indicated in his memorandum of October 27th (R. v. II, 1015-21), as he could, and was trying to accomplish that end by identifying the interests of the companies with those of the Government (R. v. III, 1026).

In the conferences there were two subjects that were discussed most. One of them was the additional facilities at Pearl Harbor, to be obtained under the contract, and the other was the royalty to be provided for in the lease (ib. 1028). Representations were made by the respective parties as regards the advantages each would obtain under the contract and lease which were the subject of the negotiations (R. v. III, 1028-30; v. II, 792). There was finally reached an agreement on every point except the royalties to be allowed the Government under the proposed lease (R. v. II, 794). There had been heated discussions as regards the number of sections in the reserve which, if leased, should be open to immediate drilling, and the number of sections which should be included in the western half of the reserve on which drilling was not to be permitted until and unless ordered by the Government (R. v. II, 870-1). Mr. Anderson of the Petroleum Company insisted that the royalties to be rendered to the Government under the proposed lease should range from 12½ to 20 per cent, a range referred to throughout the record as Interior Department's regulation royalties (R. v. III, 1030-37). Admiral Robison insisted on a schedule of royalties beginning with one-seventh instead of one-eighth and running up to a maximum of 30 per cent (R. v. III, 1036). Mr. Anderson refused to accept the Admiral's royalties or anything except what he proposed (R. v. II, 794). The negotiators split on this point (R. v. II, 871).

Dr. Bain and Mr. Ambrose prepared memorandum of the schedules of royalties the Government was receiving under various leases theretofore made (R. v. II, 783-94) and Dr. Bain took this memorandum to Secretary Fall and talked over the subject with him and the Secretary and the Director worked out an intermediate or compromise set of royalties as being a fair basis and one which perhaps could be agreed upon (R. v. II, 794; 871). Secretary Fall instructed Dr. Bain to take up this intermediate set of royalties with Ad-

miral Robison and also to give a copy of it to Mr. Cotter to see if Mr. Doheny would take it up. The Secretary pointed out that negotiations would probably fail because Mr. Doheny could hardly overrule his own men. Dr. Bain gave a copy of the suggested schedule to Mr. Cotter and told him to take it up with Mr. Doheny while he, Dr. Bain, took it up with Admiral Robison. At that time the conferences had broken up. Admiral Robison after studying this schedule talked to Dr. Bain and Mr. Ambrose and then went up and talked it over with Secretary Fall (R. v. II, 794-5). Admiral Robison at this time prepared a memorandum, dated December 8, 1922, for his own use in presenting the case to the Secretary of the Navy (R. v. III, 1032). He took up the subject with Secretary Denby, went over his memorandum with the Secretary with the idea of obtaining from the Secretary authority to come to an agreement. After they conferred Secretary Denby's final instructions to Admiral Robison were to go ahead and do the best he could (ib. 1032). In his memorandum of December 8, 1922, Admiral Robison set down arguments minimizing the risk which the Transport Company was taking in connection with the project for increased oil in storage at Pearl Harbor, showing the value, according to a quoted statement made by Mr. Doheny, of the proposed lease if the same was based upon payment of standard royalties (R. v. III, 1033), by which was meant the Interior Department's regulation royalties of 12½ to 20 per cent (ib. 1037), and concluding that on the basis of standard royalties the Government would not receive a sufficient return under the lease and that therefore the royalties to be paid by the lessee should somewhat exceed the regulation royalties. Admiral Robison figured that the average return from regulation royalties had amounted to 14½ per cent and that, if his analysis was correct, the Government's interest could be fully protected by securing a minimum royalty of one-seventh

instead of the regulation one-eighth and by increasing the maximum royalties for the larger average wells to 30 per cent as had theretofore been recommended by the Secretary of the Interior (ib. 1033-36).

Following the sending, under Secretary Fall's instructions, by Dr. Bain through Mr. Cotter to Mr. Doheny of proposed schedule of royalties (ib. 1030), Mr. Doheny under date of December 8, 1922, wrote the Secretary of the Interior to the effect that very careful consideration had been given to the difference between the royalty schedule offered by the Government for insertion in the lease in connection with the proposed modification of the Pearl Harbor contract and the schedule which his companies had proposed to request of the Government; that realizing that the value of the contract would depend largely upon better prevailing prices, it had been concluded that the possible appreciation in prices might be made to absorb the difference between the two schedules of royalties, and the companies had decided to accept the Government's schedule as offered (R. v. II, 619). Immediately upon receipt of this letter Secretary Fall referred it to Admiral Robison under cover of a letter dated December 8th in which he reviewed briefly the differences he understood existed as regards royalties and stated that he presumed Mr. Doheny, by the reference in his letter to royalties which the Government had offered, referred to those which had been tentatively suggested by the writer as affording a ground for discussion and which are set forth in the letter to the admiral. Secretary Fall's letter stated that unless these royalties were entirely satisfactory to Admiral Robison, and unless the draft of the contract was in other respects satisfactory, he would immediately notify Mr. Doheny of the admiral's conclusion, adding that he would not agree to or sign any contract which was not in every particular satisfactory to Admiral Robison as the latter had been designated by the Sec-

retary of the Navy to represent him personally in the matter (R. v. II, 796-8).

Admiral Robison having been over his memorandum (R. v. III, 1033-36) and having been authorized to go ahead and do the best he could (ib. 1032), called on Secretary Fall, evidently before the receipt of this last-mentioned letter, and told the Secretary that he wanted a one-seventh royalty for a minimum and Mr. Fall told him to go ahead and see if he could get it as he, Fall, could not (R. v. III, 1031).

Admiral Robison then went to the Bureau of Mines and stated he wanted to do some more trading, that he still thought he could get a higher royalty (R. v. II, 795); he entered a conference with Messrs. Doheny, Anderson and Cotter and brought out all the arguments he could in favor of increasing the royalty, and set forth his idea of the enormous advantage that it would be to a concern to have such an assured supply of oil; he represented the advantages to the company as big and those to the Navy as small and he urged that the Government get greater royalties than those set forth in the so-called compromise schedule. He had previously been assured by Messrs. Bain and Ambrose that this schedule was materially better than the Government could otherwise obtain and was an excellent bargain for it, quite irrespective of the advantages represented by the obtainment of 4,000,000 barrels of oil in storage (R. v. III, 1031). Mr. Doheny was present with Mr. Anderson and Mr. Cotter at this conference, and said he had gone as far as he thought he could (R. v. II, 795; v. III, 1032). The discussion became heated. Something said caused Mr. Doheny to threaten to terminate the negotiations. After giving thought to the representations made, and further talk on the subject, Admiral Robison and Mr. Doheny reached an agreement to enter into a lease providing for royalties according to the schedule included in the lease of December 11, 1922 (R. v. II, 795; v. III, 1032). After the last-

mentioned conference, which was held in the office of Dr. Bain on the afternoon of December 8, 1922, Admiral Robison reported to Secretary Denby on the subject that he had to accept returns that began with 12½ per cent and went up to 35 per cent. Secretary Denby asked the admiral if it was the best he could get and upon learning from the latter that it was and that he had tried hard, the Secretary approved his action (R. v. III, 1039).

Following the conference at which the agreement was reached Admiral Robison replied to Secretary Fall's letter of December 8th, by letter dated December 9th, stating that in view of the records of production in Reserve No. 1 it appeared that the royalties given in Secretary Fall's letter were materially in excess of the standard royalty, and in view further of the great value to the Government of the immediate construction of additional naval facilities for the storage of oil and of the assumption on the part of the contractor of the entire risk of repayment in royalty oil, it appeared desirable that the Government acquiesce in those royalties. The writer added that he was going over the details of the proposed contract and would inform the Secretary further as soon as he had been advised by the legal authorities of the Navy Department (R. v. II, 798-99).

EXECUTION OF CONTRACT AND LEASE OF DECEMBER 11, 1922.

Messrs. Bain and Ambrose and Messrs. Anderson and Cotter worked on the drafting of the contract and lease of December 11, 1922 (R. v. II, 799). When it had been drafted Admiral Robison went over it in detail and at length with the Secretary of the Navy and passed it over to the Judge Advocate General for study and any necessary revision. There were several changes suggested by the Judge Advocate General in the verbiage of the contract that appeared to that office would better safeguard the naval interests. Ad-

miral Robison talked with Mr. Neagle, the Solicitor of the Navy, as well as to the Judge Advocate General himself, regarding that draft (R. v. III, 1039). The Solicitor and Judge Advocate General approved the draft of the contract, which on or about December 9th had been referred to the legal advisers of the Secretary of the Navy by Admiral Robison, acting by direction of Secretary Denby (R. v. II, 706-7). Thereupon Admiral Robison transmitted the draft to the Secretary of the Interior, under cover of letter dated December 11, with the statement that it had been carefully reviewed by himself and the Judge Advocate General of the Navy and with the exception of the changes noted thereon was entirely satisfactory to the Navy Department and believed to be an advantageous contract for the Government to enter upon. The Admiral stated that he assumed that the Interior Department would prepare the final contract for signature and unless otherwise directed he would act accordingly (R. v. II, 707).

After receipt of this communication by the Bureau of Mines the drafts of the contract and lease were revised, where necessary, a few pages being recopied, and they were executed in the office of the Director of the Bureau of Mines on behalf of the defendant company by Mr. E. L. Doheny. Dr. Bain then presented these documents to Secretary Fall, informing the Secretary that they represented the contracts that had been worked up. Secretary Fall had not seen the draft of contract and lease prior to that time and when they were presented to him he read them carefully, asked if they were all right, and was informed by Dr. Bain that they were. There were present at the time, in addition to the Secretary, Messrs. Doheny, Cotter and Bain (R. v. II, 801).

From the Interior Department Robison took these papers to Secretary Denby's office, being accompanied by Messrs. Doheny and Cotter. When

the contract and lease were presented to Secretary Denby for signature he inquired of Admiral Robison whether they included the changes which the Secretary had indicated and the admiral showed him that they had been included in the final draft as directed. The Secretary then inquired if there was anything else in the contract except as agreed and Admiral Robison assured him that it was identical with what he had been over with the Admiral in detail. The Secretary of the Navy thereupon executed the contract and lease.

Prior to this time Mr. Denby and Mr. Doheny had never met and they were introduced by Admiral Robison, who also presented Mr. Cotter to Secretary Denby. Mr. Doheny and Secretary Denby had a brief conversation in which the Secretary said, in substance, "You have got a big job to do and you have got a fine piece of property," and Mr. Doheny replied, "We have got what I hope will be a fine piece of property, but we certainly have got a big job to do" (R. v. III, 1040-1).

There was attached to and made part of the December 11th contract the letter from the Secretary of the Navy to the Secretary of the Interior, dated November 29, 1922, advising of the Navy's decision to contract for the increased fuel oil in storage and to lease additional lands in Reserve No. 1 (R. v. I, 41-50).

OPERATIONS UNDER AND COMPLETION OF PROJECT PROVIDED
FOR BY THE TERMS OF CONTRACTS OF APRIL 25 AND
DECEMBER 11, 1922.

The carrying on of the work under these contracts was turned over to the Bureau of Yards and Docks, the United States Navy. Admiral Robison functioned in connection with having the tanks filled with the fuel oil (R. v. II, 1010). The construction work was done by the White Engineering Company for the Transport Company. All the plans and specifications were prepared in the Bureau of Yards and Docks (R. v. II, 541; 561; 573-4). The April 25th and December 11th

contracts were designated as Bureau of Yards and Docks Serial No. 4650 and No. 4800, respectively, by which they were identified in correspondence and other papers relating thereto (ib. 561). As the April 25th contract was actually opened there was allowed no profit to the principal contractor, the Transport Company (ib. 570). The December 11th contract was a cost contract under which the Transport Company has done the work without any profit to it (ib. 574). Bids for all sub-contracts were submitted to the Bureau of Yards and Docks before sub-contracts were entered into (ib. 582).

Admiral Gregory had charge of the operations under both contracts. Admiral Simpson, and his successor Admiral McDonald, commandants of the naval station at Pearl Harbor, were in command of the work, and Commanders Carlson and Brownlow, on duty at the Pearl Harbor Navy Yard as public works officers, were in direct touch with it. The Bureau of Yards and Docks detailed to Pearl Harbor Lieutenant Keating, who had acted as liaison officer between the Navy and the Bureau of Mines during the period when the first set of plans was being prepared and the first contract was being negotiated, and who had prepared an estimate on the cost of the project (R. v. II, 565), to immediate supervision of the work, to see that it was done in accordance with the Navy's plans and specifications. Lieutenant Keating was assisted by naval inspectors. The entire matter was handled in accordance with the Navy Department's usual custom (ib. 570, 571). The April 25th contract was entirely completed three months before this suit was instituted (ib. 575), and at the time of the trial in the District Court the work under the December 11th contract was over 90 per cent complete (ib. 575), and prior to the entry of decree had been entirely completed (R. v. III, 1197). The work progressed in a very satisfactory manner as to time and quality (R. v. II, 575).

No officer or employee of the Interior Department,

as distinguished from officers and employees of the Navy Department, has had anything to do with this work (R. v. II, 571).

In the opinion of the Chief of the Bureau of Yards and Docks the United States has received at least \$1.10 for every \$1.00 expended on this Pearl Harbor work (ib. 570), and he considers the fuel base now there the best the United States has in the entire service, and he does not know of any better in the world (R. v. II, 575).

The Transport Company's books containing the accounts relating to the construction work done and the oil supplied under the April 25th and December 11th contracts have been audited by Government accountants and have been found to have been properly and accurately kept; vouchers showing all expenditures on account of the construction work done at Pearl Harbor and showing the delivery of fuel oil in tanks there under these contracts were all certified by the naval officers on the job and sent to the Bureau of Yards and Docks in Washington, and there certified by Rear Admiral L. E. Gregory, Chief of that Bureau, and thence sent to the officers of the Transport Company (R. v. III, 1197-8). The cost of the work, of the fuel oil, and of crude oil delivered by the Government to the Transport Company in payment therefor, was agreed to by the parties in the District Court (ib. 1198).

The naval officers in charge of the work at Pearl Harbor and the Chief of the Bureau of Yards and Docks in Washington have certified to the final completion, to the satisfaction of the Navy Department, of the construction work under contracts of April 25 and December 11, 1922, and the delivery of all fuel oil, of naval specification quality, required under the April 25th contract (R. v. III, 1196-1201).

By the terms of the December 11th contract the Transport Company was obligated to deliver the 1,500,000 barrels of oil called for by the April 25th contract at a time earlier than required by the last mentioned document. The April 25th contract provided that

the Transport Company should be allowed credit for that oil on the basis of the market price thereof, plus the cost of transportation at prevailing freight rates, from Pacific Coast to Pearl Harbor. In January, 1923, this delivery was called for. The market price of fuel oil at that time was \$1.00 per barrel at tidewater, California. The Transport Company was able to procure the oil at 90 cents a barrel, 10 cents less than the then prevailing price, and, upon investigation, the Bureau of Supplies and Accounts of the Navy found that 90 cents was a lower price than the Bureau could obtain fuel oil for. The Transport Company agreed to give the Government the benefit of this saving of 10 cents a barrel and by an exchange of correspondence the company was directed, and agreed, to supply, and deliver into the tanks at Pearl Harbor, the 1,500,000 barrels of fuel oil on the basis of 90 cents per barrel, plus 46 2-3 cents freight, the latter being slightly below the then prevailing freight rate, or a total of \$1.36 2-3 a barrel, in exchange for which the Transport Company was to receive from the Government an equivalent number of barrels of crude oil (R. v. III, 1046; v. II, 808-821). In connection with this arrangement the Transport Company further agreed that should there be a decline in price of fuel oil during the period of delivery it would, under its agreement with the Associated Oil Company which was supplying it with fuel oil, receive a proportionate decrease in the price to be paid by it to the Associated Company and would give the benefit of any such decrease to the Government (R. v. II, 821).

The oil delivered in the tanks at Pearl Harbor by the Transport Company (the actual quantity being 1,453,274.94 barrels, R. v. III, 1201) was tested and passed by Navy inspectors (ib. 1046).

OPERATIONS, OIL PRODUCED AND EXPENDITURES MADE, UNDER
LEASES OF JUNE 5 AND DECEMBER 11, 1922.

These leases, executed under the authority of the Act of June 4, 1920 (R. v. I, 50), are separate documents from the contracts. The lands in Naval Reserve No. 1 covered by these leases are graphically shown by Exhibit XXX (R. v. III, 1210). The sections shaded on this exhibit are those which, while leased, are reserved from drilling until the Government consents to drilling thereon (R. v. I, 57). Plaintiff and defendants are in agreement as to the amount expended by the Petroleum Company in drilling, putting on production, and maintaining and operating wells drilled under the leases, and in making other useful improvements on the property covered thereby (R. v. III, 1199-1200). The Petroleum Company's books containing the accounts of these operations were audited by certified public accountants employed by the Government for the purpose (ib. 1197). All expenditures made were in compliance with and performance of the terms of the leases, and were properly accounted for and vouchered, and the work was done under proper supervision, in an economic and efficient manner, and the improvements were all of the full value paid therefor to the lands covered by the leases (ib. 1200-1; 1428).

The Government received under these leases an average royalty of 28 per cent. Under leases in Naval Reserve No. 2 the average royalty received by the Government is 18 per cent (R. v. II, 829).

INFORMATION TRANSMITTED TO CONGRESS WITH MESSAGE
OF PRESIDENT STATING APPROVAL.

On April 29, 1922, the Senate adopted a resolution directing the Secretary of the Interior to furnish the Senate with correspondence, papers, files, executive orders, and all contracts for drilling oil wells on naval oil reserves of the United States, with all detailed information relating thereto (Senate Resolution No. 282,

67th Congress, 2nd Session). On June 3, 1922, the data requested was transmitted to the Senate and included in that data so transmitted was a copy of the contract between the United States and the Transport Company of April 25, 1922, omitting only detailed specifications and blueprints (Senate Document No. 210, 67th Congress, 2d Session, pp. 2, 11). A report from the Secretary of the Interior to the President, dated June 3, 1922, set forth in considerable detail the plan under which crude oil was being, and would be, exchanged for fuel oil and storage facilities therefor at strategic points designated by the Navy (ib. 10-11; 13). In a message of the President of the United States to the President of the Senate dated June 7, 1922, in which the aforementioned Senate resolution was referred to, the President transmitted to the Senate the above mentioned report which he had received from the Secretary of the Interior, and said:

"I think it is only fair to say in this connection that the policy which has been adopted by the Secretary of the Navy and the Secretary of the Interior in dealing with these matters was submitted to me prior to the adoption thereof, and the policy decided upon and the subsequent acts have at all times had my entire approval." (Senate Document 210, 67th Congress, 2d Session).

By Senate Resolution No. 305 of that session 4,000 copies of this message of the President, with the accompanying communication from the Secretary of the Interior, were ordered printed.

No other action was taken by the Congress until there was passed Joint Resolution, approved February 8, 1924, directing the institution of this suit.

THE CIRCUMSTANCES IN WHICH WORK UNDER THE CONTRACTS OF APRIL 25 AND DECEMBER 11, 1922, WERE CONTINUED AND COMPLETED.

In the early part of 1924 conferences were held in the Navy Department at which were discussed the sub-

ject of the ways and means of completing the Pearl Harbor project. The Acting Secretary of the Navy then said it was vitally important that the thing be completed, and that the work in progress be prosecuted immediately to completion (R. v. III, 1048).

Under date of March 8, 1924, Mr. E. L. Doheny addressed a letter to the President of the United States in which, after referring to existing conditions and his company's primary reason for entering into the Pearl Harbor contracts, he stated that approximately \$7,500,000 had already been expended under those contracts and that the completion of the construction would cost \$2,000,000 more. Mr. Doheny informed the President that unless otherwise directed by the President of the United States or by the Navy, the Transport Company would complete the work, and that it had undertaken to do this upon Mr. Doheny's personal guarantee that it would be saved from any loss due to the continuance of the work (R. v. III, 1159-61).

Upon the trial in the District Court the defendants by their counsel in open court tendered themselves ready, willing and able to perform all the obligations imposed upon them by the terms of the contracts and leases in this suit (R. v. III, 1161).

As hereinbefore stated, the work provided for by both of the contracts has been fully completed, and the 1,500,000 barrels of fuel oil called for by the first of the contracts has been delivered into the tanks at the Pearl Harbor naval station.

THE EVIDENCE PRESENTED TO DEFEAT ALL OF THE CONTRACTS AND LEASES IN SUIT.

The United States in its amended bill of complaint charged that the contracts and leases in issue in this case were entered into as a result of a conspiracy between Albert B. Fall and Edward L. Doheny, that each and every act done in the negotiations and making of the contracts was "pursuant to said conspiracy," and that it was agreed, as part of said conspiracy, that in

consideration of the rights created in the defendants, under the terms of said writings, Fall was to receive from Doheny, and he did receive, upon said consideration, on Nov. 30, 1921, the sum of \$100,000 (R. v. I, 10-13).

It was shown by evidence received on the trial (over the objections and under exceptions duly noted by defendants) that on November 30, 1921, Mr. E. L. Doheny, Jr., drew from his personal bank account, kept at the banking house of Blair & Co., New York, the sum of \$100,000 in currency; that at that time the balance in the personal account of Mr. Doheny, Sr., at said bank amounted to \$8,633.72 and the balance of Mr. Doheny, Jr., amounted to \$111,011.65; that on December 6, 1921, there was credited to the Doheny, Jr., account the sum of \$40,000, the proceeds of check of E. L. Doheny on Security Trust and Savings Bank, Los Angeles, California; that on January 23, 1922, there was credited to the account of Doheny, Jr., the sum of \$116,002.29, proceeds of two checks of E. L. Doheny on the said Security Trust and Savings Bank, one for \$60,000 and one for \$56,002.29 (R. v. I, 165-9).

There was given in evidence a promissory note dated Washington, November 30, 1921, by the terms of which the maker promised on demand to pay to the order of E. L. Doheny \$100,000 at New York or Los Angeles, with interest. This note was identified as being entirely in the handwriting of Albert B. Fall, and it was shown that the signature had been torn from the body of the note (R. v. I, 173).

The testimony of the wife of E. L. Doheny, Sr., showed that at the apartment occupied by Mr. and Mrs. Doheny in New York Mr. Doheny had shown his wife the above mentioned promissory note, which at that time had on it the signature of Albert B. Fall. At that time Mr. and Mrs. Doheny were about to leave New York for Los Angeles to spend the Christmas holidays at home. Mr. Doheny said to his wife that he had loaned his friend Mr. Fall \$100,-

000 and had the latter's promissory note for it; that the loan was made to help Mr. Fall out of financial difficulty; that if on their trip across the country they were overtaken by disaster resulting in both being killed, it would be the duty of Mr. Doheny's executors to enforce the note according to its terms; that as Mr. Fall had borrowed the money to purchase a ranch, if the note was enforced immediately against him he would be in a worse position financially than he was before the note was made; that therefore Mr. Doheny would put the note in two parts, taking off the signature and placing it in the custody of his wife, and keeping the body of the paper in his own possession, which he did, saying, at the time, that in the event of their deaths their son would understand this act. Mr. Doheny enjoined his wife to keep the signature carefully so that the note could be put together again when Mr. Fall was ready to pay it; that he wanted her to take care of it until such time as he called for it to put the two parts together. Mrs. Doheny put the part of the note on which the signature appeared, first in a jewelry box, and, after the arrival of her husband and herself in Los Angeles, in their joint safe deposit box in that city. In January, 1924, her husband had asked her to get the signature for him and at that time she was uncertain as to just where she had placed it and did not find it in a hurried examination of her safe deposit box. Subsequently, on April 30, 1924, in the presence of Judge Charles Wellborn, one of counsel in the case, Mrs. Doheny found the signature in a small envelope in the box where she had placed it in December, 1921 (R. v. I, 181-5).

Plaintiff offered evidence to show that on December 5, 1921, Albert B. Fall entered into a contract for the purchase of property known as the Harris Ranch, located at Three Rivers, N. M., adjoining a ranch theretofore owned by Mr. Fall; that the contract provided for the sale of land and cattle for a total price of \$91,500 on account of which there was at that time paid

the sum of \$10,000 in currency. Testimony was given of subsequent payments by checks on account of the aforesaid purchase price (ib. 174-180).

The Government called to the stand Messrs. E. L. Doheny, Sr., and Jr., and upon the District Court being informed by Government counsel that there were pending in the Supreme Court of the District of Columbia indictments charging the Messrs. Doheny with conspiracy and bribery in connection with the transaction about which the Government desired to interrogate them as witnesses, the Court sustained their constitutional immunity and excused them from testifying (ib. 185). Mr. Doheny, Sr., testified that he was at the time chairman of the Board of Directors of the Transport Company and had in November and December, 1921, been its president; that he was, and for many years had been, a stockholder in the company (ib. 187).

By answer of the defendant companies it was admitted that Mr. Doheny was, on July 24, 1922, president of each of the defendants, having on that date retired as president of the Petroleum Company, since which time he had been chairman of its Board of Directors; that he had been president of the Transport Company up to December 7, 1923, at which time he retired as president and was elected chairman of the Board of Directors (ib. 84).

It was stipulated on the trial that all of the shares of the stock of the Petroleum Company at the time of the occurrences referred to in the bill of complaint were owned by the Transport Company; that the capital stock of the Transport Company was divided into two classes, known as A and B, of which the former was the voting stock; that the total stock of the Transport Company amounted to 2,726,630 shares, of which 1,100,556 shares were Class A and 1,626,074 were Class B; that there were a total of 11,850 separate shareholders owning these two classes of stock; that E. L. Doheny was the owner of

2,417 shares of A stock; his wife owned 837 shares and his son and son's wife a total of 785 shares of A stock and 3,755 shares of B; that the Petroleum Securities Company, a California corporation, owned 525,480 shares of Transport Company A stock and that the outstanding stock of the Petroleum Securities Company was owned, one-third each by E. L. Doheny, Sr., and his wife, and one-sixth each by E. L. Doheny, Jr., and the latter's wife.

Plaintiff offered voluntary statements made in January and February, 1924, by Mr. Doheny before the Committee on Public Lands and Surveys of the United States Senate, conducting hearings on the subject of leases upon naval reserves (R. v. I, 187-196; 196-294). Testifying before the Senate Committee, Mr. Doheny stated that on November 30, 1921, he loaned Mr. Fall \$100,000 upon his promissory note to enable him to purchase a ranch in New Mexico; the sum was loaned to Mr. Fall by Mr. Doheny personally with his own money, which did not belong in whole or in part to any oil company with which he was or had been connected; in connection with the loan there was no discussion between Messrs. Fall and Doheny as to any contract whatever; the loan had no relation to any of the subsequent transactions; the transactions themselves, in the order in which they occurred, disposed of any contention that they were influenced by his making a personal loan to a life-long friend; the reason for his making, and Mr. Fall's accepting, the loan was that they had been friends for more than thirty years; Mr. Fall had invested his savings for those years in his home ranch in New Mexico, which Mr. Doheny understood was all that remained to him after the failure of mining investments in Mexico and nine years of public service in Washington during which he could not properly attend to the management of his ranch; the death of Mr. Fall's son had deprived him of the one who had been in charge of the management of the ranch; in frequent talks that

occurred in the fall of 1921 between Messrs. Fall and Doheny it was clear that the acquisition of a neighboring property controlling the water that flowed through Mr. Fall's home ranch was a hope of his amounting to an obsession; the joining of the two ranches and the control of the water from the ranch he wished to acquire, to supplement the water on his own land in order to make a good cattle ranch, would make a complete ranch for Mr. Fall's purposes; funds could not be realized on his once valuable Mexican mine holdings; Mr. Doheny and Mr. Fall had been old-time friends; they had both worked in the same mining district in New Mexico in 1885; they were bound together by the ties that bind men who have lived under trying circumstances and conditions; they had studied law at the same time; they had practiced in the same district; Mr. Doheny had watched Mr. Fall's career as district attorney, judge, United States senator, and Secretary of the Interior; he was very much interested in him on account of their old association; Mr. Doheny had followed prospecting, had been fortunate, and had accumulated a large amount of money; Mr. Fall had been unfortunate in his investments, but had a home ranch and entertained the hope of acquiring the adjoining ranch; Mr. Doheny was frequently in Mr. Fall's apartments in Washington and they were always talking about the old-time days, and talked over these things; Mr. Fall had been depending upon raising the money to buy the ranch adjoining his by getting a Mr. McLean to buy an interest in it or by a loan from Mr. McLean or an old partner of Mr. Fall's named McKinney. In one of their talks Mr. Doheny, being of an impulsive nature, told Mr. Fall that he would be willing to make him the loan, that whenever the latter needed the money to pay for that ranch the former would lend it to him. Mr. Fall spoke at that time about possibly borrowing the money from Mr. McLean and he said something about giving the ranch as security

and Mr. Doheny stated that he would make the loan on Mr. Fall's note, that the latter need not give the ranch as security. Later, in the autumn of 1921, by telephone from Washington to New York, Mr. Fall told Mr. Doheny that the purchase had become possible by reason of the willingness of the then owners of the Harris Ranch to sell and that the time had arrived when he was ready to take advantage of Mr. Doheny's offer to make the loan. Thereupon Mr. Doheny had his son cash a check on the latter's account with Blair & Co.'s bank in New York for \$100,000, take that sum in currency to Washington, and deliver it to Mr. Fall. Mr. Doheny does not remember whether Mr. Fall asked that the amount of the loan be sent him in currency or whether he adopted that form at his own election; it was not unusual for him to have large transactions in which currency was used; Mr. Doheny's son obtained from Mr. Fall the latter's note for \$100,000 and delivered it to his father; the loan was a bona fide one for the purpose of accommodating an old friend on his note, which the lender would insist on the repayment of, if the borrower's health remained good. Prior to the time the loan was made Mr. Fall had often spoken of resigning as Secretary of the Interior before his term was out; he said he did not intend to remain in that office very long.

Mr. Doheny has made many loans and this loan to Mr. Fall was not an extraordinary thing to him; there is an army of old prospectors, less fortunate than himself, to whom he has made loans only because of old friendship.

Mr. Doheny expected that probably after Mr. Fall retired as Secretary of the Interior, if Mr. Fall did not sell or turn over the land (referring to his New Mexico ranch property), later on Mr. Doheny might employ him in connection with affairs in Mexico, with which Mr. Fall was very conversant, and the loan would be paid out of the latter's salary, in case Mr. Fall did not find it possible to pay it out of the profits

of his property or was not able to pay it in any other way.

No attorney or officer of the defendant company had any knowledge of this loan transaction, that being an entirely private matter involving in no way the company's funds.

(R. v. I, 198-200; 201; 209; 210; 211; 217; 221; 222; 226; 245; 249; 250; 255; 267; 268).

Before the Senate Committee Mr. Doheny testified regarding the separation of the signature from the body of the note, and the purpose thereof, in substance as Mrs. Doheny testified at the trial (R. v. I, 261-3).

In his testimony before the Senate Committee Mr. Doheny, as an offhand estimate, stated that he expected that the profit that would be made out of production of oil from the leased land in Naval Reserve No. 1 and from the piping, storing, refining and marketing of it would amount to \$100,000,000, which he expected would be realized in the course of 30 or 40 years, in doing which it would be probably necessary to invest in the neighborhood of \$100,000,000 to \$150,000,000, the drilling alone of the required number of wells being estimated to cost \$96,000,000, without pipage, storage, refining, and marketing facilities; up to February, 1924, \$32,000,000 had been expended in preparation for the development of the leases (R. v. I, 234; 240-2).

II.

Specifications of Error Intended to Be Urged.

The Circuit Court of Appeals erred—

1. In holding that the Act of June 4, 1920, did not authorize the contracts between the United States and the Transport Company dated April 25 and December 11, 1922.

2. In holding that the Act of June 4, 1920, did not authorize the leases of lands in Naval Petroleum Reserve No. 1 between the United States and the Petroleum Company dated June 5 and December 11, 1922.

3. In failing to hold that the Secretary of the Navy

under the authority to take possession of all properties in the naval petroleum reserves of the Government and to conserve, use, develop and operate the same, in his discretion, by lease or contract, and to use, sell, exchange and store the products thereof, conferred by the express provisions of the Act of June 4, 1920, had ample power to enter into the contracts and leases in suit, and that the said Secretary of the Navy in the execution of said contracts and leases exercised that power.

4. In holding that the contracts between the United States and the Transport Company, dated April 25 and December 11, 1922, were void because providing for the establishment of naval fuel depots at places where such had not been authorized by Congress; and in not holding (1) that the Navy fuel depot at Pearl Harbor had been lawfully established long prior to such contracts, and (2) that the Act of June 4, 1920, fully authorized the Secretary of the Navy to store at Pearl Harbor petroleum products received by the Government as a result of the operations of the naval petroleum reserves.

5. In holding that the contracts between the United States and the Transport Company of April 25 and December 11, 1922, were void because proposals therefor had not been publicly advertised.

6. In making a similar holding as that referred to in the last specification with respect to leases between the United States and the Petroleum Company dated June 5 and December 11, 1922.

7. In not holding that the District Court erred in its holding that the contracts and leases in suit were invalid because of alleged delegations of authority from the Secretary of the Navy to the Secretary of the Interior therein contained.

8. In holding that the plaintiff was entitled to the relief prayed without showing any pecuniary loss or damage to it resulting from the execution of or operations under the contracts and/or leases in suit.

9. In affirming so much of the decree of the District Court as ordered cancellation of the aforesaid contracts and leases.

10. In holding that the Transport Company was not entitled to retain royalty crude oil delivered to it by the United States in return for fuel oil and facilities for the storage and handling thereof at Pearl Harbor, Hawaii, under the contracts of April 25 and December 11, 1922, but should be compelled to account to the United States for the value of said crude oil.

11. In holding that the United States was entitled to cancellation of the contracts and leases in suit without doing equity by crediting the defendants respectively with expenditures made under and in performance of the terms of said contracts and leases, which expenditures the District Court found were beneficial to the United States and resulted in benefits and improvements to its property which it should retain.

12. In holding that the Petroleum Company should account to the United States for the gross value of all crude oil produced from wells on Naval Petroleum Reserves Nos. 1 and 2 under leases of June 5 and December 11, 1922, and should not be credited with the cost of producing said oil, bringing into production and operating the wells drilled under said leases, and making other necessary and useful improvements upon the leased land in connection with the said production and operation.

13. In reversing that operation of the decree of the District Court which directed that the defendants be credited with the cost price of the storage facilities for crude oil products at Pearl Harbor and the cost price of the fuel oil contents thereof and the actual expenditures of money in drilling and putting on production wells drilled under the aforesaid leases.

14. In holding that the District Court's findings of fact which the evidence was insufficient to support were of little importance and that the case could be disposed of on conclusions upon the law applicable to it without regard to the facts.

15. In not holding that the District Court erred in finding that the Secretary of the Navy was passive as regards, and took no part in directing and making, the contracts and leases in suit, and did not have full knowledge of the contents of, or carefully read or comprehend the documents: for that there is no evidence to support such findings; and in failing to hold that the Secretary of the Navy, pursuant to his lawful authority, with full responsibility directed the negotiations for and executed the contracts and leases in suit.

16. In not holding that the District Court erred in finding that Albert B. Fall, Secretary of the Interior, dominated and directed the making of the contracts and leases in suit and did so pursuant to a conspiracy entered into by him with Edward L. Doheny: for that the said holdings are not supported by the evidence; and in failing to hold that the said Albert B. Fall did not dominate, direct, recommend, request or in any way influence the making of said contracts and leases, and/or the negotiations therefor, and that the same were not the result of any conspiracy between, and were not influenced by any transactions between, Albert B. Fall and Edward L. Doheny.

17. In holding that the District Court did not err in admitting in evidence against the defendant corporation the testimony of E. L. Doheny before the Senate Committee on Public Lands, conducting an investigation in Washington in January and February, 1924, which testimony was the voluntary statement of the said Doheny as an individual and consisted of a narration of past events and was not made as an officer of or in connection with the transaction of any business for the corporations, nor at a time when the declarant held any office in either of the said corporations authorizing him to bind them or either of them by any acts or statements.

18. In not passing upon and holding to be error the action of the District Court in admitting hearsay and irrelevant testimony (a) of conversation between Mr. and Mrs. E. L. Doheny, Sr.; (b) of the personal bank

account of Mr. and Mrs. E. L. Doheny, Jr., and withdrawals therefrom and deposits therein; (c) regarding purchase of a ranch in New Mexico by A. B. Fall, payments therefor, and bank accounts of the said Fall, and of C. C. Chase and of the firm of Fall and Chase, which erroneous rulings were covered by assignments of error filed in the District Court and presented to the Circuit Court of Appeals numbered 22-40, inclusive (R. v. III, 1442-1446).

19. In not holding that the District Court erred in admitting in evidence plaintiff's Exhibits Nos. 173-236 (R. v. II, 623-677) covered by defendants' objections and their assignment of error No. 49 filed in the District Court and presented to the Circuit Court of Appeals (R. v. III, 1449-50).

20. In not reversing the decree of the District Court and remanding the cause with directions to dismiss plaintiff's amended bill.

III.

Argument.

The District Court held that as a matter of law the Secretary of the Navy had authority, under the Act of June 4, 1920, to make for the United States the contracts and leases in suit (R. v. III, 1367-1386), but that as a matter of fact the Secretary of the Navy had not made or authorized the making of said contracts and leases (ib. 1366-7).

The Circuit Court of Appeals held that as a matter of law the Secretary of the Navy did not have authority to make for the United States the contracts and leases in suit and that in view of that conclusion upon the law applicable to the case the disputed facts became of little importance, even though the evidence was insufficient to support contested findings (R. v. III, 1499).

Upon the threshold of this case, therefore, there are found the questions involving the construction of the Act of June 4, 1920, the powers of the Secretary of the Navy thereunder, and whether or not the contracts and leases in issue were authorized thereby.

POINT I.

Under the Provisions of the Act of June 4, 1920, the Secretary of the Navy had Authority to Make the Exchange Contracts and the Leases Involved in This Case.

A. THE LANGUAGE OF THE LAW.

The full text of the Act of Congress relating to the naval petroleum reserves, which was adopted in the form of four provisos in the Naval Appropriation Act approved June 4, 1920, has been set forth on page 14 of this brief.

B. HISTORY OF THE ENACTMENT OF THIS LAW.

We have sketched this hereinbefore, pages 11-14.

The history of the naval reserves, the use for which they were specifically and exclusively created, the long consideration by the Congress to legislation relating to Government oil and gas lands which had been withdrawn from location and settlement, and the imperative necessity for legislation to give effect to the dedication to the exclusive use or benefit of the United States Navy of the petroleum reserves involved in the instant case, combine to assist to a clear understanding and correct construction of the law upon which the transactions now before this Court were based.

Because the applicable legislation was enacted in the form of provisos in the Naval Appropriation Act for the fiscal year ending June 30, 1921, the learned Circuit Court of Appeals referred to it as "casual" and gave to it a construction and application which we shall herein endeavor to show to be unsustainable. The fact that Congress followed a now quite usual custom of attaching general and permanent legislation to an appropriation act in no way affects its construction. There is not a word in these provisos which relates to or limits any part of the statute to which they are attached, and there is nothing in the appropriation clauses of the statute, or elsewhere therein, which

limits or restricts the natural meaning of the provisos. This was a special enactment, complete in itself, relating to a subject which was not included in the general act, and simply placed in the form of a proviso for legislative convenience, or for some other reason which does not affect its meaning and scope.

“This Court has had occasion to hold more than once that language used in provisos shows the legislative intention to bring in new matter rather than to limit or explain that which had gone before.”

American Express Co. v. U. S., 212 U. S., at p. 534.

“But it is, nevertheless, a frequent use of the proviso, in federal legislations, to introduce, as in the present case, new matter extending, rather than limiting or explaining that which has gone before.”

I. C. C. v. Baird, 194 U. S., at pp. 36-37;

C. & P. Tel. Co. v. Manning, 186 U. S., at pp. 242-243.

The Act of June 4, 1920, contains within itself a complete and comprehensive legislative scheme to repose exclusive control in the Secretary of the Navy as to all matters in connection with naval reserve affairs.

This was the first legislation which had ever been adopted for that purpose.

The statute is broad and sweeping and grants general discretion to the Secretary of the Navy without conditions or limitations, except as to the amount of cash which he is authorized to expend.

The entire responsibility for the handling of these naval reserves was vested in the Secretary, and he was given full discretion.

1. He could theoretically leave them as they were and take chances with regard both to the loss of oil from adjacent drilling and as to the unavailability of petroleum products for naval use when needed. This is covered by the use of the word “conserve” in its narrow sense.

This was not what Congress had primarily in mind,

because it could have been accomplished without any new legislation; and the law had been passed with the idea that active and not inactive methods should be thereafter pursued in order to protect both the oil reserves and the strategic interests of the United States Navy.

The word "conserve" must be construed together with the other language used—and is immediately followed by the words "develop, use and operate." Hence, it is submitted to be clear that an active conservation and not merely a passive conservation was intended by Congress, and that Congress recognized that truest conservation of oil which was intended for the use of the United States Navy might well be accomplished by operating and developing the oil fields—using them—getting the oil to the surface either by lease, development, contract or otherwise taking such steps that this oil should be transmuted into something which the Navy could actually consume, and so locating it that when necessary it would be available for naval service.

It is impossible to construe the word "conserve," used in connection with the other explicit commands of the statute, as directing a policy of inaction. On the contrary it indicates a policy of action—with full power and discretion in the Secretary as to what that action should be.

2. The Secretary could "develop" all or any part of these naval reserves.

The word "develop" can have but one meaning as applied to oil territory, and that is to cause oil to be produced from that territory. He could do this directly by hiring drillers and organizing a field force, if he saw fit.

This would be an "operation" of the property.

Or he could develop the same property indirectly or by contract—that is to say, by hiring the services of skilled oil men to do the necessary work and produce all oil possible, for the account and risk of the United States.

3. Or he could "lease" all or any part of this property.

The term "lease" as applied to an oil property is likewise wholly unambiguous. The meaning of an oil lease is known in almost every State of the Union. It is a contract under which the lessee, at his own cost, charge and risk, takes over the development of the property leased, furnishing all moneys and equipment necessary to produce oil therefrom, and yields to the lessor a stipulated consideration.

4. To emphasize the extent of the Secretary's discretion as to how these lands should be handled, the words "or otherwise" are added after the specific words hereinbefore mentioned.

Inasmuch as the specific words had covered practically all forms of utilizing the territory in question (especially as the word "use" had been employed in addition to the words already discussed), the effect of these two words "or otherwise" is not so much to suggest a definite and additional alternative as it is to emphasize the breadth of the discretion which was intended to be vested in the Secretary. The use of these words shows beyond the possibility of argument that the language "in his discretion" was intended to place in the Secretary of the Navy the untrammelled power to do everything that he saw fit to do with regard to these lands and oil royalties, except to irrevocably dispose of the title to them.

He could not sell or make a gift of this territory.

But he could do practically everything else with it that a private owner could do.

5. As to the leasing power:

The power to lease these lands is absolutely unlimited and unconditional.

a. There is no limit as to the area which could be leased in any or all of the reserves.

In this respect the statute is notably different from certain of the sections of the law of February 25, 1920, in which definite limitations were placed upon the

power of the Secretary of the Interior to lease lands. The latter could only lease lands in the reserves to the extent that producing wells had been developed (Sec. 18).

He could only lease other known oil lands within the public domain—

“in areas not exceeding 640 acres in tracts which shall not exceed in length two and one-half times their width.”

Under Sec. 14 certain other lands could be leased in areas specified therein.

The contrast between these two laws is so clear that it is inconceivable that Congress intended to hamper the Secretary of the Navy with any such limitations as to areas as those by which the Secretary of the Interior was bound under portions of the prior statute.

b. Nor is the Secretary of the Navy limited as to the time for which any lease might be made.

Here, again, there is a clear distinction between the provisions of the law of June 4th and Section 17 of the law of February 25, 1920, in which latter statute it is stated:

“Leases shall be for a period of twenty years with the preferential right in the lessee to renew the same for successive periods of ten years, etc.”

c. There is no limitation as to the terms and conditions, as to royalty or otherwise, which may be introduced in any lease made by the Secretary of the Navy.

Here again this law differs notably from certain provisions of the Leasing Act.

d. There is no limitation as to the purpose for which leases shall be made, except that they must be, in the discretion of the Secretary of the Navy—

“for the benefit of the United States.”

e. There is no condition fixing any particular set of circumstances or motives or reasons which must exist in order to give the Secretary of the Navy power to make any such lease.

If he believes that the interests of the Navy can be

better protected by leasing than by allowing the land to remain untouched, his decision is final and binding; and, as we shall see, cannot be reviewed by the courts, even though the reasons which actuated him do not seem persuasive to the tribunals to which they are presented.

The two leases attacked in this action were directed and made by the Secretary of the Navy, who was fully authorized to do so.

His motives or wisdom cannot be judicially reviewed.

6. On behalf of the plaintiff it is urged that the power given the Secretary of the Navy to "conserve, develop, use and operate" the lands in the naval petroleum reserves "in his discretion, directly or by contract, lease or otherwise," is limited by an implied condition that such development and operation could only be undertaken if drainage from outside sources was threatened. We submit that to so hold would be to write into the law a limitation and condition which it does not contain, and which if thus written in would absolutely prevent the taking out of oil from the land at times when, even if no drainage danger existed, the oil was needed either for the present or the future operations of the United States Navy.

In other words, such a limitation ends the operation of the Naval Reserves for the only real purpose for which Naval Reserves are required, to wit, Naval and strategical use, and the national defense.

But Government counsel have urged strenuously that Congress, in passing the Act of June 4, 1920, cannot be considered as having been "legislating for the national defense."

But if Congress, in passing the Law of June, 1920, was not legislating upon a subject-matter inherently and necessarily connected with the national defense, what was it legislating about?

Is, or is not, the U. S. Navy maintained and operated with reference to national defense plans, to national defense possibilities and to national defense necessities—not only as they exist today, but as those in charge

of the Department believe that they may exist to-morrow?

Were the Naval Reserve lands set aside, or were they not set aside pursuant to the policy of strengthening and aiding the needs of this Navy?

If not, for what purpose were they set aside and why were they styled "Naval Petroleum Reserves"?

If not, what was meant in the order setting these lands aside by the words "for the exclusive use or benefit of the Navy"?

And if the Navy, and these Naval Petroleum Reserves are not to be considered—as they must be considered—of primary importance to the Nation in so far as they help the Nation in its national defense plans and national defense activities, what substance is in the claim that ideas of national defense (by which is meant, not mere commercial, but strategic as well as protective considerations), were not entitled to be considered by the Secretary of the Navy in deciding which of the powers granted him by this law should be exercised and in what manner this exercise should take place?

If he did not and could not base his decisions upon such considerations, upon what grounds would he base them?

7. Plaintiff's counsel further contend that the law did not give the Secretary of the Navy any power to establish, above ground, reserves of petroleum products, but only permitted him, if and when he had any available oil, to "use the oil for current use or exchange it for current use oil."

No such limitation is found in the act.

No such limitation is within the reason of the act.

Any such attempted limitation is inconsistent with the reserve idea for national defense embodied in the designation "Naval Reserves".

Any such limitation would at once strike down one of the important strategical and practical purposes for which these reserves were to be created, i. e., to create something which would not merely theoretically,

but practically, be available for the uses of the Navy at such time as its exigencies might require.

As a practical matter, if this construction were adopted, where would the line be drawn?

What is current use?

Does it mean that the fuel must be put aboard naval vessels on the very day when the exchange is consummated?

If it does not mean this, can it be carried in any shore tank for a week's time?

Would the Secretary have power to carry such products in storage for a month?

If for a month, why not for a year?

How can the line be drawn at any definite period of time?

Why should the line be drawn at any definite period of time, or upon any time basis whatever?

Is not all crude royalty oil and all fuel petroleum which the Secretary receives in exchange for crude in his exclusive charge, and is there anything in the act which prevents it remaining in his exclusive charge until such time as he thinks best to use it?

If he thinks it best to use it on the day when he receives it, and if he is able to do so, has he not the power?

If he thinks it best to keep it for a week, what is there to restrain him?

If he thinks it best to keep it for a year, what language in the law renders this unlawful?

If he thinks it best to keep it without fixing any definite time, but with the idea that it shall be used whenever in the future its use seems best calculated to subserve the interests of the Navy and the United States, what reason is there, either in the terms of the act or any possible motive that led to its adoption, why he should not have this privilege?

We submit that the ground taken by the Government, and which we are endeavoring to controvert, is flatly opposed to the very essence of the spirit and language of the statute.

As we have already shown, it is inconceivable that Congress, without having said so, and having used the broadest general language to the contrary, should, nevertheless, have intended that the unrestricted power to develop, use, operate, and lease could only be exercised in those particular instances where drainage from outside drilling was threatened.

Undoubtedly he might have leased because of that theory.

But also, and we say undoubtedly, he had the right to lease if he believed that the development of the property and the taking of the oil by means of a lease, would operate to the best interests of the Navy, either by the establishment of an above-ground reserve of fuel oil, into which the crude might be exchanged, or otherwise.

Whatever his decision was in this and other similar matters, and whatever the reason for his decision, the jurisdiction and discretion was his and will not and cannot be reviewed by the Courts.

“The Court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment.”

U. S. ex rel. Ness vs. Fisher, 223 U. S. 683, 56 L. Ed. 610, citing numerous prior decisions of this Court by which, said the Court, “original discussion” is foreclosed on this point.

So wide and sweeping are the powers granted to the Secretary by the provisions directing him to “conserve, develop, use and operate” the reserves “in his discretion,” above discussed, that we submit that these provisions, even had the law contained nothing else, would have constituted a sufficient grant to the Secretary of power to handle and administer, in any way which he might think best, the naval reserve lands and the products of the development, use and operation thereof. To hold that the Secretary could have developed and operated, either by lease, direct action, drilling contract, or otherwise, these lands, and yet have been without power to utilize the products of such development and operation in the ordinary ways in

which such products can be utilized—that is, by using, selling, storing or exchanging the same—would nullify the statute and be wholly unreasonable. In view, however, of the specific provisions upon these points contained in the succeeding phrases of the law, extended discussion thereof is unnecessary. So great was the desire of Congress to give the Secretary unquestioned powers in this regard that they proceeded expressly to vest him with the powers to which we have alluded in connection with the handling and utilization of the oil itself.

8. The Act empowered the Secretary “to use, store, exchange, or sell the oil and gas products” and “those from all royalty oil from lands in the naval reserves, for the benefit of the United States.”

We shall first discuss the meaning of the words “exchange” and “store” independently of the appropriation clause of the Act, and then shall undertake to demonstrate that the latter clause does not limit or modify the exchange and the storage power as it otherwise exists.

9. The power to exchange:

The word “exchange” is clearly the most important word in this branch of the statute, so far as the practical operation of the statute for the benefit of the Navy itself is concerned.

For, remembering that under the former law royalty oils must always be sold, but that this would immediately make the operation of the naval reserves a commercial proposition, rather than a Navy fuel proposition, obviously the only way in which any royalty oils could be turned to account for naval benefit under the terms of the Act was by the exercise of the power to exchange them for other things.

Crude oils cannot be used in naval vessels. Something must be done with them, either by way of refining them or by way of exchanging them for products which can be used.

The Act as originally drawn contained the word “refine” so as to give the Secretary power to “use,

refine," etc.; but in its final form as adopted the word "refine" was stricken out.

This left, as the sole and only mode by which royalty oils could be turned to account for naval purposes, the exercise of the exchange power.

The question then arises—

For what may royalty oils be exchanged?

The plain and ordinary meaning of the word "exchange" is

"a contract by which the parties mutually give or agree to give, one thing for another, neither thing nor both things being money only."

Words and Phrases, first series, page 2546;

23 Corpus Juris, 186-187;

B. & O. R. R. v. Western Union Tel. Co., 241 Fed.

Rep. 170, "Exchange is barter";

Postal Tel.-Cable Co. v. R. R. Co., 248 U. S. 471.

"The distinguishing feature of a barter is that goods are exchanged for goods instead of money; and to constitute a transaction a barter, it is no more essential that the delivery should be made by both parties at the time the bargain is made, than it is necessary, in order to constitute a sale that the price should be paid contemporaneously with the delivery of the goods, which are the subject of the transaction."

Jenkins v. Mapes, 41 N. E. 137 (Ohio).

Benjamin on Sales, 7th Ed., p. 2, says:

"If any other consideration than money be given it is not a sale."

It will be observed that the well recognized meaning of "exchange" contains no limitation whatsoever as to the character or quality of the things which may be the subject of the exchange, or the terms or the conditions of the contract.

The only requisite is that the subject matter must be property other than money.

Personal property whether tangible or in action may be exchanged for real estate or for other personal property of any kind whatsoever and irrespective of time of delivery, place of delivery, quantity, quality or character.

Hence, in the absence of some controlling reason, this is the interpretation which should be given to the word as used in the present statute.

But plaintiff's counsel seek to limit this ordinary, natural, and well recognized meaning. They have always contended that the exchange could only be made for fuel oil, and they have added that this fuel oil must be acquired for current use. They deny that the crude oil from the reserves may be exchanged for storage tanks or the equivalent to that crude oil or products received in exchange, or for any consideration other than petroleum products of one class or another. Government counsel so insisted in the District Court and in the Circuit Court of Appeals. Neither Court agreed, the District Court rejecting the contention entirely and the Circuit Court of Appeals, refusing to go as far as Government counsel have, taking the view that royalty oil may be exchanged for "current fuel oil or facilities for the storage of royalty oils" (R. v. III, 1503).

Government counsel, the Court of Appeals, the District Court and ourselves all agree that the royalty oil may be exchanged for something of a different nature from royalty oil itself.

We say, as the District Court in this case and Judge Kennedy in the *Teapot Dome* case (5 Fed. (2d) 330) have said, that royalty oil may be exchanged in the discretion of the Secretary of the Navy, not only for fuel oil for current use, but for fuel oil which the Navy needs for use at any time, and also for gasoline or kerosene, for Diesel oil, for lubricating oil, and for other forms of petroleum products, and also for any incidental thing and rights which the Navy needs to have or to use in connection with the solving of its naval reserve petroleum and petroleum product problems, of every nature.

On one further point counsel for the Government and the Circuit Court of Appeals and ourselves are agreed, and that is that the power to exchange is not entirely unlimited. We all concur in the view that the

word "exchange" must have some reasonable limitation and that it cannot be extended to unreasonable lengths.

"All laws should receive a sensible construction, ~~and every term should be so limited in their application~~ as not to lead to injustice, oppression or absurd consequence."

Church of Holy Trinity v. U. S., 143 U. S. 457.

We respectfully submit that there is no logical basis for limiting the exchange practice to current fuel oil or to facilities for the storage of royalty oils only.

Why fuel oil for current use? If the Secretary has any exchange power can he not acquire fuel oil which he intends to store for a few months instead of using it immediately, or within such period of time as might be deemed to be current use?

Fuel oil is fuel oil—of the same chemical composition—prepared according to the same manufacturing standards and Navy specifications—whether it is originally destined in the mind of the Secretary (which he may change from time to time) to be used immediately or to be held to some later date.

And we submit that when Government counsel and the Circuit Court of Appeals conceded that some exchange power existed and that this exchange power could extend to any kind of fuel oil, they practically conceded this point, *i. e.*, that fuel oil for storage purposes is just as much within the exchange power as fuel oil for "current use."

In the next place why any distinction between fuel oil of any kind and for any purpose on the one hand and gasoline, benzine, kerosene and other petroleum products on the other?

There is no distinction in the act.

There is no such distinction in logic.

There is no such distinction in any suggestion made by the learned court below.

Is it not clear that the exchange power, if it exists at all, as to oil of any kind, certainly extends to all kinds of petroleum products which the Secretary in his discretion decided that the Navy needed?

In the next place may the very important point be noted that the Court below admits that the Secretary did have power to exchange for at least one thing other than petroleum products of any kind—*i. e.*, that the Secretary could have thus acquired “facilities for the storage of royalty oils” (R. v. III, 1503).

Here is an out and out statement that some tanks or other appurtenances appropriate or necessary for the storage of some kind of oil could, within the meaning of the act, be acquired by the Secretary of the Navy—not for cash, but in exchange for royalty oils.

The effect of this is (aside from the claim of limitation as to amount, which we shall discuss shortly) of the greatest importance, we submit, in this connection as bearing upon the correctness of the conclusions reached by the Court concerning the limitation of the exchange power. For, if some storage facilities could be acquired for any purposes—where within the Act or within its reasonable construction is there room for any distinction based upon whether the storage facilities—these iron tanks and pipes, etc.—are intended to be used for the storage of royalty oils, or fuel oils, or gasolines, or anything else—or based upon any distinction between whether any of these liquids are to be stored for “current use” or for some longer period?

It seems to us that the theory of the Circuit Court of Appeals makes the validity of the exercise by the Secretary of the Navy of his exchange power, dependent upon his mental attitude at some particular moment of time.

Thus, the Court holds that the Secretary may exchange royalty oil for fuel oil—but qualifies this by insisting that he must intend this fuel oil for current use.

And the Court also holds that the Secretary had power to exchange royalty oil for storage facilities—but again qualifies this statement by saying that these storage facilities must be intended “for the storage of royalty oils.”

We submit that distinctions of this nature have no basis in the law or in logic.

If the Secretary could acquire fuel oil in this manner, then even though he intended it at the moment of acquisition to be used for current use, he could immediately thereafter decide to hold it for a time, *i. e.*, to store it. And if the Secretary could acquire any storage facilities in this manner, he could, even though he originally intended them to hold royalty oils, change his mind at any moment and fill them with fuel oil.

When the physical things themselves are from their very inherent nature capable of being applied to one purpose or another, it cannot be true that the validity of contracts for their acquisition depends upon the thought of the public official acquiring them, at the moment of acquisition, as to the purpose to which these chattels were eventually to be applied.

There is but one logical limitation of the exchange power contained in these general words, and that is that it must be exercised in the discretion of the Secretary for some purpose not merely relating to the Navy Department as an entirety, but related to the Naval Reserve, petroleum and petroleum products problems of the Navy Department.

If the law under consideration had given the Secretary sole discretion as to every matter connected with the administration of the entire Navy, then possibly he would have been able to exchange royalty oil for new navy yards or battleships.

But while it gave him no such unrestricted discretion as to all naval matters, it gave him ample discretion as to all Naval Reserve and petroleum matters.

This construction is the only reasonable one in view of the clear purpose of the law. And the contracts here attacked were within the scope of this reasonable discretion.

10. The power to store:

We discuss the powers of the Secretary separately, noting, however, that the power to store was exercised in this case in conjunction with and through the power to exchange and the power to lease. Despite

the detailed and separate analysis, the Court will bear in mind in determining the breadth of the Secretary's power over the products of the reserves that the law authorized him "to use, store, exchange or sell the oil and gas products thereof and those from all royalty oils from lands in the naval reserves."

The District Court held that out of the combined powers to exchange and store the Secretary of the Navy had authority to exchange crude oil for fuel oil, and other petroleum products, and storage facilities therefor.

The Circuit Court of Appeals held that under these combined powers the Secretary of the Navy had authority to exchange crude oil for fuel oil for current use and to exchange crude oil for "facilities for the storage of royalty oils" (R. v. III, 1503), but that he did not have authority to exchange crude oil for fuel oil and for tanks in which to store that fuel oil.

Both of the courts below, therefore, have held that the Secretary had power to exchange crude oil from the naval reserves for refined petroleum products and for storage facilities, the Circuit Court of Appeals, however, insisting upon writing into the statute a limitation upon these powers to exchange and store which is not found in the legislation itself.

The power to acquire storage facilities as well as petroleum products through the exercise of the exchange power is directly within the many cases holding that where a particular power is granted, everything necessary to carry out the power and make it effective and complete will be implied from the language of the statute.

"The intention of the lawmaker constitutes the law. What is clearly implied in a statute is as effectual as what is expressed."

Telegraph Co. v. Eyser, 19 Wall., 427.

"What is implied in a statute is as much a part of it as what is expressed."

County of Wilson v. The Bank, 103 U. S., 778.

"It is also elementary that when a power is conferred by statute, everything necessary to carry out the power and make it *effectual and complete*, will be implied."

Dooley v. The Railroad, 250 Fed., 143.

"The privilege carries the right to use all appropriate and reasonably necessary means and agencies."

Ex Parte Yarborough, 110 U. S., 658;

McHenry v. Alford, 168 U. S., 672;

Great Northern Co. v. U. S., 155 Fed., 959;

Gelpcke v. Dubuque, 1 Wall., 220;

U. S. v. Babbitt, 1 Black, 61;

Steel Co. v. U. S., 235 U. S., 460;

In re Neagle, 135 U. S., 7;

Loan Ass'n v. Topeka, 20 Wall., 655;

U. S. v. Engine Co., 91 U. S., 321;

New Mexico v. Trust Co., 172 U. S., 171;

McCulloch v. Maryland, 4 Wheat., 407;

Luria v. U. S., 231 U. S., 9;

U. S. v. McDaniel, 7 Pet., 1;

County of Wilson v. The Bank, 103 U. S., 778;

Royalty oil, fuel oil, or any other form of liquid or gaseous petroleum products, cannot be handled except in containers.

And unless containers exist at the spot where the Secretary, in his discretion, deemed it necessary that crude petroleum or its products should be located, or unless these containers were adequate in kind and capacity to hold such petroleum or its products, the providing of them was just as much a part of the Secretary's duty as the providing of the petroleum or its products themselves.

Great emphasis is placed upon this by the use of the word "store" as well as "exchange" in the law.

The containers were, or might necessarily be, incidental to the execution of the exchange power.

And to deny that this power was granted by the express use of the word "store," as well as by the necessary and proper interpretation of the word "exchange" as an incidental thereto, would be to limit

the exchange power to cases and places where containers already exist—a construction which, in view of the comprehensive plan to administer the Naval Reserves and to supply the needs of the Navy as to fuel and other petroleum products, would simply defeat and not effectuate the clear intent of Congress.

The results which would flow from any construction of the statute which, while admitting that the Secretary of the Navy could acquire storage facilities for royalty oil in exchange for royalty oil itself, would prevent him from acquiring such storage facilities if they were to be used for fuel oil received in exchange, would be so illogical and, we think, so unreasonable, as to make it practically certain that no such intention was in the mind of Congress.

Assume that the Secretary of the Navy in his discretion—which is conceded—desires to acquire a certain amount of fuel oil. Assume that he has on hand royalty oil which is available for exchange for such fuel oil. Assume, if we please, though this is not necessary, that it is for any one of a number of reasons greatly to the advantage of the Navy to exchange this royalty oil for fuel oil rather than to sell it for whatever price may be obtainable, and to turn the money in to the treasury, and in addition to this let us assume that at the place where the fuel oil is urgently needed there are inadequate storage facilities, as, for instance, at the Brooklyn Navy Yard or any other similar place where perhaps some storage facilities exist, but not enough to hold the fuel oil which is to be acquired.

How absurd, we submit, it would be in the face of so broad a statute as this, enacted for such purposes, to refuse to allow the Secretary to make the contemplated fuel oil exchange and at the same time to provide a tank or tanks at the navy yard without which the fuel oil could not be handled if thus received unless he first and in each case obtained special statutory approval! It is earnestly submitted that there could be no reason for the limitation suggested, that all reason is against

it, and that there is nothing in the act or in the public policies of the country which requires its establishment.

And this is exactly the sort of situation which was met in this case by the passage of this general act vesting discretion in the Secretary.

Our adversaries have suggested that power to store is limited to royalty oils and not to fuel oil received in exchange, because the statute says:

“To use, store, exchange or sell the oil and gas products thereof, and those from all royalty oil from lands in the Naval Reserves,”

adding that fuel oil produced from some other crude oil and received by the Government in exchange for its royalty oil does not come within the foregoing category since it was not produced from Naval Reserve royalty oil.

The untenability of this is instantly apparent when we remember that if the Secretary could not store fuel oil received in exchange, then since all these powers are covered in the same sentence and have the same limitation, neither could he use fuel oil received in exchange. No such argument can possibly be valid.

Not only the words “use, store, exchange or sell,” as applied to the products particularly, but the words “conserve, develop, use and operate” the entire Naval Reserves, place it beyond doubt that Congress never intended any such finespun distinction, but that the Secretary of the Navy’s power as to handling and disposing of crude petroleum and any refined forms of petroleum, extended not only to crude petroleum directly produced by the Government from these lands and to royalty crude petroleum, but also to all refined products from petroleum either produced directly by the Government itself from Naval Reserve lands, or received by the way of royalties, or acquired by the Government in exchange for oil either produced by the Government or received by way of royalties. If the Secretary were held to have no power to store fuel

oil which he acquired in exchange for royalty oil, his exchange power in the absence of adequate storage tanks already existing where he desired the fuel oil delivered would vanish unless the fuel oil received in exchange could be instantly delivered on board the particular ship where it would be actually consumed, and unless such ship were available at the time and place where the exchange were effected and at the very instant of the exchange.

We submit that the mere statement of such an argument, keeping in mind at the same time that without question the idea of an available fuel reserve was one of the ideas which led to the passage of the statute, shows the fallacy of the Government's contention.

11. Manifestly the question of the proper interpretation of the statute, cannot be affected by the amount of royalty oil which the Secretary, in the exercise of his discretion, may determine to exchange for fuel oil and/or its containers.

Counsel would doubtless disclaim any intention to seriously argue that if the Secretary of the Navy has discretion in this regard, the Court has power to review his discretion upon the theory that too much or too little royalty oil has been devoted to any particular purpose.

And yet counsel have on previous hearings interwoven in their argument suggestions that the enormous quantity of royalty oil which might have been devoted by the Secretary to the acquiring of above-ground reserve fuel oil, including containers therefor, somehow characterizes and qualifies his act and renders it more subject to judicial review.

The point, if made, that the setting aside of a substantial amount of royalty oil for the construction of tanks and plant would constitute a diversion thereof from the fuel purposes of the Navy and that, therefore, the statute of June 4, 1920, should not be interpreted so as to permit this to be done, is disposed of when it is remembered that before this statute was

passed all royalty oil was sold, and thus was diverted from the fuel purposes of the Navy.

Moreover, every lease of any part of the Naval Reserves lands, every drilling contract which the Secretary might make with an operator, and even the exchange of royalty crude for fuel oil itself—which Government counsel and the courts below concede to be legal—involves some loss of the total amount of royalty oil which otherwise would be in the possession of the Government. For no such transaction could take place without the lessee or drilling operator being entitled to a part of the product, or the other party to the exchange of crude oil for fuel oil obtaining more royalty oil in volume than the amount of the refined product which he gives in exchange therefor.

POINT II.

The Appropriation Clause Does Not Limit the Power of the Secretary of the Navy Under the Act, except in the Expenditure of Cash.

The District Court so held. The Circuit Court of Appeals held otherwise.

1. The language of this clause is:

“Provided, further, that such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the Naval Petroleum Reserves to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922;

“Provided, further, that this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States, at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct.”

2. Our position is that this appropriation was not in the least degree intended as a limitation upon any power, but solely as an aid to the execution of such powers as might require the use of cash.

3. The Government's contention upon this point is, in substance, that except for this appropriation, the statute has no validity, and the extent of the powers granted is dependent upon and limited by the amount of the appropriation made. They refer to Section 3732, R. S. U. S., providing that "No contract . . . shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfilment" This statute recognizes two alternatives as to the existence of powers to contract—one an express grant of power and the other an implied grant existing from an appropriation of money for a given purpose. That either of these alternatives empowers the official to act is settled:

Chase v. U. S., 155 U. S., at p. 502;

Fowler v. U. S., 3 Ct. of Cl., 43;

Shipman v. U. S., 18 Ct. of Cl., 138.

4. The powers of the Secretary of the Navy under the Act of June 4, 1920, do not depend upon the cash appropriation, as would be the case in instances where the only basis for any power at all was the existence of such an appropriation.

"The first clause of section 3732 applies to direct authority to contract granted by statute. The second clause covers an implied authority arising out of the appropriation of means."

19 Op. Attys. Gen., at 654.

15 Op. Attys. Gen., at 235.

Under this statute, therefore, which contained express grants of all these powers, it is submitted that if there had been no appropriation clause at all the Secretary of the Navy would have had complete powers over the Naval Reserve and its products so far as Naval Reserve petroleum and fuel matters are concerned, with one exception, to wit, that he would have had no money to spend.

But even under such circumstances it would not only have been his right but his duty to administer the Naval Reserves, to take possession of the properties,

to administer them in such way as he thought best, to exercise his discretion as to developing them, using them or operating them, as might seem most fitting; to decide whether the products should be used, stored, exchanged or sold, and in all other respects to have exercised the discretion and fulfilled the mandate expressly conferred upon him by Congress.

As to some of these faculties there can, we submit, be no question but that it would have been his right and his duty to exercise them, even if no appropriation had ever been made.

What has an appropriation to do with a lease of lands involving no expense to the Government?

What has an appropriation to do with a development contract other than a lease, as long as no money expenditure was required?

What has it to do with a sale or exchange or the use of the products derived from any such development?

Nothing, we submit.

But Congress, in addition to imposing these duties (be it remembered that the word "directed" is the one that is used in the law) saw that the Secretary might need money for some of these tasks and proceeded to authorize him to spend \$500,000 "for this purpose until July 1, 1922."

The phrase "for this purpose" is general, and, so far as language goes, applies to the entire scope and meaning of the act. It is not specifically applicable to any one or more powers.

The Circuit Court of Appeals construed it as limiting the power of exchange, to wit, a power in the exercise of which it was not necessary for the Secretary to spend one single dollar of cash belonging to the United States—although no such limitation is specified by the statute.

But, we submit, such an interpretation of the statute entirely disregards the obvious purpose for which the appropriation was authorized, which was to furnish

money available to the Secretary for use in connection with matters where he could not do his duty unless he had money to spend.

In other words, the appropriation was not intended to derogate from and limit the broad powers theretofore expressly granted in the act, but was intended simply to aid the Secretary to exercise such of the powers as could not be exercised unless he had money at his disposal.

When this appropriation is considered as an aid to the exercise of certain powers theretofore expressly granted, and not as a limitation upon any power whatsoever, the entire situation becomes perfectly clear.

Distinctions would immediately be drawn upon the only possible lines, to wit, between powers which could only be exercised by the use of money—as, for instance, if the Secretary wished to have the Navy Department itself drill wells, etc., upon Naval Reserves—and on the other hand powers in connection with the exercise of which no money whatsoever was needed—as, for instance, the making of a lease or other development contract involving no expense, the sale of royalty oil to any extent whatsoever, including only the taking in and not the giving out of money, and the exchanging of royalty oil for any purposes within the fair scope of the statute, wholly irrespective of whether the amount of such royalty oil were \$500,000 or \$5,000,000.

The appropriation aids the Secretary in the exercise of the first class of powers, not because it creates or defines the power itself (which is already granted by the law), but because the power itself is of such a nature that it cannot be exercised without the existence of an appropriation and the ability to spend money thus appropriated.

Thus considered, the appropriation clause instantly reconciles itself with the balance of the statute.

Another consideration is worthy of note, and that is that, even under the interpretation of the appropria-

tion clause given by the Circuit Court of Appeals, this \$500,000 cannot be the final limit because in a proper case it could be renewed and re-renewed under the last clause of the statute by being reimbursed out of any other "proper appropriations."

Lastly, may it be noted that the appropriation in question was only available, under the language of the proviso, until July 1, 1922.

If the construction given by the Court below were correct, then, even though not one single dollar of this appropriation had been spent before the date mentioned, all of the powers of the Secretary, even though they involved no use of money, would have ceased to be exercisable after the date mentioned.

There can, we submit, be no acceptance of the Court's argument unless it be carried out to its complete conclusion, and that involves the question of time as well as the question of amount.

We believe that any interpretation which makes the exercise of these general powers to conserve, to lease, to exchange, to sell, etc., after July 1, 1922, dependent upon whether Congress has seen fit to make a further appropriation or to extend the time within which the original appropriation could be employed, would not be found by this Court, after full consideration, to be admissible.

As to the Reimbursement Clause:

The Court is asked to note:

1. This clause does not come into play unless some part of the \$500,000 appropriation is spent.

2. Even if this expenditure takes place, the reimbursement clause does not come into play unless it is spent for some purpose covered by another "proper appropriation."

3. It does not apply unless "oil and gas products from said properties" are "used by the United States."

4. The clause refers to the "use" of royalty oil for fuel and the use of a part of some fuel appropriation to

reimburse the \$500,000 appropriation if some part has been spent.

5. And the draftsman of the appropriation clause doubtless had in mind the possibility that the Secretary might himself refine some of the royalty oil and use for current consumption a part of the products therefrom, in which case he would be saving the Government a part of the cash appropriation which otherwise would be called upon to furnish fuel for the Navy. The word "refine" was in the bill as originally drawn.

But the word "refine" was stricken out of the bill before it was adopted.

6. As a result, royalty oil cannot be refined and thus directly used for fuel purposes.

7. This reimbursement clause was not intended to, and does not, in any way modify any of the general powers of the Secretary, cut down or eliminate his power to exchange, or operate adversely as against any of the arguments which we have set forth.

POINT III.

The Contracts of April 25 and December 11, 1922, Were Intended to Be and Were Exchange Contracts Within the Meaning of the Law. This is True Despite the Provisions Thereof by Which the Quantities of Crude Oil and of Fuel Oil to be Delivered Were Made Variable in Cases of Variance of the Reference Prices of These Two Commodities.

This position was upheld by the District Court (R. v. III, 1380-1386).

The Court of Appeals did not discuss this point.

The Government contends these were "sale" and not "exchange" contracts.

Before entering into this discussion let us call attention to a point which was overlooked in the arguments of our adversaries in the District Court, which is—

That the statute gives the Secretary of the Navy full power to make both kinds of contracts.

The words "sale" and "exchange" are both used in the act.

We shall develop this point more fully later; but at the moment we simply submit that our adversaries cannot by any possibility show that these contracts are illegal by drawing distinctions between these two classes of agreements.

If they were not exchanges—they certainly were sales.

And whichever they were, the Secretary of the Navy was given express power to make them by the language of the act.

In other words, the inclusion in the statute of both words "sale" and "exchange" removes from the necessity of discussion the many decisions which have been rendered in litigations where the point involved was as to the scope of a statute or other writing where only one of these words was used, such as where powers of attorney to sell but not to exchange are construed.

1. These contracts were exchange contracts and were so intended.

In Articles II and III of the contract of April 25th it is said:

"It is the intention of the parties hereto to effect an exchange of crude oil * * * for fuel oil * * * to be delivered by the contractor * * * into storage facilities to be constructed and erected by the contractor" (R. v. I, 28);

and in the supplemental contract of December 11, 1922, it is provided that—

"Whereas, a certain contract was entered into by the above named parties, dated April 25, 1922, providing for the exchange of royalty crude oil belonging to the Government and produced from Naval Reserves Nos. 1 and 2 in the State of California for fuel oil in storage at Pearl Harbor, T. H., including tanks and incidental facilities * * *, and whereas said contractor has expressed a willingness to furnish the desired amounts (i. e., an increased quantity) of fuel oil and other petro-

leum products in storage in exchange for crude oil in the field" (ib. 41).

Then follow the contractor's obligations and after that it is provided in Article II that—

"For the considerations herein mentioned and contained, to wit, the furnishing of oils in storage and facilities and options as specified above, the Government agrees (a) to deliver in exchange to contractor all royalty oil, etc." (ib. 47).

No cash was intended to pass in connection with this arrangement.

These contracts will be seen by an examination of the terms of the statute and the authorities to be fully authorized by the law.

2. The position which the United States takes in connection with these two contracts is, that even though the Secretary might be deemed to have power to exchange crude oil for fuel oil in storage, nevertheless under the terms of the contract of April 25th that contract was not a true contract of exchange for the reason that the quantity of crude oil deliverable thereunder might have increased or diminished from the number of barrels specified therein.

The provisions of the contracts upon this point may be stated as follows:

(a) On April 25, 1922, the price of crude oil in the field was \$1.10 per barrel.

(b) The price of fuel oil at the California coast was \$1.50 per barrel.

(c) It was recognized that deliveries of fuel oil would be made by the contractor at various dates thereafter and that the price of such fuel oil might at the date of delivery of a given quantity vary from the reference price of \$1.50 per barrel specified in the contract.

(d) It was also recognized that the delivery of royalty oil would be made at various times during a long period until the cost of Pearl Harbor storage and the fuel oil to fill it was defrayed and that at the vari-

ous times of such delivery the published field price of such oil might vary from the reference price of \$1.10 published in the contract.

(e) To properly protect the interests of the United States and of the contractor and to avoid the necessity of making a purely hazardous and gambling contract which might become a burden upon or work an injustice to either party, it was provided in the April 25th contract that the quantities of crude oil delivered on the one hand and of fuel oil deliverable on the other should be subject to change from the amounts originally estimated, such change being proportionate to the changes in price above alluded to of these respective commodities.

(f) So far as the contract of December 11th was concerned it was not a lump sum contract. It was, however, provided that all crude oil delivered to the contractor should be delivered at the published field price on the date of delivery and that all fuel oil delivered by the contractor to the Government should be delivered at the market price thereof at the date of delivery at the California shipping point plus the going rate for transportation to Pearl Harbor.

(g) In other words, both of these contracts contemplated inevitable changes in price of the two commodities; and for the reasons above stated made the quantities respectively deliverable in final adjustment of the obligations of the parties depend upon the extent of these price changes.

(h) But it will be noted that no provision in either contract contemplates the payment of one dollar in cash by either party to the other at any time, in connection with the construction of the Pearl Harbor plant, whatever may be the fact as to differences in valuation of the commodities involved.

In other words, while the quantity of the commodity was dependent upon price changes to a certain extent, there was never to be delivered by either party to the

other in connection with the Pearl Harbor construction anything but property of the kind and quality specified; and under no circumstances was any payment of money to be made.

(i) The plaintiff asserts, however, that the determination of quantity by reference to varying market prices of the two commodities takes the case out of the category of exchanges and requires it to be described by some different denomination—presumably a sale on the one hand of royalty oil and a purchase on the other of fuel oil and of storage facilities.

3. This contention is, we submit, conclusively disposed of by the decision of this Court in *Postal Telegraph Cable Company against Tonopah Railroad Company*, 248 U. S., 471.

This case decided three appeals taken from different lower courts, all involving the construction and effect of the standard form of contract entered into between railroad companies and telegraph companies for an "exchange of services," throughout the U. S.

These contracts were all made under the provisions of Section 1 of the Interstate Commerce Act, as amended in 1910, which provided:

"Nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

The essential facts involved in these contracts were:

(1.) That the railroad company agreed to transport employees and materials of the telegraph company free up to an amount not exceeding \$10,000 per annum, calculated at the current transportation rates of the railroad, it being provided that as to excess transportation, the telegraph company should pay the railroad one-half of its aforesaid rates.

(2.) The telegraph company in exchange for the foregoing agreed to transmit messages of the railroad company up to the same amount of \$10,000 per annum,

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calculated at the regular day rates of the telegraph company, and excess messages to be paid for at one-half the telegraph company's regular rates.

(3.) Settlements between the parties were to be made yearly.

It will be noted that the question of how many messages the telegraph company should send was determined solely by reference to its regular rates of charge; and the question of how much transportation should be given by the railroad company was likewise determined by reference to its regular rates.

It will be also noted that the rates which formed the basis were the "current transportation rates of the railroad" and the "regular day rates of the telegraph company."

In other words, the contract was not for the transportation of a given number of men, or a given number of tons of freight on the one hand, and a given number of telegraph messages on the other, but in each case the quantum of the service to be rendered was to be fixed by reference to a changeable cash standard; that is to say, such amount of service, as based upon the cash standard for the unit of service, should equal a given aggregate sum.

The situation disclosed by these contracts was almost the identical situation established by the exchange contract in this case.

This Court held that these transactions constituted an exchange, and upheld as valid and within the statute, the arrangement embodied in the contracts. And this decision could not have been reached had plaintiff's contention in this case been good law.

Plaintiff's counsel have naturally made strenuous efforts to escape the effects of these cases, claiming below that:

"In every one of these decisions the Court speaks of what is normally an exchange contract and distinguishes an exchange contract in its true

essence from the thing that Congress was talking about here."

An examination of the following quotations will show that the courts certainly did feel called upon to define the meaning of the word "exchange" in its normal and legal interpretation, and they certainly did so define it.

They also examined the history of the enactment for the purpose of ascertaining the intention of Congress; and as a result of this examination, not only the lower courts, but this Court, decided that Congress had used the word "exchange" not in an abnormal sense, but in its normal and accepted legal meaning; and from both points of view (*i. e.*, the normal meaning of the word "exchange" and the intent of Congress as determined by the Court), the same result was reached, to wit: that the contracts under consideration constituted true exchange contracts and that as such they were intended to be permitted by Congress not only as regards "on line" services, but "off line" services.

We are sure the Court will pardon us if we trace and analyze these decisions in some detail.

Judge Mayer in *B. & O. R. R. v. Western Union Telegraph Company*, 241 Fed. Rep., 162 in his opinion, commencing on page 169 and ending on page 174, discusses the meaning of this word, first, as it normally would be under the accepted legal rules as to what constitutes an exchange, and, second, as the term was intended to be used by Congress in this statute.

And from both of these analyses he reaches the same conclusion, to wit: That the contracts were themselves exchange contracts and that Congress intended to legalize them as such.

We quote as follows:

"Whether the meaning of the 'exchange of service' is determined by (a) the narrow test of verbal literalism, or (b) the broader rule of ascertaining the intention of the Congress from the language used in the Act * * * by a resort to the

history of the times when it was passed (166 U. S., 290), the result is the same" (p. 170).

"(b) Where, in addition to the language of the statute, considered by itself, the intention of the Congress is sought in the light of relevant history, the construction already indicated is amply confirmed."

Let us now pass to the decision in the same case in the U. S. Circuit Court of Appeals of the Second Circuit reported in 242 Fed. Rep., 914.

This decision was rendered by Judges Ward, Rogers and Hough. The Court after summarizing the agreement, said:

"At stated periods the amount of 'off line' business transacted by each for the other, is ascertained and balances discharged (as in a clearing house) at a rate of settlement or exchange fixed at one-half of the ordinary rates of each party to the agreement. The right to do this is the only question in this case."

The Court then quotes the statute, and proceeds to say:

"In our opinion (in the absence of fraud) the right to exchange implies the right to fix the rate, method, or amount of exchange. The agreement being to exchange the carriage of goods against the transmission of intelligence, each party has the further right to fix the value of the services of each to the other; it makes no difference whether for convenience they ascertain that value by the usual money measurement or adopt some other course" (pages 915-916).

In *Chicago Great Western R. R. Co. v. Postal Telegraph & Cable Company*, 245 Fed. Rep., 592, the District Court of the Northern District of Illinois, construing another one of these same contracts, reached a decision contrary to that which Judge Mayer had arrived at. But the decision of Judge Evans was reversed on appeal by the Circuit Court of Appeals of the Seventh Circuit, 249 Fed. Rep., 664, where that Court follows the Circuit Court of Appeals for the Second

Circuit, and says that it finds no additional facts that ought to change the situation presented in the other Courts.

This Court affirmed the decision of the two Circuit Courts of Appeal above examined, and in the opinion (248 U. S., 471) said:

"The contracts elaborately provide for the reciprocal rights of the companies, for a division of expenses between the railroad and telegraph, for the use by the telegraph of the railroad's right of way for its poles, for monthly payment of a certain sum by the telegraph, and then agree, this being the point now material, that up to a certain amount calculated at the regular day rates of the telegraph it should deliver free of charge messages pertaining to the railroad business to any points on its system on or beyond the railroad lines, and that up to an amount calculated in similar manner the railroad should transport the materials, supplies and employees of the telegraph, needed for the construction, maintenance or renewal of the telegraph lines whether on or off the lines of the road. The latest ruling of the Interstate Commerce Commission is that these contracts for an exchange of service while valid for services on the line are invalid as to services off the line, which last, it is held, must be charged for by the railroad upon the basis of its published rates and by the telegraph upon that of its charges reasonably charged to other customers for similar services. . . . The question more specifically stated is whether the construction adopted by the Commission is right.

"We do not see how that construction can be got from the words of the act. The words are general and as certainly allow services off the line as services on it to be exchanged. In fact they do so almost in terms by allowing common carriers to exchange with cable companies. This being obvious, it is said that while the abstinence of the act from preventing exchanges covers the whole ground, the exchange of services off the line must be on the terms that we have stated, which makes the act as to them merely a superfluous permission

to settle accounts periodically instead of paying for each transaction in cash. But 'exchange' is barter and carries with it no implication of reduction to money as a common denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received. This is admitted with regard to services on the line, and if so whatever services can be exchanged can be exchanged in the same way.

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"Nothing is gained by referring to the provisions in other sections or to those of the section to which the proviso is attached, for the provision is that nothing in the act, in whatever section it may occur, shall be twisted into preventing the exchange. The passion for equality sometimes leads to hollow formulas and the attempt to bring these arrangements under the head of undue preferences and the like hardly seems a natural result of the statute. No one knows which of the two would be found to be preferred as having the best of a very complex bargain. All the great benefits derived on one side are the consideration for all those conferred upon the other."

After following precisely the two different routes which had been previously followed by the other Courts, the opinion of this Court concludes as follows (248 U. S., 471, at 476) :

"We do not go into more minute discussion because the result reached must stand on the plain words of the Act, the meaning of which is confirmed rather than made doubtful by the circumstances in which the proviso was enacted and the events that had gone before."

Clearly the intention of Congress and of the Courts was not to give or uphold an abnormal meaning of the word "exchange," but to use it in its normal meaning as conclusive in favor of the validity of the contracts then under consideration.

Counsel for the United States referred below to the following sentence contained in the opinion of this Court (248 U. S., 471) :

"Exchange is barter and carries with it no implication of reduction to money as a common denominator."

It has been urged that this Court, in using this language, meant that an exchange must not carry with it any such implication.

We submit that this sentence, instead of conveying such a meaning, clearly means that an exchange does not necessarily carry with it the implication in question.

The entire accuracy of our contention on this point is at once manifest when the situation in the Railroad-Telegraph case in this Court is examined.

For in that case the Telegraph Company and the Interstate Commerce Commission were arguing that the exchange of services covered by the contract must be calculated at the regular rates therefor.

See brief of the Western Union Telegraph Company in this Court in which it is said, on page 14:

"Both terms (*i. e.*, 'exchange' and 'contract') imply the fixing of terms dependent upon the special situation of the particular parties contracting or exchanging. . . . Such exchange implies valuation by each of the services to be furnished or rendered to or by the other."

Similar ground was taken by the Interstate Commerce Commission.

If this argument had been valid, the exchange clauses at half rate would have been void as to "off-line" services.

The appellees in these cases denied the validity of the foregoing arguments, urging that since the contracts were contracts of exchange, there was no compulsion to refer them to the regular cash rates:

"It is contended by the Commission that the exchange of services provided for must be an exchange of such services calculated at the regular rates. *Non constat* if the contract could be analyzed and valuations could be placed upon the rights and all the multitude of services and bene-

fits derived by each of the parties thereto, it would transpire that the services are exchanged at greater than regular rates. But that is not the point.

“The first fallacy lies in the idea that the exchange must be measured by dollars. . . .

“To exchange services for services does not require that the services shall be translated into dollars. That would be merely keeping books and not exchanging services at all” (Brief of Baltimore & Ohio R. R. C., pp. 39-40).

This Court upheld the contention of the appellees, decided that an exchange did not necessarily require a reduction to money as a common denominator, and the opinion then proceeded to say—similarly to what had been held by the Circuit Court of Appeals of the Second Circuit—that an exchange—

“contemplates an estimate determined by self interest of the relative value and importance of the services rendered and those received.”

The parties are not compelled to reduce the terms of their exchange to money.

But they have a perfect right to do so. As was said by the Circuit Court of Appeals of the Second Circuit (242 Fed., 915):

“It makes no difference whether for convenience they ascertain that value by the usual money measurement or adopt some other course.”

The striking similarity of the Railroad-Telegraph cases to the contracts now under discussion, is apparent when we note:

(a) That no tangible and identified property passed in either case at the time the contracts were made.

In each of the cases the contracts had reference to things covenanted to be done in the future.

(b) In both the Railroad-Telegraph cases, and in the one at bar, the contract simply operated to create mutual executory rights—the rights granted by the one party being exchanged for the rights granted by the other. Some of these rights in the case at bar are in the nature of options.

In the Railroad-Telegraph cases these rights had reference to the rendition of services by each party for the other at future times—to an indefinite extent and at uncertain periods.

In our case the things to be done were somewhat more distinctly specified; but the principle of the two cases is identical.

(c) The question of whether or not the contracts contain complicated and interwoven provisions is wholly immaterial as bearing upon the validity of the exchange.

Plaintiff's counsel attempted below to make much of what they term "a medley" of obligations.

This specific point, however, existed in the Railroad-Telegraph cases and is alluded to in the opinion of this Court:

"No one knows which of the two would be found to be preferred as having the best of a very complex bargain. All the great benefits derived on one side are the consideration for all those conferred upon the other" (248 U. S., at page 475).

(d) In each of the cases the reference to a money standard is not made for the purpose of ascertaining a sum of money which is to be paid by one party to the other.

The only object of the use of the money standard is to ascertain the amount of the consideration deliverable on each side.

(e) Counsel's comment, below, upon the fact that if the Government made a delivery of royalty crude oil to the contractor at any time, a credit would be built up in favor of the Government, to be discharged later, and that therefore the transaction cannot be considered as an exchange, is likewise met by a precise set of facts in the Railroad-Telegraph cases.

In these cases it was entirely uncertain which party would render services to the other first, or how the balance might stand at the end of any yearly period.

In the meantime, and until a balance was struck,

there would, of course, be a credit established in favor of each party against the other, and a balance of credit in favor of the party who had rendered the greater services.

This situation did not take the case out of the category of an exchange contract.

And the same situation would be presented in every case of a continuing exchange contract unless—which probably never would happen—all future exchanges were exactly simultaneous and involved the delivery by each party to the other of quantities of their respective articles which exactly balanced the quantity received at the same time.

4. Our adversaries have pointed to the provisions of Article II, Paragraph "A" of the December 11 contract, to the effect that after the Government has delivered enough royalty oil to the Transport Company to liquidate all Pearl Harbor obligations it shall still continue to deliver the royalty oil for fifteen years from the date of the expiration of the April 25 contract, and shall be entitled to receive in exchange therefor at its option either fuel oil, other petroleum products, additional storage facilities or cash. They claim that the optional right of the Government to demand cash for this excess royalty oil renders the entire contract one of sale and not of exchange.

This argument disregards the fact that the clause in question is a purely incidental and minor term of the whole contract; that it does not in any way relate to Pearl Harbor but only comes into operation after that entire work has been done and reimbursed through the operation of the exchange contract; that the provision in question is not an absolute provision, but is contingent and purely optional at the will of the Government, and lastly that, as we shall immediately show, even if to this extent the excess royalty oil over and above the Pearl Harbor quantities is considered as sold by the Government instead of exchanged, such a

sale is entirely within the power of the Secretary of the Navy to make.

If for any reason this clause could be held to be void as a part of an exchange contract, the District Court below was correct in saying that it would only vitiate the December contract "to a limited extent and not totally," and as no attempt has been made to effectuate such provision or option, its effect is immaterial in this case. (Citing cases, *R. v. III*, 1382.)

5. Our adversaries cited below a number of cases in support of the proposition that where there is a reference to money, or, as some of the quotations say, a "fixed price," the contract is one of sale even though consideration is not paid in money but by the transferring of certain specified real or personal property.

Based upon these authorities, they reached the conclusion that the contract in question was a sale.

Subsequently counsel for the first time realized that the Law of June 4, 1920, not only gave the Secretary of the Navy power to "exchange" royalty oil, but to "sell."

Seemingly it then became clear to them that if the authorities upon which they relied succeeded in bringing this transaction into the category of "sales" rather than "exchanges," they would still have failed to successfully attack the power of the Secretary to do what he did.

For the purpose of evading the second horn of this dilemma into which they then saw that they had entered, they cited sections of the revised statutes providing that "all moneys received," etc. (Section 3617), and "all proceeds of sales" (Section 3618), from the sources therein mentioned, shall be covered into the Treasury of the U. S.

They then proceeded to argue that because in this case there are no proceeds in the form of money which could be thus "covered into the treasury," hence the Secretary of the Navy would have no power to make

the transaction in question, even if it were considered a sale.

But Sections 3617 and 3618, to which they refer, do not have the remotest bearing upon the validity of a contract like the one in question here, made pursuant to the provision of a special law, but only amount to directions by Congress to the Government executive officers as to what specific use shall be made of certain moneys or "proceeds of sale" if such proceeds be in the form of money, which may result from certain transactions.

To hold that these provisions, which are solely, as we have said, in the nature of instructions to the officers of the Government, could be so construed as to invalidate contracts which did not result in money coming into the hands of these officers, but which contracts are expressly authorized by Congressional enactment, is to commit an absurdity which to be fully appreciated only needs to be stated.

Counsel to evade this point said:

"It will probably not be contended, but certainly cannot successfully be contended, that the phrase 'to sell' as used in the Act conferred upon the Secretary of the Navy, or the Secretary of the Interior, or both, any authority to receive other than cash for the royalty oils."

But, if their previous contention was correct, their own objection was met and disposed of by the very authorities which they themselves had cited.

In the Law of June, 1920, there is no provision limiting the right to sell to cases where the consideration was payable in cash.

If such a limitation existed, it must therefore be found either in some other statute (which does not exist), or in some judicial decision upholding the theory that a sale is not a sale if the consideration is payable in property other than cash.

But in the effort which the Government's counsel had made to show that in the last mentioned case the

transaction was not an exchange, they would have succeeded, if their arguments are accepted as valid, in establishing exactly the contrary of that for which they must now contend.

In other words, if their authorities have demonstrated that this transaction is a sale because of the reference made in the contract to money values, then the plaintiff has by the same authorities established the power of the Secretary of the Navy to make such a sale, even though the consideration was payable in some other form than that of money.

As we have said at the beginning of this point if the transaction is a sale for the purposes of plaintiff's arguments, it is also a sale within the powers granted by the law of June, 1920.

Let us not be misunderstood upon this point. The transaction was clearly an exchange. There is nothing contained in the decisions relied upon by plaintiff's counsel which tends to shake the law as laid down by this Court in the *Railroad-Telegraph* cases.

But, without departing from the principle for which we contend, it is clear that if for any reason the Court should hold that this transaction presented any of the elements of a sale, then the plaintiff is no nearer success; for the reason that the plaintiff itself would have also proved that such a sale, even though the price is payable in property or rights, was likewise within the power of the Secretary to make.

The statute as to payment of cash into the Treasury only applies if there is cash.

POINT IV.

The Power to Lease Naval Reserve Lands, Conferred by the Act of June 4, 1920, Supports the Contracts as Well as the Leases in Suit.

As we have seen, the Secretary of the Navy directed the making of the contracts of April 25 and December 11, 1922, under the authority conferred by the law of

June 4, 1920, to exchange crude oil and gas from the naval petroleum reserves for fuel oil and other petroleum products desired by the Navy and facilities for the storage and handling thereof. Ample as was the authority to exchange to support these contracts, they are also supportable by the unrestricted authority conferred by the law upon the Secretary of the Navy to lease.

Power of the Secretary of the Navy to lease naval petroleum reserve lands is too clear to admit of doubt. There is no limitation as regards the acreage in the reserves which he may lease, the periods of time for which he may make leases, the method by which or the terms upon which leases may be made. To the discretion of the Secretary of the Navy the Congress committed these things.

The Secretary had power to agree upon the consideration to be received by the Government from any lessee. He might have agreed to receive a money consideration, represented by a lump sum payable at one time, or by a stipulated yearly or monthly rental. Undoubtedly the Secretary could have agreed that the consideration to the Government under any lease should be fuel oil, a refined product of crude, rather than the oil in its crude state at the time of original production.

We submit that it is not doubtful that the Secretary of the Navy could have agreed in any lease entered into by him that as part of the consideration from the lessee to the Government the former should provide storage tanks or other necessary improvements on the reserves.

If the Secretary could have agreed that the Government should have received fuel oil as consideration for a lease, could he not have also agreed that the lessee, as part of that consideration, should provide for the storing and handling of that fuel oil?

And in substance is this not what was done in the

instant case? The lease of December 11th was expressly granted as a consideration of the obligations assumed and services undertaken by the Transport Company under the terms of the contract of that date (R. v. I, 49). The Navy, as an inducement to the Transport Company to provide fuel in storage, render specified services, and agree for a stated period to supply Navy fuel requirements below prevailing market prices, expressly represented that it would agree to lease all of the unleased portion of Reserve No. 1 "if they got enough for it" (R. v. II, 791; 1023; v. III, 1025-6). The negotiations for the contract of December 11th were all conducted on that basis: The Government was desirous of obtaining a certain consideration in petroleum products and storage therefor and services in respect thereof, and was willing in consideration therefor, and in further consideration of the receipt of a percentage of crude oil produced from its lands, to make a lease of the same (R. v. III, 1026).

It is not believed that any serious question would have been made respecting the power of the Secretary of the Navy to make such a lease as that actually made under date of December 11, 1922, were it not for the contract of that date. And it is submitted that as that contract represents but an added consideration to the Government for the lease, its making cannot invalidate the exercise of the Secretary's undoubted power to lease.

What is there in the law to prevent the Secretary of the Navy making the lease of December 11th upon consideration of (1) a percentage of crude oil produced from the leased lands by the lessee; and (2) a specified quantity of fuel oil and other petroleum products in storage? Nothing, we submit. And we further submit that it is perfectly clear that this in substance is what the transaction was. In the judgment of the Secretary of the Navy, exercising the discretion committed to him by law, it was "for the

benefit of the United States'' to lease, upon the above mentioned considerations, the lands in Naval Reserve No. 1 described in the December 11th lease. That judgment is unreviewable. *U. S. ex rel. Ness v. Fisher*, 223 U. S. 683, 56 L. Ed. 610, and cases therein cited.

The existence of an exercised power does not depend upon the clause or phrase in the law which the authorized officer thought gave him the power to do that which he did. If in the law there is found the power to do the thing which the officer did the legality of his act is not subject to successful attack.

What we have thus far said under this point specifically applies to the December 11th lease and contract. In substance it is equally applicable to the April 25th contract and the lease and agreement to lease made in consideration thereof. As a consideration for the agreement of April 25th the Government expressly agreed to lease the lands described in the lease of June 5, 1922, and further conditionally agreed, in the event leases of further lands were determined upon, to lease the same to the Transport Company. Irrespective of form, therefore, this transaction also represents the exercise by the Secretary of the Navy of his power to lease naval petroleum reserve lands upon considerations which in his judgment were "for the benefit of the United States."

The Act of June 4, 1920, "directed" the Secretary of the Navy to "take possession of all properties within the naval petroleum reserves" and empowered him to "develop, use and operate the same in his discretion, directly or by contract, lease or otherwise." Here, we maintain, is ample authority to support the contracts and leases. This is true irrespective of any language in the contracts or documents relating to them.

POINT V.**The Contracts of April 25 and December 11, 1922, Are Not Void Because Providing for the Establishment of a New Naval Fuel Depot Without Express Authority From Congress.**

The Government has urged that even though the Act of June 4, 1920, empowered the Secretary of the Navy to make contracts for the acquisition of fuel oil and storage facilities in which to retain and handle the same, and even though the Secretary of the Navy did exercise that authority in the making of the contracts of April 25 and December 11, 1922, with the Transport Company, nevertheless these contracts are invalid because they provide for the establishment of a new naval fuel depot whereas, Government counsel assert, Congress has expressly declared that the Secretary of the Navy shall have no power to "establish at such places as he may deem necessary, suitable depots for coal and other fuel for the supply of steamships of war."

The argument is based on the fact that formerly there was a statute (Act of August 31, 1842, U. S. R. S. 1552) which provided that the—

"Secretary of the Navy may establish at such places as he may deem necessary suitable depots of coal and other fuel for the supply of steamships of war."

but that the Act of March 4, 1913, provided that—

"Section 1552 of the Revised Statutes of the United States authorizing the Secretary of the Navy to establish at such places as he may deem necessary suitable depots for coal and other fuel for the supply of steamships of war, is hereby repealed."

By this repealing act the former grant of authority was, of course, revoked, and the matter was left, in 1913, without any statutory provisions upon the point.

In other words, instead of finding that counsel for the Government are directing our attention to an

affirmative statute containing specific provisions and conditions, we find that they are directing our attention to a situation where no statute at all existed prior to the passage of the law of June 4, 1920.

So far as the element of "public policy" is concerned, which brought about the repeal of the former act, we are left in no doubt, because the report of the House Committee on Naval Affairs (House Report 62nd Congress, 3rd Session) criticized the former statute because it had authorized the Secretary of the Navy to establish coal depots without the supervision of Congress as to *where* the depots were to be located.

The argument overlooks (1) the fact that the contracts in question neither intended to nor did provide for the establishment of any new fuel depot or station for the Navy; and (2) the authority of the Secretary of the Navy under the Act of June 4, 1920.

(1) As to the facts:

No new fuel depot was established at Pearl Harbor by either of the contracts in question.

At the bottom of all of the arguments of the Government counsel lies the total misapprehension of the facts upon this point. For unless what was done amounted to the establishment of a new fuel depot, then the entire point, whether based upon "public policy," "public statutes" or absence of public statutes, is of no validity whatsoever.

(At this point let us note, once and for all, that the word "depot" and the word "station" have exactly the same meaning.

For, whereas in the law itself which was repealed the words "fuel depot" are used, yet in the report of the Committee which recommends its repeal, after speaking of "coal depots" the same installations are immediately afterwards referred to as "coaling stations" [House Report, 62nd Congress, 3rd Session]).

1. The Pearl Harbor Naval Station first came into existence pursuant to the Navy Appropriation Act of March 3, 1901, for the acquisition of land at that point.

2. For the fiscal year ending June 30, 1909, an appropriation was provided for the building of the Naval Station at that place including the erection of coal sheds; and later facilities were further provided for by the Act of August 22, 1912, making a special appropriation for that purpose and authorizing the Secretary of the Navy to expend out of appropriations made in the Act as much as might be necessary for a coaling station and fuel station. The first contracts for tankage for Navy fuel oil supply at Pearl Harbor were let on August 14, 1912.

Hence 1909 was the year when this fuel depot was established.

3. The Act of March 4, 1913, appropriated funds necessary for the completion of the coaling station.

4. Thereupon a fuel oil plant was erected at this depot.

5. Reference to plaintiff's Exhibit 131 (R. v. III, 1206) will show near the left-hand corner, as part of the fuel depot station at Pearl Harbor, the location of a group of "fuel oil tanks," nine of which were "formerly on the property" prior to the making of either of the contracts in suit (R. v. II, 542). "The area which was selected for the first group of tanks, under the April 25th contract," was "adjacent to the old group" (ib.), and it was only because of the insufficiency of that particular area that space in another part of the same Navy Yard was used for the additional tanks provided for under the December 11th contract (ib. 542-3). All of the facilities constructed under the two contracts in question were built upon the same tract of land that had long been owned by the United States and upon other portions of which the then existing fuel plant had theretofore been erected (ib. 558-9). A direct physical relationship and connection was even established between the new fuel oil tanks and equipment and the pre-existing fuel oil tanks and equipment. The new pipeline facilities from the new wharf built under these

contracts were so built as to serve both the old and the new group of tanks (R. v. II, 543; v. III, 1206). All this is plaintiff's testimony.

Moreover, by plaintiff's Exhibit No. 165 (R. v. II, 614-5) it is shown that prior to the acquisition of one barrel of fuel oil or storage facilities therefor at Pearl Harbor under defendants' contracts, the Navy had in storage at that station 426,000 barrels of fuel oil, counted as part of the total quantity of reserve fuel oil required under the Navy's plan to be kept there (see page 615, v. II, showing quantity "*present storage fuel*" before quantity to be provided under April 25th contract and to be provided under subsequent arrangements).

Also a reference to the Secretary of the Navy's letter of November 29, 1922, will show that he states that the Navy needs for storage of fuel oil and other petroleum products at Pearl Harbor involve a considerable extension of filled storage beyond that *existing* or provided for in the contract with the Transport Company dated April 25, 1922 (R. v. II, 616).

Thus clearly the record made by the plaintiff discloses to this Court, what from appropriation bills would in any event be judicially known, that there existed prior to the year 1922 a Navy fuel oil station or depot at Pearl Harbor; that there was a large quantity of fuel oil in storage existing at the station therefore established, and that as a matter of fact these contracts only provided for an enlargement of an existing fuel depot and not the establishment of a new one.

But it is urged that Congress had not specifically authorized facilities for reserve fuel rather than for fuel for current use and it is argued that this has some bearing in view of the fact that it was the intention of the Secretary of the Navy that the additional facilities to be provided under the Transport Company's contracts should be for fuel to be held in reserve.

It is submitted that the intention of the Secretary of the Navy as regards the time in which the oil put in the tanks might be used is wholly immaterial to the validity of these contracts.

Whatever his intention was, the fact remains that the plant was not erected at any new place—that it was built upon land owned for years by the United States, and that it was an addition to the fuel depot which had been established by the United States pursuant to the approval of Congress as far back as 1909.

Nor is it material whether the new plant could be operated as a separate unit; for whether operated separately or jointly with existing facilities, it was nothing more nor less than an amplification of a fuel depot previously established.

There is no such thing as a "reserve" storage tank as distinguished from a current use storage tank. A fuel oil tank is a fuel oil tank, and it will be built upon the same specifications and will contain the same quality of material whether or not it is mentally labeled by the Secretary of the Navy as a "reserve" or a "current" use tank. No labels, even if they existed, would be conclusive. Any fuel oil tank could instantly be utilized for current use instead of reserve use, and vice versa, if the Navy necessity should so demand. Any tank for the storage of royalty oils could always be used for fuel oil and could be changed from one purpose to the other from time to time as desired.

If these additional tanks of precisely the same size and specifications had been erected by the Secretary at the same place, with the intention of using them for current fuel purposes, Government counsel could hardly be heard to argue that the construction of such facilities were against "public policy."

And the only difference between this last supposition and the facts of the case at bar is a difference in intention—in mental impression or attitude of the Secretary of the Navy, not affecting place, location or specifica-

tions, and which attitude could instantly be changed by him at any time.

As there is no basis for the premise upon which is built the argument that the contracts are void because they provide for the establishment of a fuel depot at a place not selected by Congress for such purpose, the possession by the Secretary of the Navy of authority under the provisions of the Act of June 4, 1920, to store oil wherever in his discretion it would be to the interests of the United States so to do is of secondary importance in this connection. However, we proceed to show the existence of that authority.

(2). As to the law: The Government's legal argument relating to this point is, in the first instance, based upon complete disregard of the statute of June 4, 1920.

The Government's theory is that the repeal of the old statute allowing the Secretary to establish new fuel depots, was the last legislative word upon this subject.

On this theory they insist that the sweeping and general provisions of the 1920 law must always be construed as so limited as to deprive the Secretary of the Navy of the power to build storage tanks.

But the fact is that Congress not only could legislate again upon this topic, but did legislate in the act of June 4, 1920, in such a manner as to give the Secretary of the Navy absolute power to provide for the construction of such storage tanks as he might see fit, whether these were constructed in connection with the depot already established or at a new depot, and whether such construction constituted a separate and distinct unit or not, and that he might thus provide for the storage of fuel petroleum products received in exchange for royalty crude oil—provide for such storage, either for current supply purposes or for reserve supply purposes—provide for it at such places and to such an extent as he in his discretion thought best for the interests of the United States and

of its Navy—and liquidate the cost of such facilities through the delivery of such portion of the royalty oil as he saw fit.

If this is considered as contrary to the policy of 1913, then it overrules that policy.

In making this statement, we are not overlooking the point that what he actually did in this case was, not the establishment of a new fuel depot, but the creation of additional fuel storage facilities at an existing fuel depot where facilities inadequate for the storage purposes he had in view, already existed.

Before proceeding to our next point let us observe that if these new tanks, built as they were as an addition to an existing fuel depot, could not have been constructed without the prior express approval of Congress as to the location, then the Secretary of the Navy could not even have used any part of the \$500,000 general appropriation contained in the Act of June 4, 1920, for the construction of a storage tank at any place whatsoever—whether for reserve purposes or current purposes, and whether at a new location or in connection with an existing fuel depot, unless Congress had passed a subsequent act approving the particular location for the particular tank.

In other words, this particular point does not depend upon the question as to whether the new proposed tanks were built under an exchange contract or by the use of a new general cash appropriation, for the “public policy,” if it existed, as claimed by counsel, had to do with the place—with the location of every tank added to any existing tank installation—and would apply equally even though the construction were to be accomplished by the use of funds theretofore appropriated, the use of which was to be in the discretion of the Secretary of the Navy.

The law of June 4, 1920, permits of no such interpretation.

POINT VI.**The Contracts of April 25 and December 11, 1922, Were not Invalidated by Reason of Any Lack of Public Advertisement.**

This was so held by the District Court.

Judge Kennedy reached the same conclusion in the *Mammoth* case (5 Fed. 2nd at p. 352).

The Circuit Court of Appeals disagreed with the opinion of the District Court upon this point (*R. v. III*, 1505), holding that this law did not "repeal" Section 3709 U. S. R. S.—

"which makes competitive bidding and advertising indispensable to the making of all such contracts."

In opposition to this conclusion, we ask the Court to note:

A. That neither Sec. 3709 U. S. R. S. nor any other general law of the United States provides, or ever provided, that competitive bidding or public advertisement should take place in cases of acquisition of property through exchange contracts.

The only statutes which our adversaries have cited or can cite in support of their contention, are those relating to purchases and contracts for supplies and services. The term "contracts" manifestly refers to "executory contracts" of purchase, as distinguished from spot purchases.

Nor are there any general statutes which purport to require public advertisements as to sales.

None of the statutes has anything to do with exchanges, which are covered by entirely different rules, and which from their very nature, not involving cash transactions, would not usually be the subject of competitive bidding. If all exchanges were covered by this statute, then contracts involving the exchanging of two specific parcels of real estate would require public advertisement—which is absurd.

B. In the absence of express statutory requirement,

no competitive bidding is necessary in connection with governmental contracts.

"It is well established that, in the absence of charter or statutory requirement, municipal contracts need not be let under competitive bidding. *McQuillin on Municipal Corporations*, Sec. 1186, page 2634; *Elliott v. Mpls.*, 59 Minn., 111, 60 N. W., 1081; *Middle-Valley Trap Rock, etc. Co. v. Board of Freeholders*, 70 N. J. L., 625, 57 Atl., 258; affirmed in 71 N. J. L., 333, 60 Atl., 358, *Yarnold v. Lawrence*, 15 Kan., 125; *Augusta v. McKibben*, 22 Ky. Law Rep., 1224, 60 S. W., 291; *Dillingham v. Spartanburg*, 75 S. C., 549, 56 S. E., 381; *Schefbauer v. Kearney Tp.*, 57 N. J. L., 588, 31 Atl., 454; *Fitzgerald v. Walker*, 55 Ark., 148, 17 S. W., 702."

Price v. City of Fargo (N. D.), 139 N. W., 1054;
Crowder v. Sullivan (Ind.), 28 N. E., 94.

C. The primary purpose of these contracts was the acquisition of fuel oil for the Navy.

Even if the contracts in question are construed as being purchase contracts and not exchange contracts, it has been the express statutory law since 1850 that the Secretary of the Navy may purchase fuel without the necessity of competitive bidding.

The Act of September 28, 1850, Ch. 80, Stat. L. 513, U. S. R. S., Sec. 3728, is as follows:

"In purchasing fuel for the Navy or for Naval Stations and Yards the Secretary of the Navy shall have power to discriminate and purchase, in such manner as he may deem proper, that kind of fuel which is best adapted for the purpose for which it is to be used."

D. The Act of June 4, 1920, which was a comprehensive act intended to cover the entire subject of the Naval Reserves, vested in the Secretary of the Navy ample discretion to enter into contracts pursuant to such methods as seemed to him best.

In other words the entire manner as well as matter of the administration of the Naval Reserves, both in substance and in detail, was confided to his discretion—

and this rule applies even though the contracts in question, instead of being exchange contracts, as they were, were construed as being contracts of purchase and sale.

His discretion was of the broadest conceivable nature.

It was restricted by no limitations. It was not hampered by any compulsory choice of methods.

It was not hindered by any statutory conditions.

It was not affected by any other statutory limitations, for the subject matter covered by this special enactment had never been covered before by any previous legislation; and the statute in question was intended to furnish a complete scheme of law for the first time in the history of the United States, covering all matters connected with the administration of the Naval Reserves. The Secretary's only mandate was to do whatever he might do in such a way as to be, in his opinion, "for the benefit of the United States."

And being vested with this wide and ample discretion, by virtue of the special statute, designed for the first time, to cover the entire subject matter, it is well settled that this special statute contains the only measure of his authority, and that general enactments contained in prior laws, even if they might be otherwise applicable to similar situations, have no bearing in such a case.

In *Fowler v. United States*, 3 Ct. Cl. 43, an appropriation was made to construct a building, such appropriation to be expended under the direction of the Secretary of the Interior.

The Secretary made certain contracts without advertising for competitive bids.

It was held that this matter being especially confided to the judgment and discretion of the Secretary of the Interior, was not subject to the provisions of the general law:

"A majority holds that the act directing this work to be done and making an appropriation for

its execution did not require an advertisement in the newspapers. We think that Secretary Usher by virtue of the power conferred in the act had power to make the contract with Fowler in the manner in which he did."

In the case of the *Snow & Ice Transportation Company*, 22 Op. Atty. Gen., 437, Congress passed a law authorizing the Secretary of War to fit out an expedition for the relief of persons who had gone out to the Arctic Regions, and to use the Army of the United States in aid of such expedition.

The Secretary settled a damage claim for unliquidated damages, although the general law restricted him to the payment of liquidated claims. It was held that such a settlement was within the powers incidental to the general power granted him.

The Attorney General said at page 442:

"Everything pertaining to the expedition was committed to the discretion of the Secretary of War.

It is difficult to see that within the general object of the expedition and the amount appropriated, he did not have all the power and discretion which the Government itself had or could exercise. . . . He had **all the power there was or that** could be conferred; there was no limit to it save to keep within the general object of the expedition, . . . because the statute has not restricted him to the payment of liquidated claims, he is clearly not so restricted, and this discretion thus given by the statute is one which no Court can interfere with or control."

Where an appropriation for national defense was "to be expended in the discretion of the President," the general law as to the necessity of written contracts did not apply, and an oral contract was binding.

In re Claim of Leach, 9 Dec. Comp. Treas. 457 (1903).

In the Act of 1902 an appropriation of \$100,000 was made for unforeseen contingencies for the mainte-

nance of the Navy "to be expended at the discretion of the President."

It was held by the Comptroller of the Treasury that this discretionary power allowed him to expend the money under oral contracts and that the general provisions of Section 3744, requiring that all contracts should be reduced to writing, and signed at the end thereof, did not apply.

9 Dec. Comp. Treas., 805, citing *Leach* claim, *supra*, *Snow & Ice Co.* opinion, *supra*, and *Pacific Steam Whaling Co.* case, *infra*.

In *Pacific Steam Whaling Co. v. United States*, 36 Court of Claims, 105, a statute authorized the Secretary of War to relieve the sufferings of the people of Alaska.

The Secretary made an oral contract not in accordance with R. S. 3744.

Held that this was a special matter in which the Secretary had power and that it was not covered by the general law.

In *re Claim of Iowa* for reimbursement of expense in preventing small-pox among the Indians, 9 Dec. Comp. Treas., 656, a fund was appropriated to be expended in the discretion of the Secretary of the Interior.

He reimbursed the State of Iowa for expenses which were made voluntarily by the State, but which the Secretary could have contracted for before they were made. Held this was within his discretionary power.

In *United States v. Mathews*, 173 U. S., 381, a special act was passed appropriating a sum of money to be expended under the direction of the Attorney General for the prosecution and detection of crime against the United States.

At that time there was a general law that no civil officer of the Government should receive any compensation from the Treasury beyond his compensation allowed by law.

A United States deputy marshal claimed a reward offered by the Attorney General payable out of this particular fund.

The Court held that inasmuch as the offer of the Attorney General had not excluded officers of the Government, there was no reason why the deputy marshal should not recover the reward and that the general statute preventing extra compensation did not apply.

"As the reward was sanctioned by the statute making the appropriation and was embraced within the offer of the Attorney General, it clearly, under any view of the case, was removed from the provision of the statute in question. The appropriation act being a special and later enactment operated necessarily to engraft upon the prior and general statute, an exception to the extent of the power conferred on the Attorney General and necessary for the exercise of the discretion lodged in him for the purpose of carrying out the provisions of the later and special act (page 387).

"The provisions of a special charter or a special authority derived from the legislature are not affected by general legislation on the subject. The two are to be deemed to stand together, one as the general law of the land, the other as the law of the particular case."

State v. Stoll, 17 Wall., 425, page 436.

In *Walla Walla v. The Walla Walla Water Co.*, 172 U. S., 1, there was a general statute requiring an election to ratify contracts made by cities for water supply.

A city charter provided that it might enter into a contract for a water supply. There was no express provision for an election, although the charter did provide for such an election as a condition of the erection of water works by the city. The Court held:

"While this special act is silent with reference to the ratification of contracts to supply water, we think the maxim '*expressio unis est exclusio alterius*' is applicable and that it was clearly the intention of the legislature to supersede the gen-

eral law in this particular, leaving the general law to stand, where it is proposed that the city shall erect and maintain water works of its own." Page 22.

See *New York Central & Hudson Railroad v. United States*, 21 Court of Claims, 368;
See *Cobb v. The United States*, 7 Court of Claims, 470, to same effect.

It will be noticed that in none of the foregoing authorities was there any necessary inconsistency between the special act and the general laws which were held inapplicable.

If any inconsistency existed, of course the special statute alone would apply; but the general principle applies where the special statute is clearly intended to cover the entire subject matter, even though there is no inconsistency.

This Court alludes to—

"The well-settled rule that general and specific provisions and apparent contradictions, whether in the same or different statutes and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general."

Townsend v. Little, 109 U. S., 504;

Lessee of French v. Spencer, 21 How. at p. 237;

Kepner v. U. S., 195 U. S., at p. 125;

Rodgers v. U. S., 185 U. S. at p. 87;

Hemmer v. U. S., 204 Fed. at p. 906;

Jackson v. Graves (C. C. A., 5th Cir. 1910), 238 Fed., 117;

U. S. v. Chase, 135 U. S., 255;

Priddy v. Thompson, 204 Fed., 955.

Anchor Oil Co. v. Gray, 257 Fed., 283.

In view of constant reiteration by counsel for the plaintiff of the thought that our contention would repeal the general law which otherwise might require public advertisement, we deem it proper to repeat that none of these cases holds that the effect of the special statute is to repeal the general law previously in existence, but that it simply operates to create an exception to that law.

The rule which has been laid down in numerous decisions in slightly varying language is nowhere better stated than in the decision of the Circuit Court of Appeals of the 2nd Circuit in *Magone v. King*, 51 Fed., 525, 526, in the following words of Circuit Judge Wallace:

“The settled rule of statutory construction is that general legislation must give way to special legislation on the same subject, whether the provisions are found in the same statute or in different statutes; and general provisions must be interpreted so as to embrace only cases to which the special provisions are not applicable.”

Before leaving this point we again emphasize the fact that the Secretary's discretion extends to questions of detail as well as to those of greater importance. The sweeping and inclusive nature of the language used gives him all the power that can be given—all the power there was—as to the entire subject matter, not only substance but methods as well. Had a contrary intention existed—if Congress had intended to limit the inclusive provisions of the act in any particular—it would have so provided in the law itself, as was done in several of the sections of the Leasing Act of February, 1920, and in the Fortifications Appropriation Act of June 25, 1906, ch. 3540, 8 Fed. Stat. Ann., 395:

“It shall be the duty of the Secretary of War to apply the money herein and hereafter appropriated for fortifications and other works of defense, in carrying on the various works, by contract or otherwise, as may be most economical and advantageous to the Government. Where said works are done by contract, such contract shall be made after sufficient public advertisement for proposals, in such manner and form as the Secretary of War shall prescribe; and such contracts shall be made with the lowest responsible bidders, accompanied by such securities as the Secretary of War shall require, conditioned for the faithful prosecution and completion of the work according to such contract. (34 Stat. L., 463.)”

If Sec. 3709 applied to all contracts, whether or not forming part of a project the manner for the execution of which was confided to the discretion of the President or a particular head of department, then there was no need of expressly providing in the above quoted fortification act that where the Secretary of War determined to do any part of the work by contract he should advertise for bids. The inference to be drawn from the fact that such a provision was included in that act is that Congress itself did not consider that where discretion in the expenditure of funds or the execution of a project was vested by it in the head of a department, he would be controlled by general legislation with reference to advertising unless in the special act they specifically so provided.

E. The cases upon which the Government relies are not applicable.

In *U. S. v. Envelope Co.* (249 U. S., 313), there was no pretense of a special law taking that supply contract out of the operation of the general law.

The case of *U. S. v. Ellicott* (223 U. S., 524), upon which much reliance is placed by the Government, is submitted to be an authority directly in our favor.

That case arose under the Isthmian Canal Act which directed the President of the United States to cause the canal to be constructed, and to appoint a Commission. It then provided:

“Said Commission shall in all matters be subject to the direction and control of the President.”

He thereafter (April 1, 1905, p. 483, Proceedings of Isthmian Commission) ordered the Commission to award contracts on advertised proposals, and this order was followed by the adoption of resolutions (ib., p. 492) by the Commission embodying the language of the order.

And the decision that was made was not in a case where the general law applied, but in a special case covered by a special statute, where the discretion was

vested in an executive officer, and where that executive officer, having full power, had ordered that competitive bidding should take place.

If the President had ordered that no competitive bidding should take place, can there be any doubt but that under this special act, he would have had full power to do so?

The case of *Great Northern R. R. Co. v. U. S.* (108 U. S., 452) was not a case involving a comprehensive statute governing a particular situation.

The case of *Erie Coal & Coke Co. v. U. S.* (266 U. S. 518) was a case where the special discretion vested in the Secretary of War was not intended to, and did not, cover the matter to which the general law applies.

The case of *U. S. v. Noce* (268 U. S., 613) is rather against, than in favor of, the Government's contention, since in that case the Court refused to consider a later general statute as controlling, and held that the previous special statute covered the particular situation under discussion. Each statute was recognized as having its special scope and application in its particular field.

POINT VII.

The Secretary of the Navy Was Not Required to Resort to Competitive Bidding As a Condition Precedent to the Making of the Leases of June 5 and December 11, 1922.

The District Judge so ruled.

It was so held by District Judge Kennedy in the *Teapot Dome* lease case, 5 Fed. (2d) 330.

Judge Shepard also so held in *United States v. Belridge Oil Co.*, decided July 17, 1925, D. C. S. D., Cal., unreported.

The Circuit Court of Appeals, Ninth Circuit on July 12, 1926, affirmed Judge Shepard's decision in the *Belridge* case and held that the provision of Section 3709, R. S. U. S., requiring that contracts for supplies and services shall be made by advertising a sufficient

time previously for proposals, "of course, can have no application" to a lease under the Act of June 4, 1920, of land in the naval reserves.

In the case at bar the Circuit Court of Appeals made no reference to this point.

It is not only clear, as the Circuit Court of Appeals held in the *Belridge* case, *supra*, that the provisions of Sec. 3709, R. S. U. S., do not require advertising for proposals for leases of Government property, but there is not and never has been any law so requiring.

"As has been stated, the effect of this statute is to require advertisement for bids in all purchases or contracts for supplies or services by the Federal Government, but there are certain well defined exceptions, as follows: * * * When the subject of the proposed contract is neither services nor supplies, for instance, lease for the rental of property."

Shealey on Law of Government Contracts, page 159.

The Act of June 4, 1920, contains no provision requiring advertising or competitive bidding in such cases.

POINT VIII.

The Secretary of the Navy As Matter of Fact Exercised, in Connection with the Contracts and Leases Involved in This Suit, the Power Conferred Upon Him By the Act of June 4, 1920.

No points to support the claim that these contracts and leases were executed without legal authority have been presented in addition to those hereinbefore discussed. But it is urged by plaintiff's counsel and was held by the District Court that as matter of fact these contracts and leases are voidable, even though authority of law existed for them, because—

1. The Secretary of the Navy, the only officer authorized by law, did not make or authorize them;

2. The Secretary of the Interior, who was not so authorized, did make them and did so pursuant to a conspiracy to defraud to which he was a party and be-

cause he was influenced thereto by a financial transaction he had with defendants' chief executive officer;

3. In any event, even if the two claims above stated are not sustained, these contracts should be set aside because they contain delegations from the Secretary of the Navy to the Secretary of the Interior of discretionary functions which only the Secretary of the Navy was authorized to perform and which he could not lawfully delegate.

Of these in the foregoing order.

(1) As we have seen, the District Court concluded that the Secretary of the Navy had ample power to make contracts and leases of the character here involved. That Court held these contracts to be true exchange contracts within the Secretary of the Navy's power to exchange oil produced from naval lands; that the Secretary of the Navy under the power to "exchange" and the power to "store" had a right to exchange crude oil belonging to the Navy for fuel oil and the facilities necessary for the storage thereof and incident to the use thereof. Specifically the District Court concluded that except for delegations in the contracts of functions to be performed by the Secretary of the Interior, and for his conclusion that the evidence showed fraud (with which it was not charged, argued or held that the Secretary of the Navy or any officer of his Department had the slightest connection), these contracts and leases would have constituted valid exercises of the lawful power of the Secretary of the Navy (R. v. III, 1390-1).

In view of the legal conclusions which he had reached, if the District Court found that the Secretary of the Navy had in fact made the contracts which in law he had the power to make, the necessity of sustaining those contracts was unescapable. But the District Court found that the Secretary of the Navy did not in fact really make the contracts which in law he was authorized to make.

The Circuit Court of Appeals did not approve or even discuss this finding of fact. It was the outstanding disputed question of fact, the primary contested finding. Assuming, what we shall undertake to show the evidence disclosed to a demonstration, that the Secretary of the Navy did in fact make these contracts and leases the Circuit Court of Appeals found that there was no authority in law for their making.

As a preliminary to an examination of the uncontradicted documentary and oral evidence on this question of fact we respectfully submit, in view of the position taken by the Circuit Court of Appeals, the non-applicability of the "two-court rule" laid down by this Court as regards a review here of findings of fact supported by evidence. It is submitted that this rule cannot be applied where, as here, the appellate court not only held that the disputed facts were unimportant in view of its conclusions upon the law applicable to the case, but also clearly recognized that the evidence was insufficient to support contested findings of fact (R. v. III, 1499).

Aside from the foregoing, this Court will review findings of fact and disregard them unless they are supported by evidence—for the Court has repeatedly held that the two-court rule applies only when there is evidence sufficient to support the contested findings:

"Lastly, complaint is made of the findings of fact sustaining the defense of adverse possession and laches. The courts below concurred in these findings and explained them in considered opinions. The record shows with certainty that the findings had very substantial support in the evidence. This Court accepts concurrent findings with such support. (Citations.)"

Del Pozo v. Wilson Cypress Co., 269 U. S. 82; 70 L. Ed. 72.

"The questions * * * are questions of fact. * * * In the present case both the district court and the circuit court of appeals have found, from the evidence, * * * that the land in dispute is

east of that line * * *. Under the well-settled rule these concurrent findings on questions of fact will be accepted by this court unless clear error is shown. (Citations.) An examination of the evidence—which need not be recited here—discloses no such error; and, on the contrary, leads us to the conclusion that the findings of the lower courts are in accordance with the greater weight of the testimony.”

United States v. State Investment Co., 264 U. S. 206, 211, 68 L. Ed. 639, 642.

Norton v. Larney, 266 U. S. 511, 518, 69 L. Ed. 413, 417.

Second Russian Ins. Co. v. Miller, 268 U. S. 552, 557, 69 L. Ed. 1088, 1090-1.

Assuming the legal power of the Secretary of the Navy, which we have hereinbefore fully discussed, then if he in fact exercised it, the instruments here in suit are unassailable because, as regards Secretary Denby, there is no allegation in the bill, there is no evidence in the record, there was no claim in the courts below and there can be none here, that he was party to any conspiracy, to the commission of any fraud, that he was bribed or that on the subject of these contracts there was any misrepresentation made to him, any deceit practiced upon him, or any improper influence exerted over him, by Secretary Fall, on the one hand, or by any person connected with these defendants, on the other. Indeed, before we proceed further, let it be said that this record is bare of any representations of any kind made by Secretary Fall to Secretary Denby in connection with or for the purpose of bringing about the making of these contracts. And this statement is true as regards any and every officer of the Navy Department who had any connection with, or performed any duty in relation to, these contracts or the departmental plans, decisions or negotiations which brought about their making.

We turn now to what the District Court found and what the indisputable record shows on the point as regards what Secretary Denby in fact did:

The District Judge's thirteenth finding of fact is—

"13. That Edwin Denby, Secretary of the Navy, was passive throughout all of the negotiations that eventuated in the contracts and leases in suit, and took no active part in said negotiations, and that he signed the contracts of April 25, 1922, and December 11, 1922, and the lease of December 11, 1922, and the letter of April 25, 1922, under misapprehension and without full knowledge of the contents of said documents." (R. v. III, 1398.)

In the course of his opinion, the District Judge, referring to Secretary Denby said:

"His participation in the making and executing of the agreements in suit was perfunctory, passive and formal." (ib. 1272.)

Again, in the opinion of the District Court, it is stated that—

"Secretary Denby, as I have previously stated, showed early in the negotiations and throughout a disinclination and unwillingness to participate in the negotiations in any active way." (ib. 1281.)

Once more the Court says:

"It is very doubtful whether Secretary Denby was cognizant of the terms of the contracts. It is certain that he was induced to sign them under a misapprehension. He relied entirely upon Admiral Robison for information concerning the contracts and leases and it is shown that he signed them under the belief that they were necessary as protective measures against drainage on the reserves." (ib. 1348.)

And specifically with respect to the contract of December 11, 1922, the District Court says:

"Secretary Denby personally took no part in the negotiations and never read the contract thoroughly. He relied entirely upon Admiral Robison. He had never met Mr. Doheny until the time that he signed the contract on December 11, 1922, when Admiral Robison introduced Mr. Doheny to him." (ib. 1364.)

Does the evidence support those findings?

Answering that question we shall present to the Court—

First. All evidence showing the knowledge of the Secretary of the Navy of the contents of the documents signed by him; and

Second. All the evidence relating to the participation of the Secretary of the Navy in the making of the contracts represented by those documents.

Did Secretary Denby personally sign the documents?

If we find that he did, did he have knowledge of the contents thereof or was he without such knowledge?

Before turning to the record for the answers to these questions, and confining ourselves now to the act of signing with or without knowledge, deferring for later discussion everything that preceded that act, let us again emphasize before this Court what the District Court said on this specific point, our justification for the repetition being that it will be found that upon this all-important matter the finding and the opinion of the District Court was just as much justified (but no more) by the evidence in this case as any other finding or opinion on any important matter of fact was.

The District Judge found, and said he found from the evidence, that Secretary Denby "signed the contracts of April 25, 1922, and December 11, 1922, and the lease of December 11, 1922, and the letter of April 25, 1922, * * * without full knowledge of the contents of said documents." (R. v. III, 1398.)

The Judge further said:

"It is very doubtful whether Secretary Denby was cognizant of the terms of the contracts." (ib. 1348.)

Specifically as to the December 11th contract the Judge said:

"Secretary Denby * * * never read the contract thoroughly." (ib. 1364).

Now let us turn to the record on this subject; not to part of the record, but to all of it:

WHO SIGNED DOCUMENTS.

The record at page 1194 contains the following:

"The authenticity of the documents received in evidence in this case was admitted by the solicitors for all of the parties hereto. It was further stipulated that all signatures appearing on any of said documents were the genuine signatures of the persons whose names appear as signers, made in each instance with his own hand, there being no names signed by, or per, any other persons."

SECRETARY DENBY'S SIGNATURE.

The first of the four documents mentioned in the trial court's thirteenth finding is found at page 36 and is signed:

"The United States of America,
by Edward C. Finney,
Acting Secretary of the Interior,
by Edwin Denby,
Secretary of the Navy,

For and on Behalf of the United States of America."

That is the contract of April 25, 1922.

The second, being the contract of December 11, 1922, is signed as shown on page 50, thus:

"The United States of America,
by Albert B. Fall,
Secretary of the Interior.
by Edwin Denby,
Secretary of Navy."

The third, being the lease of December 11, 1922, is on page 65, similarly signed.

The fourth, being the letter of April 25, 1922, authorizing the document which became the lease of June 5, 1922, we find on page 68, signed:

"Edward C. Finney,
Acting Secretary.
Edwin Denby,
Secretary of the Navy."

THE LEGAL PRINCIPLES.

If we had no more than this we would have in our behalf the application of that well settled principle that one who signs a document is presumed to have knowledge of its contents.

But even more directly applicable here is the settled principle that there is always a presumption that official acts or duties have been properly performed. This Court in *Ross v. Stewart*, 227 U. S. 530, said at page 535:

"All reasonable presumptions must be indulged in support of the action of the officers to whom the law entrusted the proceedings resulting in the patent, and unless it clearly appears that they committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they themselves were chargeable with fraudulent practices, * * * their action must stand. *Shepley v. Cowan*, 91 U. S. 330, 340; *Marquez v. Frisbie*, 101 U. S. 473; *Quinby v. Conlan*, 104 U. S. 420, 426; *Baldwin v. Starks*, 107 U. S. 463; *Lee v. Johnson*, 116 U. S. 48; *Sanford v. Sanford*, 139 U. S. 642."

"The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur contrarium.*'"

Cincinnati & Texas Pac. Ry. v. Rankin, 241 U. S. 319, 327.

Literally hundreds of decided cases in this Court, lower Federal courts, and the courts of practically every State in the Union, have announced this principle. See a multitude of citations, 22 C. J. 130-133.

As early as *Delassus v. United States*, 9 Pet. 117, Chief Justice Marshall said:

"A grant or a concession made by that officer who is by law authorized to make it carries with it *prima facie* evidence that it is within his power."

And in *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, the Court said:

“It is a presumption of law that all public officers, and especially such high functionaries, perform their proper official duties until the contrary is proved.”

Mr. Justice Story in *Bank of United States v. Dandridge*, 12 Wheat. 65, 6 L. Ed. 552, stated that the law “presumes that every man, in his private and official character, does his duty, until the contrary is proved.” And Mr. Justice Moody in *Quinlan v. Green Co.*, 205 U. S. 410, 1. c. 422, referred to the “broader presumption that officers charged with the performance of a public duty perform it correctly.”

THE EVIDENCE AS TO SECRETARY DENBY'S KNOWLEDGE.

But in this case we do not rely simply on well settled presumptions for there is evidence on the subject of Secretary Denby's knowledge or lack of knowledge of the contents and the purpose of the documents he signed. There is affirmative evidence on that subject, evidence which was not contradicted or attempted to be contradicted; evidence that came from a source unimpeached and unimpeachable; evidence that came from a source commended for good faith and honesty and honorableness and patriotism by both counsel for the United States and the District Court.

We have said that we would direct the Court's attention to *all* of the evidence on the subject now being discussed and we now proceed so to do.

SIGNING OF APRIL 25 CONTRACT.

As to the contract of April 25, 1922, the draft thereof was made by a Mr. McWilliamson, an attorney connected with the office of Solicitor for the Interior Department. Admiral Robison got the draft of the contract and “Mr. Neagle, the solicitor of the Navy Department, went over the draft with Admiral Robison,

in the latter's office; the" Admiral "had his advice" (R. v. II, 1008).

Then Admiral Robison took the contract—

"to Secretary Denby; the Admiral and Secretary Denby read over that draft, made several changes in it which were made by both of them together, and which consisted of about a half dozen changes in phraseology; this was done by taking a pencil and scratching out a phrase, or inserting a phrase, as the case might be; there were no material changes made * * * . After Secretary Denby and the witness went over this draft and indicated on it changes in the phraseology, as above testified to, Secretary Denby said, respecting the draft of the contract, 'It is all right; go ahead and put it through,' or words to that effect." (ib. 1008.)

The final draft of the contract being ready Admiral Robison—

"took the final draft of the contract to Secretary Denby, and at the same time took to the Secretary the letter of April 25, 1922 * * * ; they were both accomplished at the same time; * * * Secretary Denby did not read the contract over *again*, when it was presented by Admiral Robison to the Secretary for his signature; the Secretary asked the witness whether it included the changes that they had made, and witness pointed out to Secretary Denby the places where those changes had been made, and showed him that it was exactly what he wanted, and assured him that there were no other changes included therein; witness had gone over the contract in detail before presenting it to the Secretary; thereupon, the Secretary signed it." (ib., 1009.)

We ask the Court to bear in mind that we are addressing ourselves now to the mere question whether Secretary Denby knew the contents of the documents. There is no word and no circumstance in this record in conflict with what we have just quoted as regards Mr. Denby's examination of the first contract.

CONTRACT AND LEASE OF DECEMBER 11, 1922.

Let us turn now to the contract of December 11th as to which the District Court not only found that Secretary Denby signed it without full knowledge of its contents, but as regards which that court further said "Secretary Denby * * * never read the contract thoroughly."

All of the evidence in the case on that subject is this:

"As regards the draft of the contract of December 11th, and of the lease bearing the same date, that was drawn up in the Bureau of Mines and was ready, roughly, on December 8th; witness [Admiral Robison] got a copy of it on the 9th and went over it in detail and at length with the Secretary of the Navy, and passed it over to the Judge Advocate General for study and any necessary revision." (R. v. III, 1038.)

It was stipulated by counsel for the United States and defendants that it was the fact (R. v. II, 696) that—

"On or about December 8, 1922, Admiral J. K. Robison, Chief of the Bureau of Engineering of the Navy, by direction of Edwin Denby, then Secretary of the Navy, referred to the office of the Judge Advocate General of the Navy draft of the contract of December 11, 1922" (ib. 706)

and, the evidence is, the same was considered by the Solicitor and the Judge Advocate General and approved by those officials after making several changes in matters "that appeared to that office to better safeguard the naval interests" (R. v. III, 1039).

Note that the testimony is clear, explicit, undisputed, uncontradicted, that on the 9th of December Secretary Denby and Admiral Robison went over the contract and lease of December 11th "in detail and at length" (ib. 1038).

The contract and lease having been passed upon by the Solicitor and the Judge Advocate General, to whom they were referred by the express direction of Secretary Denby, and having been gone over in de-

tail and at length with Secretary Denby by Admiral Robison, the next facts found in the record respecting them are stated as follows:

“Admiral Robison was present when Mr. Denby executed the contract and lease of December 11, 1922 * * *. When Secretary Denby signed these papers there were present, in addition to Admiral Robison, Mr. Cotter and Mr. Doheny * * *. At the time when the contract and lease * * * were presented to Secretary Denby for signature the Secretary asked the witness whether the papers had in them all the changes that ‘we put in;’ Admiral Robison showed Mr. Denby where they had been included in the final draft ‘as we had directed’ in the Judge Advocate General’s office, showed Mr. Denby that they were all in. The Secretary inquired if there was anything else in the contract except as agreed and Admiral Robison assured him that it was identical with what he had been over with the Admiral in detail. The Secretary said then that it was all ready for signature and he might as well finish the job and he signed it; he glanced over it before signing but didn’t spend the time to read it thoroughly at that time.” (R. v. III, 1040.)

SECRETARY DENBY’S COMMENT AFTER SIGNING.

On December 11, 1922, Edwin Denby signed a contract under which the Transport Company undertook to perform a great construction work, and at the same time he signed a lease to the Petroleum Company of a concededly valuable piece of Government property. Having this in mind, note his remark to Mr. Doheny who had signed these contracts for the companies:

“On this occasion” Admiral Robison ‘introduced Mr. Doheny and Mr. Cotter to Secretary Denby; Mr. Denby and Mr. Doheny said they had never met before; * * * the Secretary said to Mr. Doheny, in substance, ‘You have got a big job to do and you have got a fine piece of property,’ and Mr. Doheny replied ‘We have got what I hope will be a fine piece of property, but we certainly have got a big job to do.’ ” (R. v. III, 1041.)

No one disputes that the job was a big one but it is said that Secretary Denby did not know what he was talking about.

The Government claims that the Petroleum Company got a fine piece of property but it is said that Secretary Denby did not comprehend that fact—although he said it!

And now we have quoted to this Court all that the District Court had upon which to base a finding as regards whether Secretary Denby read the documents he signed and knew what was in them. We repeat—we have quoted all the evidence; there is nothing else, more, or different, in the record on that point.

PERTINENT STATEMENT OF DISTRICT JUDGE KENNEDY.

Referring to a similar contention of the Government made in the *Teapot Dome* case (*U. S. v. Mammoth Oil Co.*, 5 Fed. 2d 330), District Judge Kennedy, at page 344, well said that—

“To hold that it was not Denby’s official act is, it seems to us, little short of branding him as an imbecile.”

INDIRECT EVIDENCE OF KNOWLEDGE.

There are just two other items of testimony indirectly bearing upon the subject of what Secretary Denby knew as regards documents he signed and they are—

1. On October 8, 1921, a letter referring to the naval petroleum reserves had been placed on Secretary Denby’s desk in his correspondence for signature and the Secretary, differing with it, had sent for Admiral Robison and interrogated him regarding its contents and ordered that thereafter naval reserve matters should not be handled by Commander Stuart, an assistant in the Engineering Bureau, but should be handled by Admiral Robison, the Chief of the Bureau, himself (*R. v. II* 954-5).

2. Admiral Robison testified, again without any contradiction (*ib.* 989-90)—

"As regards Secretary Denby's custom with regard to signing letters placed before him, he never let any of them go through without knowing what was in them."

SECRETARY DENBY'S PARTICIPATION IN MAKING THE
CONTRACTS.

We next proceed to present to the Court the facts in evidence bearing on the question whether the Secretary of the Navy directed and controlled the making of these contracts, that is to say, whether he exercised the powers conferred upon him by the law governing all naval reserve matters.

It will serve to an understanding of the negotiations leading up to the making of the contracts if we briefly narrate some of the steps which preceded those negotiations.

Edwin Denby became Secretary of the Navy March 4, 1921.

Prior to that time Secretary Daniels had as his representative in charge of naval oil reserve matters Commander Stuart, a subordinate in the Bureau of Engineering in the Navy Department at Washington, who, though a subordinate of that Bureau, was not under the Chief of that Bureau in respect of the oil reserves. The Chief of that Bureau until October, 1921, was Admiral Griffin.

The necessary relation of the functions of the Interior Department under the Act of February 25, 1920, and the Navy Department under the Act of June 4, 1920, brought Commander Stuart, representing the Navy, into contact with Interior Department officials.

The matters which these two departments had to handle in that contact were not carried on smoothly and there were, according to Assistant Secretary of the Interior Finney, a witness for the United States, who had been in the Department thirty years, "antagonism," as well as "duplications" and "divisions of authority," "under the past administration with respect to these matters" (R. v. I, 311).

Secretary Finney so advised Secretary Fall early in the Harding Administration.

In May, 1921, as we have seen, Secretary Denby suggested to President Harding the issuance of the Executive Order. Judge Finney, who had long been a law officer of the Interior Department, gave a written opinion to the effect that under the law such an order was authorized and he made a draft of a proposed order.

After consideration by officials of the Navy Department and Interior Department the order which represented in part the work of the two departments, and was approved as satisfactory by Secretary Denby and Secretary Fall, was taken by Naval Assistant Secretary Roosevelt to President Harding and by the latter signed on May 31, 1921.

It was at that time quite evidently the intention of Secretary Denby to leave to the Interior Department the handling of leases to these lands.

But that was in 1921 and at that time Admiral Robinson had not taken charge as the Navy Secretary's representative of these oil reserves, and we shall see that it is unnecessary to devote more time to either the history or the language of that Executive Order, or to statements made by Secretary Denby, on the one hand, or Secretary Fall, on the other, as regards who would thereafter exercise the authority given by Congress in the making of leases to naval oil reserve lands, because, as we shall hereinafter show, utterly regardless of what were the intentions of Secretary Denby or of Secretary Fall in 1921, the vital question here is what in fact was done in 1922 in respect of the contracts involved in this case. However broad the language of the Executive Order may be considered, whatever may have been the belief at the time it was promulgated as regards the scope of the authority of the Secretary of the Interior under it and the surrender by the Secretary of the Navy of the powers

conferred upon him by Congress, the evidence shows, first, that so far as the only matters here in issue are concerned the Secretary of the Navy directly and through his duly authorized naval representative exercised the powers and discretion conferred upon him by Congress; and, second, that the Executive Order, except for the purpose of enlisting the aid of Interior Department officials in connection with matters which established Bureaus of that Department were better equipped to handle than any others in the Government, became and was utterly immaterial.

ROBISON'S APPOINTMENT.

On October 1, 1921, Captain John K. Robison, then an officer of our Navy for 35 years (R. v. II, 950), was, upon the recommendation of Secretary Denby, appointed, by the President, Engineer-in-Chief of the Navy, Chief of the Bureau of Engineering, with the rank of Rear-Admiral. As we have seen at this time naval reserve matters were being handled in that Bureau by a subordinate thereof independently of the Chief thereof. That anomalous situation had been created before Mr. Denby became Secretary of the Navy.

October 8, 1921, Secretary Denby directed Admiral Robison to himself handle naval petroleum reserve matters thereafter.

On October 18th, at a meeting of the Navy Council, Secretary Denby announced that unless there was objection he would sign an order transferring all fuel oil activities to the Bureau of Engineering. The minutes of this meeting show that there was a discussion on the subject of oil supply but no objection was voiced to the Secretary's proposed action (R. v. III, 1175), and thereupon the orders of the Secretary of the Navy placing Robison in charge, under the Secretary, of naval petroleum reserve matters, were formally issued in writing (ib. 955).

It took Robison a little while to get in full charge but from a period commencing about a month after he was thus designated by Secretary Denby, and regardless, we repeat, of what the language, the intention, the purpose, of anybody in connection with the Executive Order or the functions of the Secretary of the Interior in naval petroleum reserve matters may theretofore have been, the Navy Department had in the person of Robison, acting as we shall see always under the immediate direction and supervision of Secretary Denby, complete domination, direction and control of leases and contracts in respect of the naval reserves.

Robison was an active officer with a strong personality.

The naval interests were his primary concern, the national defense his patriotic hobby.

ADMIRAL ROBISON'S STATUS AND MOTIVES IN THE TRANSACTIONS IN ISSUE.

In view of the actions of Admiral Robison relating to the transactions involved in this case, the functions which he performed for, under and immediately with Secretary Denby, and the purposes and motives by which he was actuated, we digress to present this officer to this Court in language of others:

First, a description of Admiral Robison's official position as regards Navy oil was given by Government counsel in their brief below in these words:

"Admiral Robison * * * the personal representative of the Secretary of the Navy in active charge of naval fuel matters."

Second, he is identified in the record twice by Secretary Denby; once in a letter dated December 14, 1921, received by Acting Secretary of the Interior Finney (R. v. I, 339), in this language:

"I have designated Rear-Admiral J. K. Robison as my representative to handle all details in connection with naval petroleum reserve questions." (ib. 341)

and again, by letter addressed to the Secretary of the Interior, by Secretary Denby, dated November 29, 1922 (regarding plan which eventuated in contract and lease of December 11) in this language:

"I have instructed Rear Admiral J. K. Robison, the Engineer-in-Chief of the Navy, to confer with you in this matter, as my direct representative." (ib. 618.)

Third. Said the District Court:

"Admiral Robison, in acting as aide to Secretary Denby in March, 1921, and later upon being detailed to the Engineering Bureau, manifested an ardent and patriotic desire to construct and supply a reserve oil fuel station at Pearl Harbor, Hawaii, and in general to adopt a program for the establishment and construction of reserve oil fuel stations for the Navy in order to strengthen the national defense." (R. v. III, 1287.)

Again, said Judge McCormick:

"The testimony of Admiral Robison and the circumstances in proof convince me that Admiral Robison had no ulterior motive or mercenary purpose in any of the transactions involved in this case. (ib. 1287.)

Fourth, we quote what counsel for the Government said of this same Admiral Robison, and in respect of similar activities in another petroleum reserve contract transaction, as stated in the opinion of Judge Kennedy in the Teapot Dome case at page 343 of 5 Fed. (2d):

"Counsel for the Government in argument, being asked as to the basis of Admiral Robison's assertive attitude, charged it to super-enthusiasm and zeal for the welfare of that defense arm of the government which he represented."

ADMIRAL ROBISON TAKES CHARGE.

At the time of Robison's appointment in October, 1921, the Navy Department had not definitely determined whether to use oil received by it from the naval

reserves for current purposes or to place it in storage as a reserve for some future national emergency. It is important to keep in mind this point: There is much confusion in the correspondence and other documentary evidence which is clarified by remembering that there were two thoughts on the subject prior to December, 1921. One was that the Navy should use the oil produced from the reserves in its vessels while steaming in manoeuvres and in moving from place to place in 1921 and 1922. The other thought was that the Navy should use the product of reserves to build up a great reserve, the oil to be used on vessels of war when war came. Robison was an advocate of the latter policy.

In October, 1921, as the representative of the Secretary of the Navy Robison conferred with Secretary of the Interior Fall, Director of the Bureau of Mines Bain, and Chief Petroleum Technologist of the Bureau of Mines Ambrose. The result of this conference was the formulation of a letter which Secretary Denby named "the policy letter," dated October 25, 1921, sent by Denby to the Secretary of the Interior. We shall see that so far as these contracts are concerned the "policy" intended when that letter was written was departed from.

There followed some actions in the way of providing for temporary storage of oil until the Navy arranged to transport it to the points at which it was to be used, matters with which the defendant companies were in no way concerned. In conference on these subjects Admiral Robison and Secretary Fall discussed the question of the cost of tankage for oil storage, Robison himself being then intent upon providing tankage for 1,500,000 barrels of oil at Pearl Harbor.

Fall maintained that the Government paid too much for its storage when compared with the cost of commercial tankage and told Robison that he would have inquiries made to ascertain just what a commercial concern could obtain storage for.

Secretary Fall and Mr. Doheny were friends of long standing and Fall asked Doheny to obtain data on this cost.

Doheny did so and wrote a letter to Fall dated November 28, 1921, (R. v. I, 162-3).

We shall later discuss this letter in detail, passing it now because our present purpose is to present to the Court the facts regarding Secretary Denby's making of these contracts.

Suffice it at this moment to say that Mr. Doheny's letter was immediately sent by Mr. Fall to Admiral Robison.

On November 29, 1921, there was a meeting of the Secretary of the Navy's Council, a body consisting of the chiefs of bureaus in the Department, supplemented by others of the more important naval advisers, numbering in all about fourteen. The Council constitutes a high court of naval affairs.

The receipt by Robison from Fall of Doheny's letter of November 28th satisfied the Admiral that the Navy could rest assured that it could get built the tanks which he was intent upon having at Pearl Harbor.

It will be remembered, however, that up to this time the Navy had not decided definitely which policy to follow, that of using the oil currently, or storing it as a reserve.

There was settled in Robison's mind what he wanted, but at that time the Secretary of the Navy had not decided.

There were present at the Navy Council meeting of November 29th, Secretary Denby, who presided; Assistant Secretary Roosevelt; Admiral Coontz, the Chief of Operations of the Navy, the senior naval officer who was an adviser to the Secretary of the Navy; Rear-Admirals Washington, McVay, Robison, Taylor, Potter (who was Chief of the Bureau of Supplies), Stitt, Latimer (who was Judge Advocate-General), Moffett and Smith; Captains Bakenhus (representing the

Bureau of Yards and Docks) and Willard; Commander Rowcliff, and Major General Lejeune, of the Marine Corps.

Here were gathered the two civilian heads of the Navy Department; the Admiral of the Navy; ten Rear-Admirals, among whom were the head of the Bureau of Engineering, the head of the Supply Department, and the head of the Legal Department of the Navy, and the others above mentioned.

A stenographer was present at these Navy Council meetings and while in many instances it is quite apparent he had difficulty in catching the running conversations participated in by several, and his reports are fragmentary and sometimes not entirely clear, yet the substance of the discussions is ascertainable.

The notes of the proceedings of the Navy Council meeting of November 29th, appear in R. v. II, 971-5, and from them we find that early in the proceedings Admiral Coontz called upon Admiral Robison "to tell us of the oil situation" and Admiral Latimer "to tell us as to the legality of using it."

Admiral Robison informed the Council on the subject of quantity and then expressed his views as to the wisdom of the policy of transforming this reserve from its unavailable character "into a tangible reserve to be located as in accord with our plan for national defense," adding that the first step was to provide at Pearl Harbor storage for 1,500,000 barrels of fuel oil, the tanks for containing this oil to be paid for out of royalty oil. He stated, obviously referring to Mr. Doheny's letter of November 28th, that he had a definite proposition to supply that, and he testified below that that was the most definite proposition in hand at the time, and that he intended to convey to the Council the information that "We are assured that we can get the tanks built." (R. v. II, 976.)

Secretary Denby participated in the discussion and stated that the matter had been the subject of discus-

sion at the Cabinet that morning; that in his mind there were two questions, first, that of the legal right under the law; and, second, whether it was desirable to use the oil at the time. He expressed the opinion that it would be better to store it, which would conform to the reserve theory.

Admiral Coontz was apparently in favor of using the oil currently, stating that inside of two months the Navy would run out of fuel, and he wanted Robison to advise how large the supply of oil from the reserves was going to be and Latimer, the Department's law officer, "to tell us if we can use it" (R. v. II, 972).

During the discussion Judge Advocate General Latimer expressed the opinion that the law authorized the Secretary of the Navy to do anything he desired with the oil, that his powers could not be broader.

Admiral Robison pressed for instructions and the Secretary stated that he would have to go into the matter further and that he did not want to decide the matter of national policy involved in the general plan of war reserves until he had seen the President and probably taken the matter up again with Congress.

Admiral Latimer read to the Council meeting the Act of June 4, 1920, after which Secretary Denby stated—"Under that power we can adopt the policy" (R. v. II, 975), but told Admiral Robison not to go ahead with "those tanks" until he, Denby, had seen the Congressional Committee (ib.).

Thus stood the matter when Secretary Fall left Washington December 1, 1921, not to return until January 27, 1922, (R. v. I, 174), during which time he did not communicate with any one in the Navy Department.

Following that Navy Council meeting Admiral Robison, by direction of Secretary Denby, in writing requested the Judge Advocate General of the Navy for opinions.

Two communications were addressed to the Judge Advocate General, both dated November 30, 1921.

One appears at page 697 and requests opinion as to whether it would be legal to exchange royalty crude oil from the naval reserves for fuel oil in storage at Pearl Harbor or other points to be later designated by the Navy, the Government to acquire as its property in exchange for crude "the oil in storage at Pearl Harbor, as well as the tanks and appurtenances" (R. v. II, 698). The other letter to the Judge Advocate General asks for an opinion as to the legality of using the royalty oil currently on naval vessels. (R. v. II, 981.)

By law the Judge Advocate General's office is charged with the duty of advising the Secretary of the Navy respecting contracts, the construction of statutes, and his powers under the law. Here were the attorneys provided by the Congress to advise the Secretary of the Navy and to them he turned.

Counsel in this case entered into a stipulation that at all times referred to in the bill of complaint "the following were facts" (R. v. II, 696):

That the opinion of the Judge Advocate General on the subject of the acquisition of storage facilities and fuel oil in exchange for crude oil was requested; that this matter was considered by Judge Advocate General Latimer, by Assistant Judge Advocate General Woodson, and by an attorney in that office named Dyson; that an opinion dated December 2, 1921, was rendered on the subject and that

"said opinion * * * was forwarded to and considered by the Secretary of the Navy who discussed the subject matter thereof on or about December 5, 1922, with said Latimer and said Robison and in the presence of the two last named officers the Secretary of the Navy approved said opinion indicating his said approval by dating and signing the said opinion at the foot of the second page thereof; at the same time and after the aforesaid discussion, and in the presence of the said Latimer and Robison, the said Secretary of the Navy, Edwin Denby, with his own hand on the margin of the second page of the original of said

opinion wrote the following: 'Do this. E. D. Dec. 5th, 1921' " (R. v. II, 698-9).

Let us pause to note that here is a solemn agreement by plaintiff that this opinion was not only received by Secretary Denby but was considered by him; that it was not merely considered by him but that its subject matter was discussed by the Secretary of the Navy with his legal adviser and his "personal representative in active charge of naval fuel matters."

Turning to the Judge Advocate General's opinion, which covers several pages, this will be found (R. v. II, 702):

"Answering your questions, specifically, you are advised:

(a) It would be legal to exchange the royalty crude oil for fuel oil in storage at Pearl Harbor or other points to be designated by the Secretary of the Navy under arrangements whereby the exchanged oil shall be stored in tanks provided by the lessees of the oil wells, such tanks and their appurtenances to become the property of the United States."

And in the margin—

"Do this.
E. D.
Dec. 5th,
1921."

The following paragraph (b) relates to the current use of oil.

Here then the Secretary of the Navy himself decided the policy. Here then was the first definite decision as to whether the oil should be used currently or should be stored under an arrangement whereby storage facilities and fuel oil were received in exchange for crude oil. Here the Secretary of the Navy, after consideration and discussion, himself, by his own hand, concisely but specifically directed what should be done.

In the discussion in Secretary Denby's office on December 5th Secretary Denby "determined that the en-

tire royalty oil should be used to pay for the Pearl Harbor contract and not for current use, and so stated" (R. v. II, 990). Admiral Robison and the Secretary discussed at length this question (ib. 991).

That Denby knew exactly the importance of the step he was directing admits of no doubt from the uncontradicted testimony that—

"there was a discussion in the Secretary's office among the Secretary, Admiral Latimer and the witness, on December 5, 1921 * * *; prior to the time that the Secretary wrote these words" (Do this) and during that discussion "the Secretary said he had gone over the opinion in detail; that he had approved it; that it seemed that it was necessary for us to go ahead without waste of time to the accomplishment of the Pearl Harbor project, and he told witness to prepare the necessary order from the Secretary to the witness to put that project into effect" (ib. 982).

Admiral Robison, having stated that the Secretary's O. K. on the opinion would be sufficient, the Secretary—

"put abreast the Pearl Harbor plan" the words "Do this. E. D. December 5, 1921"; that was a definite order upon which witness proceeded thereafter; as the Secretary was about to sign the Judge Advocate General's opinion, with his approval, witness said: 'Wait a moment, Mr. Secretary. You realize that this is a pretty risky proposition, don't you?' The Secretary said, 'Why?' Witness said, 'Well, oil is something that no one can touch without risk.' 'Well,' said the Secretary, 'that is all right, Robison, but the way you put it you make it a matter of duty and I have got to sign it' " (ib. 983).

And Robison adds about his former chief, "He was that kind of a man."

Fall had no connection whatever with the foregoing. He made no request or suggestion regarding it. He was not in Washington. Prior to leaving he had given instructions with respect to the handing of royalty oil

which contemplated its being turned over to the Navy for current use, instructions entirely inconsistent with the plan which the Secretary of the Navy now directed his subordinate to put into effect.

Robison immediately took the subject up with the Bureau of Yards and Docks, communicated Secretary Denby's instructions, and directed that Bureau to hasten with the preparation of the plans.

December 8, 1921, the Navy Council met. Fuel was discussed. Robison stated to the Council the substance of what had been done and what was under way with respect to the exchange of crude oil for fuel oil and tanks at Pearl Harbor (R. v. II, 984). A letter had been prepared by Captain Bakenhus of the Bureau of Yards and Docks to the Interior Department requesting that Department's assistance with this project and that letter, which was prepared for the signature of the Secretary of the Navy, was presented to and made the subject of discussion at the Navy Council meeting. It contained a paragraph which according to those present seemed to cast doubt upon the legal power of the Government to make the contemplated contract, and suggesting that better contractual terms might be obtained if Congress would pass a new law setting forth, in more exact terms than the existing law, the power of the Navy Department to do what it intended to do (ib. 988; v. III, 1080-81).

The Secretary of the Navy disapproved the raising of that question, saying:

"I never questioned there was the slightest illegality. The question, therefore, should not be raised" (ib. 986).

When the author of the letter, Captain Bakenhus, stated his reasons Admiral Coontz voiced his objection and expressed the opinion that the Secretary had settled this (ib. 986). The chief law officer of the Navy suggested that the sentences being discussed be left out and an examination of the minutes on page 986

shows that that letter was before this gentleman. Admiral Coontz suggested a recasting of the letter and the so-called "passive" Secretary of the Navy peremptorily directed that—

"Anything that goes to the Secretary of the Interior must go through me" (ib. 986).

One has but to read these minutes of the Navy Council meetings to see that we had a functioning Secretary of the Navy, guided, as any sensible man in his position would be, by the naval experts around him, but, when once he had been enlightened, giving orders and directions as to what those experts and others under him should do.

The letter was recast. It bears date December 9th, and it was signed by Theodore Roosevelt as Acting Secretary of the Navy. It is Exhibit No. 62, Vol. I, 329.

Prior to that letter Admiral Robison had advised Acting Secretary of the Interior Finney (Mr. Fall it will be remembered being absent from Washington) of the Navy's plans and of the opinion of the Judge Advocate General and Solicitor of the Navy as to its legality and Finney directed the Bureau of Mines to proceed to assist the Navy in its program (R. v. I, 326).

The Bureau of Mines of the Interior Department, in conjunction with the Bureau of Engineering and the the Bureau of Yards and Docks of the Navy, undertook to launch this project.

Plans were prepared in the Navy's Bureau of Yards and Docks. They were sufficient for preliminary purposes but later turned out not to be definite enough for a lump sum bid plan, which was insisted upon by the Navy early in the next year.

Admiral Robison and the Dohenys were friends. This friendship began when Edward L. Doheny, Jr., was an officer of the Navy, subordinate to Robison on the latter's ship, during the world war. It has continued ever since (R. v. II, 952-4).

Doheny, Jr., visited Washington December 12th,

1921, to enlist Admiral Robison's assistance for a former comrade of theirs aboard the same naval vessel during the war. The purpose of that visit disposed of, young Doheny dined that evening at Admiral Robison's residence with the Admiral and his wife, and the Admiral discussed some of his naval oil reserve problems (R. v. II, 993-4) and after the young man returned to New York he wrote the Admiral a letter on that subject (R. v. I, 343). That letter concluded with the statement that the elder Doheny would be in Washington the following Saturday and that the Admiral might take advantage of that fact "to have a chat with him." And—

"Admiral Robison saw Doheny Sr. at the end of that week, or the beginning of the next, in the Admiral's office in Washington, and then talked with him about the plan for the Pearl Harbor project; this was a long conversation lasting at least an hour and a-half; * * *

"Mr. Doheny said to the witness that he had already considered the project, but that his people were against it; that they had some interests out here in California but no such considerable interests as they would have to create in order to go ahead with the proposition, and that he had made up his mind to turn it down;" (R. v. II, 994-6.)

Referring to the same matter on cross-examination the Admiral testified:

"About that meeting with Mr. Doheny when he came to witness' office in December, during the conversation he said that his company did not want to go into this proposition. It is quite out of the question for witness to tell the order of events in a conversation like that. He told witness that his company—that he had heard of this from the Interior Department and that he had considered it, but that there was great opposition to the matter in his company and he determined not go into it." (R. v. III, 1084.)

"When Mr. Doheny talked to witness in December, 1921, he said the matter had been under con-

sideration by him, that it had been brought to his attention by the Interior Department, but that the people of his concern objected to it—that they had some interest, witness thought he said, in the vicinity of California but no such considerable interests as would justify in the opinion of the rest of his company the large expenditures that would be required. Witness understood from what he said that he meant interest by way of ownership or leases of oil lands. He did not state to witness when or where they had changed their minds after the letter of November 28, 1921, was written, but said that he had made up his mind to give it up or to stay out of it.” (ib. 1116.)

Let it be borne in mind that this was the position of E. L. Doheny subsequent to the middle of December, 1921, as regards a project which in this case it is charged he had conspired to go into prior to November, 1921.

Admiral Robison “also told Doheny of the plan for the use of the oil for current naval needs, and how he had fought it, and beaten it, for the purpose of making it available in Pearl Harbor, to accomplish the prevention of the possibility of the invasion of the West coast of the United States. ‘And I talked to him about what war is like; not in terms of dead men, but in terms of shame, and I told him that it couldn’t be done except by the exchange of crude oil, and I appealed to him to help in the accomplishment of the security of this part of the country. I tried to show him that it would not involve any risk to him.’

‘I told him that he couldn’t furnish us any real facilities that would cost him money without sooner or later his getting the money back from the Government, even if he didn’t get the oil back out of the ground.’ ‘I told him the thing involved was so great as to involve the security of this country.’” (R. v. II, 995-6.)

Admiral Robison had formerly testified that while in court giving his testimony in this case he was under orders from naval authorities with respect to the subject of his testimony and with regard to what could

and what could not be disclosed and his written orders had been exhibited to the court without being made part of the record (ib. 968-9).

With this in mind it will be noted that in this part of the testimony we are reviewing (ib. 996) the Admiral was asked to state, without repeating the facts in court, whether he told Mr. Doheny anything about the necessity for action, and he answered that he had but did not give him all the information he had by any means and continued:

"But when I had got him interested I kept on because I wanted to be sure I could get the job done, and I didn't let him go until he, with red eyes and a white face, said, 'Well, Admiral, go ahead; you can depend upon it you will get one bid.' " To which Mr. Doheny added: "'And what is more, I will tell you, Admiral, if you get a bid from me, or from my company, it will be one that won't involve one cent of profit to me.' " (ib. 996.)

"In the conference in December with Mr. Doheny nothing was said about further leases. There were no further leases in the plan that was proposed." (R. v. III, 1085.)

Thereafter, through months of preparation, conferences, negotiation, Admiral Robison, who had reported this conversation to Secretary Denby, kept in mind that assurance and, as he testified below, because of it he had faith in the practicability of the project which his department considered of vital importance to the country.

The Secretary of the Navy under the law, as we contend, had power to make the contemplated contracts by negotiation and without resort to competition of any kind. But it was decided by Director Bain and Admiral Robison to seek competition from among large oil and engineering concerns, and competition was sought.

We stress this matter, not in connection with the construction of the law but in connection with a con-

sideration of the facts, because it is so utterly inconsistent with the charge that there was a conspiracy formed prior to November, 1921, which had for its purpose the secretly making of the contracts and leases here in suit with the defendant companies, as to constitute an all-sufficient answer to the charges of fraud and conspiracy.

Secretary Finney turned over to Dr. Bain the Navy's definite plan as communicated to the Interior Department, first orally by Admiral Robison and subsequently by letters of Secretary Roosevelt December 9th, (Exhibit No. 62, R. v. I, 329) and of Secretary Denby of December 14th, (Exhibit No. 66, v. I, 339).

Mr. Finney testified that the "basic reason" for his action was the direction of the Secretary of the Navy communicated through Admiral Robison (R. v. II, 510).

Dr. Bain's instructions from Finney were "to try to work out a plan which would accomplish what the Navy wanted" (ib. 719).

The details of the subsequent negotiations, as shown by the record, have been hereinbefore sufficiently set forth in the "Statement of Facts". Throughout all of the negotiations resulting in the contracts and leases in suit, and all of the acts relating thereto and to naval reserve matters which took place in the departments, Admiral Robison was constantly in contact with Secretary Denby on the subject and—

"never did one thing in this oil business without being approved by Secretary Denby first" (R. v. II, 1005).

We have seen that when bids, preceding the April 25th, contract, were received and opened, they were discussed with Secretary Denby; that in detail the provisions of the Transport Company's Proposal B were considered by him in consultation with Admiral Robison (R. v. II, 1003); that Secretary Denby and the Admiral exchanged views as to the interpretation upon

the clause asking a "preferential right" to future leases and discussed the direct saving to the Government which would result from the acceptance of Bid B (R. v. II, 1004; v. III, 1097), as a result of which, before Secretary Fall was even advised of the bids, and without any recommendation, request or suggestion, not to speak of influence, from him, Secretary Denby instructed the acceptance of the Transport Company's Bid B and Admiral Robison informed Secretary Finney of that on April 17th (R. v. II, 1005; v. III, 1099). Secretary Fall having been telegraphed and having, in effect, "put the matter up" to the Navy Department, without recommendation on his part, award was made on the 18th day of April and on the same day the public was informed, through a Secretary of the Navy statement issued to the press, of that award (R. v. II, 516-19; 1005).

We have in statement of facts herein traced in detail the situation which resulted in letter of April 25, 1922, approved by Mr. Denby over his own signature, from which grew the lease of June 5, 1922.

But for the fact that on April 15, 1922, the Transport Company was "the lowest and best bidder" (R. v. II, 524) the contracts and leases in suit would not have been made. Upon that, and upon nothing else, is founded all that followed.

SECRETARY OF THE NAVY'S PART IN MAKING DECEMBER 11TH CONTRACT AND LEASE.

In the statement of facts we have also traced this subject in detail and have shown that subsequent to the making of the first contract, as a result of consideration in the Navy Department, neither participated in by nor known to Secretary Fall, or any official of the Interior Department, or Mr. Doheny or any officer of the defendant company, the plan to enlarge the Navy's fuel oil storage facilities at Pearl Harbor was brought about, between May and November, 1922, by

a decision of the General Board, approved by the Secretary of the Navy.

"The plan to enlarge the Navy's fuel oil storage plant facilities, . . . after the April 25 contract had been made, was brought about as a result of a decision of the General Board, approved by the Secretary of the Navy, which in turn resulted in directions to the Bureau of Yards and Docks, to proceed to plan this second project." (R. v. II, 581.)

"This plan originated in the Navy Department and was based upon necessities." (R. v. II, 1024.)

The Secretary of the Navy having directed that the fuel oil storage facilities at Pearl Harbor be enlarged and there being at that time under way the first project, from an engineering standpoint the two projects were so integrally connected that a practical way of carrying on the second would not be to seek a new contractor, but—

"the only logical way was to make it an extension of the first contract." (ib. 582.)

Having before us testimony showing the source of the plan to enlarge the naval reserve oil facilities at Pearl Harbor, let us examine how the adoption of this plan was brought about.

In May, 1922, Admiral Robison, having gotten this first project under way, "called the attention of those responsible for adequate preparation of our Navy for active service to" the condition of the Navy's oil reserve matters. He invited the attention of the head of the War Plans Section of the Navy to the desirability of a complete study of the requirements.

"This was done, and the result of it was an increase in the amount of fuel oil set to be carried in Pearl Harbor."

The quantity was increased to 625,000 tons (R. 1012). But this was not determined until after the middle of November.

While this purely naval problem was being con-

sidered by the naval experts, Mr. E. L. Doheny was spending the summer of 1922 in Alaska.

In the fall of that year he prepared a memorandum—

“which it was stipulated was submitted by Mr. E. L. Doheny to representatives of the Navy and the Interior Departments, to Admiral Robison of the Navy, and to Secretary Fall of the Interior, who turned it over to Dr. Bain.” (R. v. II, 597.)

This memorandum presented a plan foundationed upon the situation brought about by the flush production of petroleum in the California fields. This plan had no reference whatever to Pearl Harbor, in no way mentioned or contemplated any extension of the defendant company's contract for storage facilities there, but, in substance, proposed that if the Government would lease the Pan American Company certain specified areas of Naval Reserve No. 1, the company would construct a pipe-line from the naval reserves to tidewater on the Pacific coast, provide a terminal for the bunkering of naval vessels, and provide storage for 1,000,000 barrels of naval fuel oil on the Pacific coast. It was further proposed to erect a new refinery and to give the Navy certain advantages in the purchase of refined products.

Let us dispose of the action of the Interior Department on the proposal embodied in this memorandum:

Secretary Fall handed Mr. Doheny's memorandum to Dr. Bain sometime in October, 1922, saying:

“‘take it up with the Admiral;’ that is, Admiral Robison, and he did not say anything more on that subject at that time. The witness (Bain) did take that paper up with Admiral Robison” (R. v. II, 789),

with whom he discussed the existing oil situation.

“Admiral Robison suggested that he did not know how far the Navy was prepared to go at that time in provision of further storage, or in opening up the reserves, and that he would take

it up and discuss it with his associates, and with the Secretary of the Navy; there was nothing else that the witness can remember in this discussion with Admiral Robison." (ib.)

Late in October or early in November Mr. Cotter called at the office of Dr. Bain and mentioned this memorandum and asked witness what had been done about it and—

"Dr. Bain told Cotter that the Secretary had given it to witness to take up with the Admiral, and that he had taken it up with the Admiral, and that nothing more would be done unless the Navy wanted something done; witness told Cotter if he wanted to push the matter, or to have any further information about it, to go to the Navy." (ib. 790.)

On October 27, 1922, Mr. E. L. Doheny called on Admiral Robison and discussed with him the petroleum situation in California and in a general way the proposal of defendant company to provide 1,000,000 barrels of fuel oil in storage in San Francisco, or on the Pacific Coast, to be available for Navy use on demand, and a pipeline for the transportation of oil, including the Navy's royalty oil, from reserves to tidewater, in consideration of a lease or leases "upon certain areas of our No. 1 Reserve not yet developed."

Immediately after this conversation between Mr. Doheny and Admiral Robison the Admiral reduced the substance thereof to a memorandum which he dictated at once, and

"which he used so as to fix what took place in his mind, and which he also used to enable him to be sure that he told Secretary Denby the whole story, after which he made that memorandum a part of the Navy Department's files" (R. v. II, 1015).

Admiral Robison's memorandum shows that the areas which the defendant desired to lease

"do not include that portion of our reserve that it will be profitable to leave in the ground" (ib. 1017).

Admiral Robison notes that the proposition is "attractive to us" but "does not measure by any means all that we can get" (ib. 1017). The memorandum shows, and Admiral Robison testified, that at the conference between himself and Mr. Doheny on October 27, 1922,

"nothing was said by either with regard to an increase in Pearl Harbor project; the Pearl Harbor subject was not mentioned at all except in connection with so much thereof as was then under construction" (ib. 1022).

And—

"In the conversation with Mr. Doheny on October 27, 1922, nothing was said about leasing the entire reserve to the Pan American Company, and Mr. Doheny did not ask it, or suggest it" (ib. 1023).

As Admiral Robison had requested, and Mr. Doheny had promised, in this conference of October 27, 1922, the latter under date of November 6, 1922, transmitted to Admiral Robison a more detailed memorandum of his plan with respect to the oil situation in California (R. v. II, 598-608).

Mr. Doheny's revised proposition set forth the services which it was proposed to perform for the Government and there was appended to the memorandum tables suggesting ideas as to the number of sections to be leased in the event of action by the Government on the proposition. The areas which, in substance, a lease was being applied for, range from a minimum of four sections to a maximum of 19 sections. That this was the substance of the application was stipulated below (R. v. II, 607-8).

We emphasize: First, that this proposition had no reference to the Pearl Harbor extension plan which was afterwards embodied in the contract of December 11, 1922. There was not the slightest suggestion on that subject and yet the District Court says there was (R. v. III, 1361), although this is all the subject of documentary evidence. Second, the proposition

neither requested nor contemplated a lease of the entire reserve.

Copy of this November 6th memorandum was transmitted to Secretary Fall and at this point we dispose of the action of that officer and of his department as regards it:

"Mr. Doheny's second memorandum came to Dr. Bain, through the Secretary's office; witness (Bain) received instructions with respect to the subject matter of that memorandum from Secretary Fall, which instructions were to do nothing except as the Navy wanted it done; the Secretary at this time further said that it was Navy business; witness did not take this second memorandum up with anybody, but waited for the Navy to take it up with him, and they took it up almost immediately, Admiral Robison from the Navy Department taking it up. Prior to the receipt by the Interior Department of letter dated November 29, 1922, from the Secretary of Navy, Admiral Robison told the witness that he was discussing the subject of the above mentioned memorandum with the officials of the Navy, and he thought that the Navy would decide to go ahead; witness does not recall that anything was said in that discussion to him by Admiral Robison about Pearl Harbor.

"After the talk with Admiral Robison which the witness has last testified to, the next thing he recalls was the receipt of the letter of November 29, 1922" from the Secretary of the Navy (R. v. II, 790).

In the Navy Department, entirely independent of Mr. Doheny's proposition, and equally independent of any suggestion or recommendation of any kind from Secretary Fall, consideration was being given to greater naval oil reserve facilities at Pearl Harbor and in November, 1922, the amount of that storage was crystalizing.

About the 15th or 20th of that month Messrs. Cotter and Anderson of the Pan American Company called on Admiral Robison and they brought up the subject of

Mr. Doheny's November 6th proposition and Admiral Robison—

“told them of the Navy's need for about two and one-half million barrels more of oil in Pearl Harbor, and that he wanted everything that Mr. Doheny offered, and this additional two and one-half million barrels, together with storage facilities therefor” (R. v. II, 1022-3).

November 20, 1922, Admiral Robison addressed a communication to the Secretary of the Navy through the Chief of Naval Operations in which it is stated that the storage for 1,500,000 barrels at Pearl Harbor is nearing completion and it is desirable that information be at hand as to the disposition to be made of royalty oil from Naval Reserves Nos. 1 and 2 (R. v. II, 611). Subsequently the Chief of Operations forwarded this paper to the Secretary of the Navy recommending that the next project to be undertaken in disposing of the royalty oil be increasing the total of all petroleum products at Pearl Harbor to figures which are set forth on page 612 and which figures it may be stated are those for which facilities were later provided for in the contract made December 11, 1922.

“By November 20th witness (Robison) knew that the Navy had approved an increase of storage tankage at Pearl Harbor” (R. v. III, 1104).

On November 22, 1922, Admiral Robison in a letter to the Bureau of Yards and Docks advised that he had been informed that the approved war plans provided for storage facilities for petroleum products in the Hawaiian Islands, including fuel oil, lubricating oil, Diesel oil, submarine lubricating oil, aviation oil, aviation gasoline, and gasoline, in the quantities exactly the same as those listed in the last mentioned communication from the Chief of Naval Operations to the Secretary of the Navy. Admiral Robison requested information as to whether or not the storage facilities could be provided within the limits of the existing naval station at Pearl Harbor (R. v. II, 614-15).

The information which Admiral Robison incorporated in his November 22nd letter, he had received "orally from the Secretary", who informed him "of the approval of the quantities listed therein as additional facilities to be installed at Pearl Harbor" (R. v. II, 1024). Admiral Robison had confirmed the figures "by personal application to the office where they had been compiled".

Secretary Denby issued oral instructions to Admiral Robison to prepare a letter requesting the assistance of the Interior Department to take up the subject of a revision of the existing contract with the Pan American Company so as to obtain the additional facilities which the Navy wanted and provide for the leasing of lands in the naval reserve "over such areas of that reserve as would naturally be opened up at once, and as would not be part of a natural reserve which can be maintained more or less indefinitely" (R. v. II, 616).

Admiral Robison dictated, pursuant to the instructions he had received from Secretary Denby, a letter to the Secretary of the Interior which is dated November 29, 1922. It is set forth at pages 616-618, and the substance of it we have just briefly stated. It was later made part of the December 11 contract.

Having prepared that letter the witness took it—

"in person to the Secretary of the Navy and went over its subject with him before he signed it" (R. v. II, 1023).

As already stated prior to that time he had received instructions regarding it from the Secretary. Secretary Denby personally signed that letter (ib. 1023-24).

"Prior to the writing of the letter of November 29, 1922, witness may have told Secretary Fall that the Navy was going to ask for additional facilities at Pearl Harbor, but he does not think he did;" (in passing let us say that there is no evidence whatever that Fall knew, or had heard directly or indirectly of the project before the

November 29th letter;) "Secretary Fall had not said anything to the witness, or asked him to get up that sort of an application; 'This plan originated in the Navy Department and was based upon necessities.' " (ib. 1024).

In the Interior Department the only action taken by Secretary Fall upon receipt of Secretary Denby's letter of November 29th was to refer it to Dr. Bain without any instructions (R. v. II, 791).

In the Navy, following the writing of that letter of November 29th, Admiral Robison—

"telephoned to the New York office of the Pan American Company, and asked them to send someone down to Washington, and promptly conferences began" (R. v. III, 1025),

some of which took place in witness' office and most of which took place in the office of the Director of the Bureau of Mines, there being present Admiral Robison, Dr. Bain, sometimes with and sometimes without Mr. Ambrose, Mr. Cotter, sometimes with and sometimes without Mr. Anderson. Mr. Doheny was present at the first meeting at which there was a general discussion and at one other meeting, the last prior to the execution of the contract, which we shall come to in a little while. The negotiations between November 29th or 30th and December 11th were constant, conferences occurring about twice a day (R. v. III, 1025; R. v. II, 791).

Now as to the source of the first suggestion that the entire unleased area of Naval Reserve No. 1 be leased. All of the evidence on this subject we now present:

"Admiral Robison was the one who first mentioned the matter of making a lease of all of the naval reserve No. 1, in connection with this extension of the Pearl Harbor project. Prior to the time when the witness suggested that action by the Government, neither Mr. Doheny nor anybody representing the Pan American Company, made any application for a lease of all of that reserve." (R. v. II, 1023).

He does not recall what was said on the subject during his conversation with Anderson and Cotter in November, 1922, but Admiral Robison—

“suggested ultimately, in that or a subsequent conversation, the lease of the entire No. 1 reserve, subject to retention ‘by us of that portion that we did not feel required drilling, for protection of the reserve property,’ and what might roughly be called the western half.” (ib.)

“It was in the early part of these negotiations that the matter of the leasing of the entire unleased portion of Naval Reserve No. 1 came up, at which witness (Robison) said on that subject that he ‘thought that we could well afford to let the whole of it in; that it would probably increase the benefits that we would get out of the deal’; witness is referring to No. 1 reserve, he means; the witness said this to Dr. Bain, and to Mr. Cotter.” (ib. 1025-6.)

We have seen that no one in the Pan American Company asked for a lease on the whole reserve. Secretary Fall did not suggest the leasing, request it or recommend it.

The only one who suggested the leasing of the whole reserve, or any major portion of it, was Admiral Robison, as he reiterates with emphasis on his cross-examination (R. v. III, 1110; 1124-5).

The only other shred of testimony on this subject comes from Dr. Bain (for he it remembered that the plaintiff adduced no testimony on this point), who testified that—

“Admiral Robison said (to Bain) that the Navy would lease the whole reserve if they got enough for it; that he was anxious to have drilling restricted as far as could be done, compatible with making the kind of a bargain that the Navy wanted; the matter as to what section or part of the reserve he wanted restrictions on came up later.” (R. v. II, 791.)

In immediate charge of the negotiations was Robison. His mainstays in respect of oil land subjects were

Bain and Ambrose of the Bureau of Mines. These two, as Dr. Bain expressed it, supported Admiral Robison in his position "as we were acting for the Navy" (R. v. II, 793).

The negotiators, between November 30th and December 8th, after heated discussions, agreed upon all points except a schedule of royalties to go in the lease which it was proposed the Government would enter into with the Pan American Company in consideration of what the Company was agreeing to do, without other profit, for the Government. During these negotiations Admiral Robison, as he frankly said in his testimony below, was trying to get all he could for the Navy out of it (R. v. III, 1026). Several pages of the testimony are devoted to the discussions in these negotiations toward the end of which Mr. Anderson of the Pan American Company, supported by Mr. Cotter, was found insisting that the schedule of royalties range from 12½ to 20 per cent as provided in what are known as the Interior Department regulation royalties, and Admiral Robison, supported by Bain and Ambrose, was insisting on a schedule which began at 14% and ran up to maximums of 30 and 35 per cent.

Bain and Ambrose prepared a tabulation of all royalties which the Government was receiving, and found what average royalty the Government was obtaining and Bain went to Secretary Fall to talk that matter over, taking with him the sheets containing the figures prepared by himself and Ambrose (R. v. II, 794). Secretary Fall and Dr. Bain worked out—

"an intermediate or compromise set of royalties as being a fair basis, and one which perhaps could be agreed upon. These were worked out in pencil and typewritten copies made in the Secretary's office; Secretary Fall instructed the witness to take that up with Admiral Robison; he also, either at witness' suggestion or at his own, or it was agreed that witness should give a copy to Mr. Cot-

ter, and he would see if Mr. Doheny would take it up; * * * witness did take the copies downstairs and gave one to Mr. Cotter and told him to take it up with Mr. Doheny, while the witness took it up with the Admiral; Admiral Robison studied it and came back and talked to witness and Mr. Ambrose; the conference at that time had broken up; Admiral Robison also went up and talked it over with Secretary Fall; witness was not present at this talk; Admiral Robison came back and stated he wanted to do some more trading; that he still thought he could get a higher royalty; there followed a further conference on the subject of royalties in Dr. Bain's office, at which there were present Admiral Robison, Mr. Ambrose and Dr. Bain, and Mr. Doheny, Mr. Anderson and Mr. Cotter" (R. v. II, 794-5).

Robison, who had been reporting to and taking directions from Secretary Denby during the negotiations, laid this matter before Mr. Denby. On December 8th he prepared a memorandum on the subject at the top of which there is a note reading: "Statement by Admiral Robison for his use in presenting case to Secretary of the Navy." (R. v. III, 1032.)

That memorandum is a full expression of Robison's views. He took it to the Secretary of the Navy and had a conference with him and after he went over the subject with the Secretary—

"the final instructions that witness received from Mr. Denby were to go ahead and do the best he could; he went over this memorandum with the Secretary and then received those instructions." (R. v. III, 1032.)

Admiral Robison's memorandum of December 8th was placed upon the files of the Navy Department from which it was produced and put in evidence (R. v. III, 1033).

Having thus presented the matter to the Secretary of the Navy and having gotten the latter's authority, Admiral Robison called upon Secretary Fall and told Secretary Fall that he wanted a schedule beginning

with one-seventh royalty for a minimum and Mr. Fall said—

“Go ahead and see if you can get it out of the old man; I can’t.” (ib. 1031.)

And directly as the representative of the Government Robison entered the conference to which we have already referred. Both Dr. Bain and Admiral Robison testified below regarding it. And there is no other evidence whatever on the subject.

Present at that conference were Doheny, Cotter and Anderson, for the defendants, Robison, Bain and Ambrose for the Government.

At that conference the actors were Robison and Doheny.

Robison did the trading (R. v. II, 793-5).

He argued for an increased royalty, arguing the advantages to the Pan American Company big and the advantages of the deal to the Navy small (R. v. III, 1031).

There was a lengthy talk (R. v. III, 1029). Mr. Anderson of the Petroleum Company was present throughout and insisted his company did not want the contract at any price, and could not get along under a schedule of royalties exceeding that commencing at 12½ and running to 20 per cent, and he did not want the contract under the royalties Mr. Doheny said he would agree to (R. v. III, 1039-40).

Robison had previously been assured by Bain and Ambrose that the compromise schedule was materially better than—

“ ‘we could otherwise obtain and was an excellent bargain for us, quite irrespective of the casual advantages, such as that of 4,000,000 barrels’ in storage.” Admiral Robison “appealed to Mr. Doheny to make it bring a royalty of one-seventh for a minimum. Mr. Doheny said he had gone as far as he thought he could. Admiral Robison said he wanted to be sure ‘that you don’t beat us, or bilk us, or some word like that.’ Mr. Doheny responded that if there was any talk of that kind

this is off right now and he said he had gone his limit; he did not state this quietly and witness was convinced he meant what he said and once more he thought he had better act quickly, so he said: 'We will accept this proposition, then'; that is the way the final agreement was arrived at." (R. v. III, 1031-2.)

Bain states the matter substantially the same as Robison, his evidence showing that Doheny and Robison negotiated directly and—

"finally the Admiral agreed to the schedule which was a compromise schedule, and which went into the December 11, 1922, lease." (R. v. II, 795.) "As regards recommendation made as to the royalties for the December 11, 1922, lease, the Bureau of Mines, Mr. Ambrose and [Dr. Bain] in that bureau 'recommended the lease on those terms, the Navy decided whether the lease was to be made.' " (ib. 799-800.)

Robison tells the Court, and there is no evidence from any other source except this on the subject, that after this conference of December 8, 1922—

"he reported to Secretary Denby on the subject, telling the Secretary on either the night of the 8th or the morning of the 9th that he had to accept the terms that began with 12½ per cent and went up to 35 per cent, the terms that are in the lease; the Secretary asked the witness if it was the best he could get and the witness replied in the affirmative and stated that he had tried hard and the Secretary said, 'All right.' " (R. v. III, 1039.)

Then Robison wrote, under date of December 9th, a letter to the Secretary of the Interior, in substance authorizing the draft of the lease and contract upon the terms and conditions, and with the royalties, which are found in these documents in the record (R. v. II, 798-9).

The contract having been drafted in rough it was taken by Admiral Robison to Secretary Denby and the two went over it "in detail and at length." There followed its revision by the Judge Advocate General and Solicitor of the Navy and its signing on December 11th.

In addition to the specific facts in evidence as to the steps taken by Admiral Robison and Secretary Denby, the actions of Denby on every important phase of these cases, Admiral Robison, testifying emphatically and without dispute or contradiction, in general terms regarding the performance of his duty under the immediate direction of Secretary Denby, said:

After taking up the duties assigned to him by the Secretary of the Navy in October, 1921, as the Secretary's representative in charge of naval reserve matters, Robison—

“talked to Secretary Denby right along.” (R. v. II, 959.)

“while he was having conferences with Fall, Bain and Ambrose, the witness saw Secretary Denby on the subject every time he saw Secretary Fall; either before, or perhaps before and always afterwards; witness made himself genuinely a personal representative of the Secretary of the Navy, and he had to inform himself of Mr. Denby's ideas, and plans, in order to accomplish that; he always made known to the Secretary of the Navy the subject of any conference; the details were reported to the Secretary, and sometimes the plans, the projected conference, was discussed before it took place; so that it may be said that Secretary Denby was informed by the witness of the information concerning these reserves, and their conditions, just as he gathered it, whether from the Navy Department files, or from the Interior Department conferences; he was given the information concerning the condition of these reserves by the witness just as fast as the witness got them” (R. v. II, 960-1).

“Secretary Denby gave to” the letter of October 25, 1921, “the name of ‘Policy letter,’ and that is the term used thereafter by Admiral Robison and Secretary Denby in referring to it in their conversations about it” (ib. 961).

“Admiral Robison discussed” the question whether the oil should be used for current pur-

poses or placed in storage "with Secretary Denby upon repeated occasions other than that at council meetings; the witness was against the use of the reserve for the accomplishment of the current needs, and recommended that the reserve be used for the accomplishment of a military reserve" (ib. 965).

As regards the question whether Robison had any talk with Secretary Denby when the latter signed the letter of December 14, 1921 (Exhibit 66, R. v. I, 339)—

"witness (Robison) had talks with the Secretary so frequently that he cannot state definitely that he talked this particular thing—yes, he can; there was nothing that he did not talk over, so he must have talked over this" (R. v. II, 989).

"Witness (Robison) never did one thing in this oil business without being approved by Secretary Denby first" (ib. 1005).

Upon this record, as we have summarized it, with much to amplify it but nothing to modify it, with innumerable details, to which more space must not be given, to strengthen it, but no word of evidence to weaken it, the District Court found that Denby did not know what he was doing and took no real part in this transaction, and that Fall dominated, directed and controlled it. Well might it be asked, what could a Cabinet officer, a man in Denby's position, do other than as and what Denby did? Certainly the day has not come when the Secretary of the Navy or the Secretary of War negotiates directly with contractors the details of contracts.

Of a similar situation in the case of *United States v. Mammoth Oil Co.*, involving a lease of the Teapot Dome and a contract for storage facilities on the Atlantic Coast and fuel oil therein in exchange for royalty crude from that reserve, upon a record which we are sure that our opponents will admit was no stronger as regards the acts of Secretary Denby than the record before this Court, Judge Kennedy in the

United States Court for the District of Wyoming, speaking to the contention which was the foundation of Judge McCormick's thirteenth finding in the instant case, said:

"The evidence clearly shows that the negotiations preceding the execution of the lease were actively, earnestly and completely participated in if not dominated by the Secretary of the Navy and his designated representative of that department, Admiral Robison. . . . Not a single significant act was performed without the advice and consent of Robison, the designated personal representative of the Secretary of the Navy, who testified that he consulted continuously with his chief in regard to every proposed move and plan, which evidence is not disputed, although Secretary Denby was presumably available as a witness had plaintiff's counsel desired to call him for the purpose of disproving Robison's statement. The lease was executed by the Secretary of the Navy after full and mature consideration and review of its contents, which must lead to the conclusion that the lease was his legitimate child, brought to life in the exercise of his official discretion. If this suit involved an attempt to fasten the responsibility for the lease upon the Secretary of the Navy, where in the nature of things it logically belongs, the evidence would clearly place it there." 5 Fed. (2d) 344.

It is to be noted that Judge Kennedy, referring to Admiral Robison's testimony that he consulted continuously with his chief in regard to every proposed move and plan, added:

"which fact is not disputed, although Secretary Denby was presumably available as a witness had plaintiff's counsel desired to call him for the purpose of disproving Robison's statement."

In this case the same comment is appropriate, but it is not necessary to refer to Mr. Denby as "presumably available." He was actually available.

In the opinion below Judge McCormick says:

"Mr. Denby although present throughout the trial was not called as a witness" (R. v. III, 1271).

He was present as a witness "subpoenaed on behalf of plaintiff and by order of plaintiff's solicitor" (R. v. I, 101, 104).

Why, if these now undenied facts were not immutably true, was not Denby called?

He was not the subject of any charges.

He was not party to any fraud.

His honor was not reflected upon, his honesty not questioned, his probity not assailed, his patriotism not denied.

There he was in court in response to plaintiff's subpoena. There he remained while this overwhelming record was made.

There can be drawn but one conclusion from plaintiff's failure to call him.

MOTIVES OF THE SECRETARY OF THE NAVY AND OF ADMIRAL ROBISON IMMATERIAL.

The District Court attached importance to what he said the evidence showed as regards the different motives actuating Secretary Denby, on the one hand, and Admiral Robison on the other, in the making of the contracts and leases in suit. He said on this subject, among other things, that—

"The contract and lease of December 11, 1922, were made, as far as Admiral Robison was concerned, to extend his desire to strengthen the national defense by utilizing oil from the naval reserves. . . ." (R. v. III, 1364).

and that Denby—

"relied entirely upon Admiral Robison for information concerning the contracts and leases and it is shown that he signed them under the belief that they were necessary as protective measures against drainage on the reserves" (ib. 1348).

The Court bases this statement of motives upon evidence which reads:

"The controlling reason for that contract so far as the Government was concerned was not a question of price, maintenance or price stabilization, but was that the Navy would get this storage project under way. To witness' mind this was the most important advantage. To the mind of the Secretary of the Navy witness believes the most important advantage was that permanent security against drainage would be secured. Witness is unable to state that, but to witness the most important advantage was the provision of security to the nation" (R. v. III, 1126).

There is no evidence that the defendants, acting by anybody, made any representation, directly or indirectly, to Denby on the subject. There is no evidence that Fall, or any one by his direction or authority, made any representations to Denby directly or indirectly on the subject.

This being so, it is difficult to understand the relevancy of any reference to the difference in entirely honorable motives which may have actuated Admiral Robison and Secretary Denby.

It is certainly an elemental rule of law, that courts cannot review, interfere with or disturb, much less strike down, acts of executive officers, within the scope of the authority given them by the law, because the courts may not agree with the judgment with which such acts were performed or may think the same unwise or impolitic, or even entirely mistaken.

"It is too well settled to admit of dispute at this day that where there is a discretion of this kind conferred upon an officer or a board of officers and a contract is made in which they have exercised that discretion, the validity of this contract cannot be made to depend on the degree of wisdom or skill which may have accompanied the exercise."

U. S. v. Speed, 8 Wall. 77, 83.

The District Court, concluding that the lease involved in this case was not, in his judgment, necessary at the time for the protection of the naval petroleum reserve from drainage from privately

owned adjoining land, and believing from the evidence that Secretary Denby made the leases because his belief on the subject differed from the Court's, by his opinion quite clearly shows that he thinks that furnishes some ground for cancellation of the lease. And this despite the fact that after concluding his discussion of the facts in the case the District Judge, when he turned to a study of the provisions of the Act of Congress under which Secretary Denby acted, was forced to hold that—

“Anything done by the Secretary of the Navy in good faith to attain these purposes is lawfully done within the comprehensive, plenary and exclusive act of June 4, 1920” (R. v. III, 1376).

POINT IX.

Secretary Fall Did Not Make, or Dominate the Making of, the Contracts and Leases in Suit.

Let us now review Secretary Fall's connection with these transactions.

The District Court held that they resulted from a fraudulent conspiracy between Fall and Doheny.

To sustain that decision the Court asserted (1), that Secretary Denby did not make the contracts, and (2) that Secretary Fall did make them and bring about their making.

The Court's 12th Finding of Fact states that—

“Said Fall dominated the negotiations that eventuated in the contracts and leases in suit” (R. v. III, 1398).

Although what we have already presented to the Court should, we submit, be sufficient to show the fallacy of that finding, when we turn from the Navy's activities to the record as regards everything that Fall did in connection with the negotiations which eventuated in the contracts and leases in suit, we will demonstrate that the 12th finding is unsustainable.

We put to one side what Fall intended in the spring and summer of 1921 and whatever he or his depart-

ment may, or may not have done with respect to other leases, and we proceed to trace the records as to what he *did* in respect to *these* contracts which were made in 1922.

In the fall of 1921, one man was set upon having navy oil to the extent of 1,500,000 barrels in storage at Pearl Harbor. That man was Admiral Robison. He conferred on this subject with Secretary Fall. The latter stated that he would obtain an estimate of the cost. At Fall's request Doheny, under date of November 28, 1921, submitted figures simply on the cost of commercial tanks and fuel oil to fill them (R. v. I, 162).

The record shows that Fall sent Doheny's letter to Robison, who did not approve it, and nothing more ever came of it. Of this later herein.

Fall left Washington on December 1, 1921, and did not return to that city until January 27, 1922. Before he left Washington, by his direction instructions were given which in effect turned over directly to the Navy the handling of oil derived from the reserves. The plan then was for current use of the oil.

After Fall left Washington, as has already been shown, Secretary Denby decided on the storage policy and directed that steps be taken to provide fuel oil in storage at Pearl Harbor.

Finney, in Fall's absence, and without communicating with Fall, specifically countermanded the orders which Fall had given to Bain on November 30, and instructed Bain to proceed with the plan which the Navy had decided upon, and Finney testified that

"The basic reason for" this action "was the request or direction of Admiral Robison who told him that the Secretary of the Navy had approved that procedure" (R. v. II, 570).

Fall's next personal contact with the negotiations, which actually started subsequent to December 9, 1921, and were all of a preliminary nature prior to March 7, 1922, was this:

On January 1, 1922, Dr. Bain, on his way to the Pacific Coast, stopped at Three Rivers, New Mexico, and acquainted Secretary Fall with the Navy's plan and told Secretary Fall that he, Bain, had "determined" to present the matter to five large oil companies on the Pacific Coast and seek to have them consider it and consent to submit bids on the project, and "the Secretary discussed this with Bain and approved what was being done" (R. v. II, 726).

SECRETARY FALL'S PART IN THE APRIL 25TH CONTRACT.

Fall returned to Washington on January 27, 1922. Bain had arrived in Washington about January 25 (R. v. II, 746). Bain reported the results of his trip to the Pacific Coast to Secretary Fall and to Admiral Robison (ib. 743-4), and Fall at about that time and before February 15, 1922, told Finney and Bain:

"to go ahead and handle this matter; that he was going to be busy on other things" (R. v. II, 745).

Bain summoned to Court by plaintiff, called to witness-stand by defendant, tells us that in those words.

Finney, summoned to Court by plaintiff, and the only Government officer having any connection with this matter, except Admiral Gregory, placed upon the witness-stand by plaintiff, tells us the same thing on page 346 in this language on direct examination:

"after Bain returned from the West he told witness that he had interviewed a number of oil companies and there was a conference in Secretary Fall's office at which the Secretary, Dr. Bain, and witness were present and regarding which witness testifies; 'I recall distinctly that Mr. Fall said he wished Bain and myself to look after the particular matter of the construction of tankage and the filling of it with oil in the West because he would be occupied with some other affairs or business' " (R. v. I, 346, repeated v. II, 511-2).

From then on Bain and Finney in the Interior Department, and Robison and Gregory in the Navy were

active in the handling of the preparations for issuing invitations for proposals, there being a great many details in connection with the changed plans, specifications and conditions, until finally, under date of March 1, 1922, final plans upon which bids could be intelligently made having been worked out, Director Bain prepared and Assistant Secretary Finney sent under date of March 7th identic letters and conditions for proposals for exchange of naval oil to Standard Oil Company, Associated Oil, Pan American Petroleum, J. G. White Engineering Corporation, and Ford, Bacon & Davis, following that a little later by similar invitations to the Foundation Company and the Pittsburgh-Des Moines Steel Company (R. v. I, 374).

The date set for the opening of the bids was April 15.

Fall had so little contact with the matter up to this time that along about April 11 or April 12, when he made inquiries regarding its status, he was surprised to know that bids were not to be received until the 15th of April (R. v. II, 772).

“This apparently was the first time that Secretary Fall realized that the change in the original proposals involved material delay” (R. v. II, 772).

About all that he did, or that was said to or by him during the interval, was that when Admiral Gregory of the Navy Department objected to the plan originally devised by Bain and Robison for bids on a cost-plus basis, and insisted that all bidders be required to submit lump sum bids, Assistant Secretary Finney mentioned it to Secretary Fall who agreed that the cost-plus plan was not feasible—in other words left the matter to the Navy (R. v. I, 357). At this time defendant Transport Company was urging the cost-plus plan and indicating that any other would make it doubtful that it could submit any proposal. (R. v. I, 366-68; v. II, 902-905).

About April 12, Fall learned from Bain, quite ap-

parently for the first time, some of the difficulties attending the project and on that date he wrote his only recommendation on the subject to the Secretary of the Navy, one which, first, was not adopted, and second, which if adopted would have absolutely changed the entire plan and have made impossible the award to the Pan American Company of the Pearl Harbor fuel storage construction contract.

This is Exhibit No. 103, on pages 393-4 of the record, and it reads—

“We have had some difficulty and delay in the matter of contracts for the construction of storage tanks at Pearl Harbor, for the following reason, to wit: The construction companies have no use for oil and can not, of course, take our crude oil and exchange fuel oil therefor. The oil companies, with whom such exchange must be made, are not engaged in such construction work as appears to be necessary to provide the storage at Pearl Harbor. The consequence has been that we must submit for bids propositions to the oil companies, and they in turn must submit bids based upon naval specifications, not only for the purchase of tanks, etc., but also for the purpose of doing the necessary construction by way of dredging, wharfage, excavation, cement work, etc. Our proposition, therefore must necessarily involve a profit on the construction to be made by the oil company in addition to any profits in oil exchange. If we were in a position to effect the oil exchange, upon the one hand, and having established a credit, to use the cash derived from such credit with which to make our own contracts, we would thus save the profits which will be made by the oil companies.

“For the reasons above given I have drawn a proposal amendment to be attached to line 8, page 25, of the naval appropriation bill (or to be attached to any other proper paragraph in said bill), which amendment reads as follows:

‘Provided further, That storage of fuel oil from naval oil reserves may be provided either by exchange of oil for such storage or (and) by sale of royalty oil in sufficient amount and the

payment of the proceeds thereof for such necessary storage facilities'—

“And a copy of which I am handing you.

“You will note that the amendment by its terms recognizes our right to obtain storage through exchange of oil, but further authorizes us to sell royalty oil and obtain storage with the proceeds of such sale. If adopted, this will save a great deal of trouble, and in the present cases which we are considering might save the Government several hundred thousand dollars—possibly half a million dollars.

“I am therefore holding up the proposed contracts indirectly by taking abundant time for the consideration of bids, etc., with the hope that meantime this amendment may be adopted and that we may obtain the results suggested by the large saving which I am confident will accrue.

“If you agree with me in this matter, would you have the amendment presented to Mr. Kelly with your approval? I am confident that should you see your way clear to take such action the Congress would unhesitatingly adopt the amendment. It may or may not be necessary to go fully into the details of what we are trying to do at Pearl Harbor; of course, impressing Congress with the view that too great publicity should not be given to the subject.”

Had the Navy Department adopted the suggestion thus made by Secretary Fall, the whole plan as it existed at that time must necessarily have been abandoned. A new plan would have inevitably followed, under which construction companies, who it may be assumed as a rule had no facilities to dispose of oil, could have offered to contract for the construction of the Pearl Harbor storage project and be paid in cash, which cash the Navy would be then authorized to thus expend when it received the same from sales made by it of Naval royalty oil.

The Standard Oil Company were urging the plan which Secretary Fall thus recommended. The Associated Company wanted additional legislation—and

Secretary Fall recommended it. Defendants had made no such suggestion.

The Court will not forget that the Bill in this case charges, and the District Court found, that months prior to the writing by Fall of his April 12, 1922, letter, he and Doheny had agreed that the contracts in issue in this case would be awarded the defendant companies.

The action proposed by that letter is so utterly inconsistent with the conspiracy charged in this case that argument to so show would be superfluous. That letter was the subject of discussion between Secretary Denby and Admiral Robison and they concluded that if bids were coming in within three days they would wait to see the result before taking any action on Secretary Fall's letter. If bids were not then received, it would be time enough to act, but if bids were received, then Mr. Fall's views of the situation would be shown to be pessimistic (R. v. II, 1002; v. III, 1089).

Mr. Fall left Washington on April 13, 1922:

"Prior to the time when Secretary Fall left Washington on April 13, 1922, he did not say anything to Admiral Robison about who this contract was to be awarded to, nor did any one in the Interior Department say anything to him prior to that time about who this contract would be awarded to" (R. v. II, 1009).

No instructions whatever were given to Dr. Bain (R. v. II, 775) at the time when bids were opened on April 15, and the same were turned over by Secretary Finney to Bain and Ambrose for study

"or at any time prior as to what the report should be and no instructions whatever, that he knows of, of that kind, were ever given to Mr. Ambrose; * * * witness certainly did not give Ambrose any instructions with regard to whose bid he should recommend, and Secretary Finney did not give any such instructions to his knowledge, nor in his presence, nor did any one else to the witness' knowledge" (R. v. II, 776).

After bids had been opened on April 15 Judge Finney

“turned over all the proposals to Dr. Bain and Mr. Ambrose, with instructions, in substance, to examine them carefully, make an abstract of them, and return them to the witness with a report and recommendation; he did not tell Dr. Bain or Mr. Ambrose, or give them any instructions, about what their recommendations should be; he had at that time no instructions whatever from Secretary Fall as regards what their recommendations should be; he had not prior to the time Secretary Fall left Washington on April 13, 1922, received any instructions from him as to what consideration any of these bids should receive; it is a fact that when Secretary Fall left Washington he left in the hands of the witness (Finney) and Dr. Bain the matter of opening these bids and giving them consideration without any restrictions being placed on the witness and Bain at all” (R. v. II, 515).

Ambrose, thus acting in accordance with his untrammelled judgment, made in writing a detailed analysis of the proposals and “recommended that proposal B, of the Pan American Petroleum & Transport Company be accepted for” reasons which he sets forth (R. v. I, 412, 417).

Denby so directed on April 17th (R. v. II, 1005; v. III, 1099).

Then the first word regarding those bids went from Washington to Fall by telegraph in this language (R. v. I, 419):

“California Reserve bids received and opened Saturday. Standard bid was for exchange only. Associated bid for oil in No. 2 Reserve only, six million two hundred one thousand nine hundred barrels. Pan-American bid oil from both reserves, six million ninety-two thousand seven hundred barrels, with an alternative Pan-American bid, five million eight hundred seventy-eight thousand nine hundred barrels, if given preference for drilling required by government in future in Reserve No. 1. Pan-American bid also advantageous, in that it provides for reduction in cost in case

storage facilities erected for less money than estimated. In opinion Ambrose, Robison, and myself, Pan-American alternative bid best offered and should be accepted.

"Referring telegram Safford and myself this morning, regarding Kendrick's resolution. Similar demand for report had been made upon Secretary Denby. Denby desires complete publicity Navy Department's part in opening naval reserve. Suggest you authorize closing contract with Pan-American. Details will require approximately three or four days to arrange. On conclusion this contract suggest you publish complete information concerning opening all reserves. In any event, suggest you telegraph your desires to Secretary Denby at once.

"If you agree with recommendation regarding California Reserve why not authorize me by wire to make award, and yourself immediately make public the entire disposition of all naval reserve contracts, with reasons therefor.

FINNEY,
SAFFORD."

And the lack of domination or attempt thereat upon Secretary Fall's part is evidenced by his reply from Three Rivers dated April 18, 1922, which is Exhibit No. 121 on page 420, and so far as it pertains to this matter reads (R. v. I, 420):

"Telegram No. 2 reference California bids, if Admiral Robison and Secretary Navy think best close immediately on basis Pan-American deal and if authorized by Denby proceed immediately award and close contract and make public entire policy in fullest and completest manner. . . .

FALL, Secretary."

On April 18, 1922, notice of award of contract, on the basis of alternate bid B, was given in writing to the Transport Company by Judge Finney (R. v. I, 421-2), Secretary Denby, as we have seen, having already so instructed, through Admiral Robison, on the 17th (R. v. II, 1005; 1003-4; v. III, 1099). The same

day this was publicly announced through the press (R. v. II, 519).

And next day, April 19th, Assistant Secretaries Finney and Safford sent a telegram to Mr. Fall, in which they said, on this subject:

“Awarded California Oil exchange contract to Pan-American Oil Company, lowest and best bidder; contract will be ready for execution tomorrow” (R. v. II, 524).

Mr. Cotter for the company insisted that the Secretary of the Navy must be a party making the contract on the part of the United States, otherwise the company would not accept the same, and on April 20, 1922, Messrs. Finney and Safford so telegraphed Mr. Fall (R. v. II, 525), who replied by telegraph on April 22, 1922 (ib. 526), that he thought “it very well make Secretary Navy and Secretary Interior both directly parties to contract with Pan-American.”

The District Court erroneously states in the 63rd and 64th findings that Mr. Ambrose was instructed to consult Mr. Fall on Ambrose's arrival at Three Rivers on the question whether Secretary Denby should be made a party to the proposed agreement and that by telegram dated April 23rd Fall consented. The documentary evidence, in the shape of this telegraphic correspondence, certainly is not only not capable of dispute, but counsel for the plaintiff stipulated that the same

“actually took place between the parties and that the times indicated in said exhibits are correct” (R. v. II, 527).

All that Fall had had before the morning of April 20th was that represented by the telegram telling him what the bids were and conveying the views and strong recommendations of Finney, Safford, Robison and Ambrose, and the telegram of the afternoon of April 19th which told him that contract had been awarded.

All that Fall had done was to refer the matter, without the slightest recommendation or intimation of his

views or desires, to the Navy Department, the only directions he gave were to his assistant at Washington to make the award if the Navy said so.

It was on the morning of April 20th that Finney and Safford telegraphed that the Pan-American had raised the question that the Secretary of the Navy should be made specifically a party in and to the contract (R. v. II, 525).

It was on the 22nd that Fall answered that telegram in the language we have quoted (R. v. II, 525-6).

It was late in the afternoon of April 20th when Fall was telegraphed that Ambrose was coming to Three Rivers, arriving there Sunday or Monday (R. v. II, 526).

It was on the 23rd that Fall telegraphed—

“Ambrose arrived. Have consulted reference all contracts. As to both contracts go ahead” (R. v. II, 526-7).

Secretary Finney testified:

“that before Ambrose ever arrived at Three Rivers on April 23rd every question with respect to who should be a party to that contract and with respect to the awarding of the contract had been settled in this telegraphic correspondence” (R. v. II, 528).

Mr. Finney adds his opinion that “It could have been unsettled by the Secretary.” But our comment upon that is, first, that it was not unsettled; and second, that Mr. Finney’s expression of opinion is of no moment in the circumstances; and, third, that it is an erroneous opinion. Here, however, we are dealing with the facts and the facts are that all that Mr. Fall did was, if we may use a colloquialism, “to put it up” to the Navy, he himself settling nothing, advising nothing, suggesting nothing, recommending nothing, influencing nothing; and not even attempting to do any of these things.

The April 25th contract and the letter accompanying it, which was the basis for the June 5th lease, was

signed at Washington on the date thereof by Acting Secretary Finney, and in the circumstances already shown this court, by Secretary Denby, who it will be remembered had directed personally and expressly that Pan-American alternative bid B should be accepted.

We have now reviewed every bit of evidence that there is with respect to Secretary Fall's connection with the negotiations leading up to, and with the execution of the April 25th contract.

Does not the evidence indubitably show that Fall neither requested, recommended or influenced, much less directed or dominated or controlled the making of that contract?

He turned over to Finney and Bain the handling of such assistance as the Interior was to the Navy in the matter, and he left to the Navy, without the slightest suggestion from him, the entire matter of the award of this contract.

SECRETARY FALL'S PART IN THE JUNE 5, 1922, LEASE.

Secretary Fall took no part in the negotiations for this. He was not in Washington where it was negotiated.

There is no evidence that he had the slightest knowledge prior to April 23, 1922, if then, that Mr. Cotter for the Transport Company had urged the assurance which resulted in this lease. The subject was not mentioned in the telegraphic correspondence. It was not even shown that Mr. Ambrose, who arrived at the home of Secretary Fall, Three Rivers, N. M., April 23d, had with him a draft of the letter subsequently written as of April 25th from Secretary of the Navy Denby and Acting Secretary of the Interior Finney to Mr. Cotter (R. v. I, 423-4). While the testimony is that Ambrose knew of, and was instructed by Mr. Finney regarding, the contemplated action represented by that letter, there is no evidence as regards what, if anything, he communicated on the subject to Mr. Fall or what Mr.

Fall ever knew, if anything, about it. It is attempted to be inferred from the reference in Mr. Fall's April 23rd telegram to "both contracts" that he referred to the April 25th contract and to the letter. This is not clear as he might very well have been giving instructions with regard to the Teapot Dome or some other contract. Mr. Ambrose was available, indeed under subpoena as a witness for the plaintiff, and it must be presumed that if it could have been shown that Mr. Fall knew anything about the assurance out of which the June 5th lease grew there would have been evidence offered of that knowledge. The failure of the plaintiff to call Ambrose, after having subpoenaed him, is significant.

On June 5, 1922, pursuant to the authority in the letter in which Secretary Denby had joined, Assistant Secretary Finney executed the lease. There is no evidence that Mr. Fall was consulted about or knew of this action.

The fact that lease of Naval Petroleum Reserve lands was signed for the Government by an Assistant Secretary of the Interior was held immaterial, provided its execution was authorized by the Secretary of the Navy, in *United States v. Belridge Oil Co.*, No. 4782, decided by Circuit Court of Appeals, Ninth Circuit, July 12, 1926, not yet reported, affirming similar decision of the District Court, Southern District of California, Shepard, D. J., July 17, 1925, unreported.

SECRETARY FALL'S PART IN THE DECEMBER 11TH CONTRACT AND LEASE.

Let us proceed to examine what Fall did in the way of "dominating" the negotiations which eventuated in the December 11th contract and lease.

From April 25, 1922, to November 29, 1922, Fall took no steps toward the making of any additional contract with, or the granting of any lease to, defendants.

Prior to November 29, 1922, Fall had no knowledge

of any plan of the Navy for an enlargement of the Pearl Harbor Reserve fuel resources or the making of a lease to any of the unleased portion of Naval Reserve No. 1, or to any part of that, or any other, reserve to the Pan American Company.

Some time in October and again about November 6, Mr. Doheny submitted to the Navy Department and to the Interior Department his two memoranda seeking a lease to specified sections in Naval Reserve No. 1, ranging from a minimum of four sections to a maximum of nineteen sections in consideration of the undertaking of the construction of a pipeline from the Naval Reserve to tidewater and the rendering of other services in connection with keeping up to 4,000,000 barrels of fuel oil in storage at specified points on the Atlantic and Pacific seaboards subject to the Navy's future call.

These memoranda made no suggestion concerning and in no way contemplated either, first, an extension of the Pearl Harbor storage project, or, second, a lease to all of the reserve.

Mr. Fall's disposition of the first memorandum was that he handed it to Dr. Bain, saying—

“‘take it up with the Admiral’; that is, Admiral Robison, and he did not say anything more on that subject at that time. The witness (Bain) did take that paper up with Admiral Robison.” (R. v. II, 789.)

Fall's disposition of the Interior's copy of Doheny's second, or November 6th, memorandum was this:

“Mr. Doheny's second memorandum came to Dr. Bain through the Secretary's office; * * * Witness (Bain) received instructions with respect to the subject matter of that memorandum from Secretary Fall, which instructions were to do nothing except as the Navy wanted it done; the Secretary at this time further said that it was Navy business; witness did not take this second memorandum up with anybody, but waited for the Navy to take it up with him.” (ib. 790.)

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Government counsel stressed the evidence showing what occurred between Fall and Robison about the subject of the first Doheny memorandum, the evidence on this point coming from Admiral Robison, as follows:

"Admiral Robison testifies that when 'this proposition was originally brought to' his attention, 'by Secretary Fall,' as stated in the foregoing memorandum, Secretary Fall told the witness that Mr. Doheny was much concerned over the state of the oil market in California, and had some sort of a proposition to advance looking toward the stabilization of prices that might be made to the Government's advantage, as well as to his own; witness told Secretary Fall that anything that came 'to our advantage' was of interest to witness and that is about all there is to it, because the witness was not furnished with any details; witness does not remember exactly what, if anything, Secretary Fall said with regard to the Navy's interests or part in that matter, but there was no question that it was a matter for Naval decision." (R. v. II, 1021-2.)

And—

"Witness does not know whether Secretary Fall had before him a copy of Mr. Doheny's memorandum when Secretary Fall discussed Mr. Doheny's plan in the autumn of 1922 with witness. * * *

"The plan for increased storage facilities was purely a naval matter, but Secretary Fall did say to witness when he discussed Mr. Doheny's plan with regard to naval reserves that he thought that plan was valuable both to the Navy and to Mr. Doheny, or would prove valuable to both of them. He was of the opinion that the suggestions offered by the Pan American Company through Mr. Doheny were not without merit from the Government's point of view." (R. v. III, 1137.)

The next thing which came to Fall on the subject of a new contract and lease is the letter from Secretary Denby dated November 29, 1922, written in the circumstances we have already presented to this court, re-

questing the assistance of the Interior Department in connection with a proposed supplementary or new contract for the greatly increased storage facilities at Pearl Harbor. (R. v. II, 616.)

Secretary Denby's letter went to Director Bain and Bain and Ambrose working, as he testified, directly under Robison, doing what the Navy wanted and in all things supporting and assisting Robison, took part in the negotiations which followed. Robison, when the letter of November 29th was written, telephoned the New York office of the Pan American Company to send down representatives to take up the matter.

Not until, at the earliest, December 7, 1922, did Fall have any contact whatever with these negotiations and then, the negotiators having agreed on everything except the schedule of royalties and Bain and Ambrose having prepared data on that subject, Bain saw Fall with this data and the two worked out an intermediate or compromise set of royalties as being one which perhaps could be agreed upon, which Fall directed Bain to submit a copy of to Robison and to Doheny through Cotter. Bain gave a copy of that set of royalties "to Mr. Cotter and told him to take it up with Mr. Doheny." (R. v. II, 794.)

Mr. Doheny evidently understood from Mr. Cotter that this schedule of royalties was offered his company by the government, for under date of December 8, 1922, he wrote Secretary Fall (R. v. II, 619) that his company, after consideration had "decided to accept the government schedule of royalties as offered."

Fall immediately wrote Robison on December 8, 1922 (R. v. II, 796), a letter in which he shows—

First: that the government had not offered Mr. Doheny's company any schedule of royalties;

Second: that he presumed Doheny was referring to the schedule which Fall's letter said he had prepared but which, as a matter of fact, as shown by Bain's evidence, was prepared by Bain and Fall on the basis of the data presented by the former; and

Third: that the only purpose of that schedule at the time was as affording a ground of discussion.

Fourth: That—

“Unless these royalties are entirely satisfactory to you and unless the draft of the contract in other respects is entirely satisfactory, I will immediately notify Colonel Doheny of your conclusions.”

“I will not agree to nor sign any contract whatsoever in the way of a modification of the existing contract or otherwise which is not in every particular satisfactory to you, as you have been designated by the Secretary of the Navy to represent him personally in this matter.” (R. v. II, 797-8.)

Having received that letter, as we have already seen, Admiral Robison, after obtaining Secretary Denby's instructions (R. v. III, 1032), called on Secretary Fall, to discuss the matter with him, and Fall told Robison to go ahead directly and get the best he could from Doheny.

We need not repeat the review of the evidence showing the direct negotiations which followed between Admiral Robison and Mr. Doheny, the other persons present being Bain, Ambrose, Cotter and Anderson, and the agreement reached directly by Robison representing the Government, then having express and specific authority from Denby to act, and Doheny, representing the defendants.

The contract and lease were prepared for the signatures of the Secretary of the Interior and the Secretary of the Navy, and all of the testimony regarding their execution by the former comes from Director Bain, who testified:

“Witness was present at the time the contract was signed by Secretary Fall; this was done in the Secretary's office, there being present Mr. Doheny, Mr. Cotter and Dr. Bain. Dr. Bain presented the contract and lease to Secretary Fall. It had previously been signed by Mr. Doheny in the office of the witness; when witness presented it to Secretary Fall, he told the Secretary this was a

contract that had been worked up; the Secretary at that time, to the witness' knowledge, had seen the letter of December 11 from Admiral Robison, last above quoted; Secretary Fall had not seen the contract or any draft thereof prior to that time; when the drafts were presented to Secretary Fall, he read the same through carefully, he asked if it was all right, addressing the whole party; witness answered that it was; Admiral Robison was not there, so far as witness recollects; Mr. Fall signed the contract and lease and the same was taken down to the Navy Department by Mr. Cotter." (R. v. II, 801).

TO SUMMARIZE, AS TO SECRETARIES DENBY AND FALL.

We now have reviewed the entire record, so far as there is anything in it, as to the negotiations of and the execution of these contracts.

On that record, may we not say that, if Denby did not make these contracts and did not know their contents, then in the language of a United States Judge he was an "imbecile."

If on that record Fall dominated the negotiations that eventuated in the contracts and leases in suit, then "domination" has a meaning no lexicographer ever dreamed of.

We have shown by the evidence, and all the evidence on the subject, just how the agreement was reached directly by Mr. Doheny for the defendant company and Admiral Robison for the Government as to the royalties which were incorporated in the December 11th lease.

We have shown by the evidence, and all the evidence on the subject, that the proposition to lease the entire unleased portion of the reserve, in connection with the December 11th contract, or for that matter in any connection whatever, originated with and came solely from Admiral Robison.

We have shown that there is absolutely no evidence to show that Secretary Fall recommended, requested or

directed the Navy Department or any one else to grant a lease to the reserve or to one foot of property in the reserve to the defendant company or to any other person or persons whatsoever at any time after November, 1921.

We cannot overemphasize the fact that these things are not the subject of any conflicting testimony whatever.

THE GOVERNMENT'S ANSWER—AND OUR RESPONSE.

In effect counsel for the Government say that, admitting all that we have stated, the schedule of royalties in the December 11th lease was fixed by agreement between Doheny and Fall, dealing directly, and was not fixed as shown by the evidence as above presented to this Court. For this they rely entirely upon the testimony of Robison and Bain.

It will be recalled that Anderson, one of the negotiators for the company, and Robison, negotiating for the Government, disagreed on the question of royalties. Anderson at first sought a flat royalty of 12½%. During the negotiations he agreed to accept a lease containing what are known as the Interior Department regulation royalties, promulgated under the Act of February 25, 1920, on a sliding scale of 12½ to 20% for one grade of oil and 12½ to 25% for another; Admiral Robison wanted to start at 14 2-7% and go up to 30 and 35%, according to gravity. Dr. Bain and Mr. Ambrose, then and thereafter, to use the language of the testimony, were supporting Robison, "as we were acting for the navy" (R. v. II, 793). They collected data as regards royalties which the Government was actually receiving from its various leases and Dr. Bain went to Secretary Fall's office with the sheet and statements on that subject and talked the matter over with him,

"and then he and witness worked out an intermediate or compromise set of royalties as being a fair basis, and one which perhaps could be agreed

upon. These were worked out in pencil and type-written copies made in the Secretary's office; Secretary Fall instructed the witness to take that up with Admiral Robison. He also, either at witness' suggestion or at his own, or it was agreed, that witness should give a copy to Mr. Cotter, and he would see if Mr. Doheny would take it up; * * * witness did take the copies downstairs and gave one to Mr. Cotter and told him to take it up with Mr. Doheny, while the witness took it up with the Admiral." (R. v. II, 794.)

In face of that Government counsel contend that while Bain was to take it up with Admiral Robison Secretary Fall took up these compromise royalties with Mr. Doheny personally and got the latter to agree to them.

It is true that Robison in a subsequent conversation so understood from Fall but there is no evidence of the fact of what was done (as distinguished from Robison's recollection of what Fall told him) except, first, Bain's statement that through Cotter it was presented to Doheny. What followed shows quite plainly that when Mr. Fall told Admiral Robison he had taken it up with Mr. Doheny he meant exactly that, the fact being that it was taken up with Mr. Doheny in the way Bain testified.

We say what follows shows this and destroys the claim that Doheny and Fall, dealing personally and directly, agreed upon the royalties, for the evidence as to this does not depend upon any witness' recollection two years after the event of what he understood another to say, but upon contemporaneous writings.

After there occurred what Bain testified to Doheny wrote to Fall his letter of December 8th. It is obvious he was thus replying to the information brought him by Cotter and even that he misunderstood that information and construed the schedule of royalties as being one offered by the Government. That letter, in part, states:

"We have given very careful consideration to the difference between the royalty schedule which the Government has offered us in the lease connected with the proposed modification of our Pearl Harbor contract and the changes in such schedule which we had proposed to request of the Government. Realizing, as we do, that the value of this contract depends largely upon better prevailing prices for crude oils than at present obtains, we have concluded that the possible appreciation in the price may be made to absorb the difference between the schedule of royalties offered and that which we had proposed to request, with the result that we have decided to accept the Government's schedule of royalties as offered." (R. v. II, 619.)

The plaintiff offered the above in evidence but refrained from putting in evidence the action taken by Secretary Fall when he received that communication. The defendants supplied that omission from the Government's files.

Fall sent Doheny's letter immediately to Robison with a communication (R. v. II, 796) from which we have quoted hereinbefore.

As against the claim that they had personally discussed and settled the matter between them, we find Fall's letter of December 9th showing that when Doheny in his letter of December 8th spoke of royalties "which the Government has offered us" he, Fall, could only "presume" that Doheny had reference to the tentative schedule of royalties the only purpose of which was to afford ground for discussion on the then open subject.

And what did Fall do after that letter? He sent it to Robison without recommendation.

What contribution did Fall make to the agreement after that letter? The answer is, from the only evidence on the subject, that he told Robison to go and negotiate directly with Doheny and Robison did so.

Bain and Robison both testified unqualifiedly to that fact and no one testified to the contrary. The record

shows that Mr. A. W. Ambrose was present when Robison and Doheny negotiated for and agreed upon the schedule of royalties. Ambrose, a Government official, never made the subject of any charges, a presumably honest man, was subpoenaed in this case by the plaintiff's counsel (*R. v. I*, 103), but was not called to the stand.

We call attention to the fact that neither by oral nor documentary evidence is there a scintilla of proof that Fall recommended or requested that the schedule of royalties in the December 11th lease be agreed upon. He and Bain did get up a schedule which was thereafter agreed upon by Robison and Doheny. But the evidence is clear that they got it up as a thing to be discussed and that when gotten up one copy was turned over to the Navy's representative, the other copy was turned over to the defendant company's representative, and subsequently in direct negotiation the representative of the Navy, having first gone to Secretary Denby and gotten his authority thereunto, dealing directly out of Fall's presence and without any influence or urging from Fall, reached an agreement with the representative of the defendant companies.

We submit that plaintiff's desperate attempt to show that the Secretary of the Navy did not make this agreement, but that Secretary Fall did, cannot succeed.

FALL'S DECLARED INTENTIONS AND FALL'S ACTUAL ACTIONS.

Great stress was laid by counsel for the Government and by the trial judge on language used in a letter written by Secretary Fall to Mr. Doheny July 8, 1921, at a time when Mr. Fall was thanking Mr. Doheny for the action of the latter in agreeing to surrender part of a lease which the Petroleum Company had become entitled to in open competition, which surrender was in order to enable the Government to settle a claim of the United Midway Company. At that time the conflict between the Interior Department and certain naval offi-

cials to which we have referred existed and Fall concluded his letter by stating:

"There will be no possibility of any further conflict with the Navy officials and this Department, as I have notified Secretary Denby that I should conduct the matter of naval leases under the direction of the President, without calling any of his force in consultation unless I conferred with himself personally upon a matter of policy. He understands the situation and that I shall handle matters exactly as I think best and will not consult with any officials of any bureau in his department, but only with himself" (R. v. I, 135).

The trial court quotes that letter in full in his opinion (R. v. III, 1299-1301) and of it says (*ib.* 1301):

"The contention of defendants that the leases in suit were the work of Secretary Denby and that Secretary Fall acted merely as his agent is utterly devoid of merit when considered in the light of his ultimatum in this letter"

That letter was written in July, 1921. It is relied upon by plaintiff's counsel and treated by the trial court as though the intentions therein set forth were actually followed out, and the testimony showing that, from the time Admiral Robison was appointed as Secretary Denby's representative in charge of naval fuel matters, no such course of conduct was pursued is entirely ignored.

The contracts in suit were made in 1922.

Let us compare what Secretary Fall *said* in July, 1921, with what he subsequently *did*.

October 18, 1921, Robison becomes Denby's representative.

October 25, 1921, Denby writes Fall—

"Rear Admiral J. K. Robison reported to me that as a result of his interview with you on Saturday, October 22, the following general agreement in connection with the naval petroleum reserves was reached" (R. v. I, 146).

October 30, 1921, Fall writes Denby—

"I have your letter of October 25 and have just consulted Admiral Robison about the subject matter. Responding to your request for information as to whether the policies set forth in the letter are agreeable to the Department of the Interior, I can say without hesitation that they are entirely agreeable and will be carried out to the very best of my ability. Of course, should any new matter come up at any time I will unhesitatingly and immediately consult you personally or through Admiral Robison" (R. v. I. 149).

November 29, 1921, Fall writes directly to Robison, transmitting Doheny's letter of November 28th and saying:

"If you approve the proposition, will you kindly indicate to me such approval by simple endorsement upon Col. Doheny's letter to myself, signed by yourself. Your simple O. K. will be sufficient" (R. v. I, 164).

April 18, 1922, Fall telegraphs from Three Rivers, N. M., to Assistant Secretaries Finney and Safford:

"If Admiral Robison and Secretary Navy think best close immediately on basis Pan-American deal" (R. v. 420).

October, 1922, when Mr. Doheny sent in his memorandum on the California oil situation to Admiral Robison and to Secretary Fall, Fall turned it over to Dr. Bain with instructions to—

"take it up with the Admiral; that is, Admiral Robison" (R. v. II, 789).

When there was received at the Interior Department copy of Mr. Doheny's November 6, 1922, memorandum, Fall turned it over to Dr. Bain with—

"instructions with respect to the subject matter . . . which instructions were to do nothing except as the Navy wanted it done; . . . that it was Navy business" (R. v. II, 790).

December 8, 1921, when Mr. Doheny indicated his company's willingness to accept in the lease then under negotiation schedule of royalties gotten up by Fall and Bain as a tentative basis for discussion, Fall immediately transmitted Doheny's letter directly to Admiral Robison by a letter concluding—

"I will not agree to nor sign any contract whatsoever in the way of modification of the existing contract or otherwise which is not in every particular satisfactory to you, as you have been designated by the Secretary of the Navy to represent him personally in this matter" (R. v. II, 797).

December 8, 1922, Secretary Fall and Admiral Robison had a conversation on the subject of lease royalties in which the Secretary turned over the whole matter for direct negotiation to Admiral Robison, the latter having stated that he wanted the schedule to begin with a one-seventh royalty for a minimum, Fall saying to Robison:

"Go ahead and see if you can get it out of the old man. I can't" (R. v. III, 1031).

We shall not reiterate references to the record showing not only the constant consultations of Interior Department officials with Admiral Robison and other representatives of the Secretary of the Navy, but their entire subordination to the Navy Department.

To quote Robison on cross-examination, the

"man who was important to witness was Secretary Denby. The rest of the people were tools. . . . Witness means the master of the Interior Department was a complete tool of witness's. They were all under witness's hand in naval matters" (R. v. III, 1087).

And the record teems with evidence so showing.

What we have here reviewed suffices to show the utter immateriality of any statement by Fall of his expectations or intentions in July, 1921, on this subject in the light of what actually occurred thereafter.

It is true Fall said *he would not consult* with Navy

officials about naval reserve leases. It is equally true that thereafter *he did consult* with Navy officials.

Had he said he would not resign, and then resigned, the plaintiff here would contend that he had not resigned because he said he would not.

Had he said in 1921 he would go to Europe in 1922 and in fact did not leave the United States, the plaintiff would have pointed to his 1921 declaration as proof that he was in Europe in 1922.

Having said in 1921 that he would not consult with Navy officials, at a time when there was conflict between his department and a subordinate of the Navy who seemed not to have been able to get on with Interior Department officials under either of the last two administrations, the District Court and counsel for the Government say that it necessarily follows that Fall did not consult with Navy officials and that the Secretary of the Navy did not make the contracts here in issue.

MR. DOHENY'S LETTER OF NOVEMBER 28, 1921, TO
SECRETARY FALL.

But the Government contends that all of the foregoing is overcome by the fact that the first proposition to exchange royalty crude oil from the reserves for fuel oil and tanks therefor at Pearl Harbor was addressed to the Secretary of the Interior by the President of the Transport Company November 28, 1921 (R. v. I, 163). We have said we would discuss this in detail. We proceed to do so.

It is to be noted at the outset (a) that the information transmitted in the letter of November 28th from Mr. Doheny to Mr. Fall had been sought by the latter as the result of a conversation with Admiral Robison in which the Admiral asked Mr. Fall to "get some figures" to show what it would cost the Navy for commercial tank installation, in view of a discussion regarding the higher cost of Navy over commercial tankage (R. v. II, 970); and (b) that no action whatever

was taken on the November 28th letter other than its reference by Mr. Fall to Admiral Robison who took no action on it. The District Court considered it significant that defendants had made inquiries of builders of oil tanks before the letter of November 28th was written. It does not appear how else an oil company could have replied to an inquiry regarding the cost of constructing such tanks and as will be observed from the language of the letter (*R. v. I*, 162), the first line states that inquiries had been made regarding that cost.

Let us examine this much considered but really unimportant letter and trace it in the Interior and Navy Departments.

In substance it advises Secretary Fall that in response to his suggestion Mr. Doheny had made "some inquiries" regarding the cost of constructing tanks for storage at Pearl Harbor and finds that the price of 27 tanks, with an aggregate capacity of 1,485,000 barrels, not erected but simply delivered at ship's side, Hawaii, would be \$538,920; that the cost of that quantity of fuel oil delivered at Pearl Harbor would be \$2,821,500; and he adds—

"Therefore, were we to construct the tanks and furnish the oil on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserve and to be leased to us, it would require a return to us in royalty crude valued at \$3,360,420, or 2,973,823 barrels, figured at today's price" (*R. v. I*, 163).

He concludes that he will have Mr. Cotter discuss the matter with Mr. Finney who he assumes, with Rear-Admiral Robison, will arrange the details.

It is insisted by the Government, and it was decided by the trial court, that this letter was—

First: a definite bid on the Pearl Harbor project ultimately embodied in the April 25, 1922, contract;

Second: the foundation and basis for the award of the April 25, 1922, contract to defendant Transport Company.

In the light of uncontradicted facts let us proceed to find the answer to two questions:

First: Was this a bid on the Pearl Harbor project subsequently contracted for?

Second: Was it the foundation of any action, or is it true that no action whatever was ever taken by the Government based on it?

As to whether this is to be held to be a bid on the Pearl Harbor project, the advance submission of which gave any advantage to the Transport Company, these points are to be noted:

1. The letter is dated November 28, 1921. Subsequently bids on that project, including two from the Transport Company, were submitted April 15th, 1922, and contract based on a bid submitted on this last date, and on no other, and without any relation to the figures contained in the November 28th letter, was made April 25th, five months, lacking three days, from the time the November letter was written. No one has explained why, if that was a bid, intended to be and actually treated as such; if it was a proposition actually accepted; if, as Judge McCormick says, at the time it was written Fall and Doheny had tacitly agreed upon the award of the contract to the Transport Company, five months were allowed to intervene before a contract was made.

2. The November 28th letter merely advised, as regards the construction part of the storage facilities at Pearl Harbor, that "some inquiries" made by Mr. Doheny showed that 27 tanks could be delivered ship's side, Hawaii, for \$538,920, the Government itself to pay for transporting the tanks from the ship and preparing the tank sites. Apparently Mr. Fall had simply asked, as Admiral Robison said he had requested Fall to do, for figures showing the cost of commercial tanks.

In the November 28th letter the cost of everything relating to tankage was \$538,920 (R. v. I, 163), whereas the bid submitted April 15, 1922, so far as it cov-

ered construction work alone at Pearl Harbor was for \$3,200,000 (R. v. II, 569).

3. As against merely 27 commercial type tanks delivered at ship's side, the Pearl Harbor project for which bids were sought and received and on which contract was let five months later embraced these items:

- (a) 30 50,000-barrel tanks specially designed by the Navy, with heavier plates than those commercially used, with steel tops and specially specified foundations (R. v. II, 542; 566);
- (b) The preparation by the contractor of the tank sites;
- (c) Construction work incident to building the foundations, the tanks, and erecting the latter;
- (d) The construction of an embankment surrounding each tank (ib. 547);
- (e) A system of connecting pipelines;
- (f) Pump houses;
- (g) Electrical work in conjunction with the operations of the plant (ib. 574);
- (h) A complete steel wire fence around the tank areas (ib. 580);
- (i) A concrete fuel station dock, on concrete piles, for the unloading and handling through pipelines of the fuel oil to be received in the tanks and the bunkering of naval vessels from those tanks;
- (j) Dredging channel so as to make available this dock and through it the storage plant;
- (k) All labor and material necessary from the assembling in this country to the completion of the storage facilities at the naval station in Hawaii.

The cost of the entire project mentioned in the November 28th letter—tanks and oil—would have been \$3,360,420. The project for which proposal B was submitted was to cost \$6,466,795.50.

4. As proved by the plaintiff through its witness, Admiral Gregory, the plans for the project which were actually used were not completed in his Bureau until March 1, 1922, and—

“they were the second set of plans prepared; the first, prepared in December, were found to be so general and to convey so little information of a kind that would be required to submit an intelligent bid, that the Bureau prepared this second set subsequent to the receipt of information from the Pearl Harbor Naval Station as to local conditions.” (R. v. II, 564.)

The making of plans upon which could be made a bid, as Gregory tells us at page 562, required information which was not even in Washington until February respecting (1) conditions of the grounds; (2) the foundations; (3) the depth of water; (4) the nature of the underlying soil; (5) amount that the piles would penetrate; and much other data, to be used (we use his own language) “in informing prospective bidders so that they could intelligently formulate real bids” (ib. 562).

The plans completed March 1, 1922, were sent out with invitations for proposals, under cover of a letter dated March 7, 1922, signed by Judge Finney, to seven substantial companies, four of them being engineering concerns and three oil corporations.

Having these entirely indisputable facts clearly in mind—facts proved by the plaintiff and embodied in official documents—clearly the November 28th letter was not, and was not treated as, a bid on the actual Pearl Harbor project and the District Court’s opinion that it was is erroneous.

We come now to the second question regarding this letter, namely:

WAS IT THE FOUNDATION OF ANY ACTION, OR IS IT TRUE THAT NO ACTION WHATEVER WAS EVER TAKEN BY THE GOVERNMENT BASED ON IT?

And in this connection, was the letter treated as a secret thing to be hidden or was it handled as something without sinister purpose or contents?

The answers to these propositions are to be found in uncontradicted evidence.

Let us trace that letter by this record:

(1) It was sent openly through the mail, addressed to the Secretary of the Interior (R. v. II, 505).

(2) It was received by Assistant Secretary Safford of that department. (ib.)

(3) It was routed by Safford to First Assistant Secretary Finney. (ib.)

(4) Secretary Finney "returned it either to Safford or to the Secretary, probably to Safford." (ib.)

(5) It was immediately transmitted by Fall to Admiral Robison in the Navy Department,—four months after Fall had declared he did not intend to consult any officer of the Navy. (R. v. I, 163-4.)

(6) The Doheny letter was taken by Robison, on the day of its receipt by him, into the meeting of the Navy Council, as we have already seen, on November 29, 1921, and the construction that Robison put upon it as being in effect an assurance that the Navy could get storage facilities in exchange for crude oil was there the subject of discussion (R. v. II, 975-6).

(7) Neither Robison, Denby, nor any one else took any action upon the Doheny letter (R. v. II, 506).

(8) Admiral Robison apparently returned it without comment to the Interior Department where it came into the possession of Dr. Bain of the Bureau of Mines along about the 1st of December, 1921, without any instructions (R. v. II, 719).

(9) When Secretary Finney, later in December, turned over to Dr. Bain the request from the Navy contained in letters of December 9 and December 14 for the working out of a plan for the exchange of crude oil for the Pearl Harbor storage, Finney instructed Bain "to try to work out a plan which would accomplish what the Navy wanted" and Bain, having ascertained from the Doheny November 28th letter that this matter was in the hands of Mr. Cotter for the Trans-

port Company, took that November 28th letter to Finney and asked Finney to write Cotter requesting that when he next came to Washington he call on Bain (R. v. I, 342; v. II, 719-20).

There was no other action

"ever taken on the November 28th letter, and from that time on, the same was kept in the files of the Bureau of Mines, where the original remains until the present date" (R. v. II, 720; 505-6).

(10) It was filed in the Bureau's safe with and kept in the same manner as other "papers relating to this case," it being looked upon by Dr. Bain as "an engineer's preliminary estimate of the probable cost," he having later "procured similar estimates from other sources as a guide to him in making up plans for the work" (ib. 720).

(11) Finally Admiral Robison testified that subsequent to the Council meeting of November 29th when

"he announced that he was going to look into the matter and see whether the tanks referred to in Mr. Doheny's letter were specification tanks; * * * he did nothing with reference to that letter; no action was ever taken in the way of accepting that proposition, or any official action on that proposition" (R. v. II, 992-3);

and his only talk about it was with Bain, the extent of which was "'we could not take any such proposition as that' and let it drop at once" (ib.).

And it did drop at once.

Never again does that letter appear in the case.

Never was it referred to by any government official or by any company official.

Never did Fall or Doheny inquire about it.

Never after December 16, 1921, was it referred to by any person in Government or in defendant's services (R. v. II, 505-6).

But it is urged that there is some sinister significance to be attached to the reference in the November 28th letter to future leases. As we shall have occasion

to discuss that point in arguing that no financial transaction between Mr. Doheny and Mr. Fall *had the slightest bearing on the matters in issue* we omit more than a reference to it here. We submit that we have sufficiently shown, regardless of what might have been written by Mr. Doheny to Mr. Fall in November, 1921, that he did not make, direct, or influence the contracts and leases involved in this case.

POINT X.

The Contracts of April 25th and December 11th, 1922, Were Not Invalid Because of Any Illegal Delegation to the Secretary of the Interior of Discretionary Powers Which Could Only Be Exercised by the Secretary of the Navy.

At the trial in the District Court counsel for plaintiff contended that even if Secretary Fall did not make these contracts and leases, which the Secretary of the Interior was not authorized by legislation to make, and even if they were not invalidated by any fraud or conspiracy to which he was party, the contracts were nevertheless void because they contained delegations to the Secretary of the Interior of powers which could only be exercised by the Secretary of the Navy. No such theory was presented by any allegation of the bill of complaint. It was first heard of on the trial.

A. The District Court specified this as the only illegal feature of these contracts (R. v. III, 1390; 1420-1).

B. The Court of Appeals did not allude to this point, or base its decision upon it in any way.

What are the "delegation" clauses which were condemned by the District Court?

1. In the contract of December 11, 1922, the phrase "Secretary of the Interior" is only used three times.

(a) The first of these is a mere reference, in the first recital, to the letter of November 29, 1922, there-

tofore written by the Secretary of the Navy to the Secretary of the Interior, requesting the assistance of the Interior Department in the matter.

(b) The second place in which the phrase "Secretary of the Interior" is used is also in a recital—the next to the last paragraph—referring this time to the preferential right granted in the contract of April 25th, "on such terms and conditions as may be determined by the Secretary of the Interior."

(c) The third place in which the Secretary of the Interior is alluded to is in paragraph one of the contract, and consists of an agreement on the part of the contractor that the delivery of fuel oil under the preceding contract of April 25th (which omitted to specifically provide for the date of such delivery) should be made "when and as directed by the Secretary of the Interior."

Aside from the fact that this constitutes no exclusive delegation of authority to the Secretary of the Interior, the matter is one of purely ministerial significance. Moreover, the record conclusively, and without dispute, shows that delivery of this oil was made when and as directed by the Secretary of the Navy (*R. v. II*, 818). Furthermore, this phase of the contract was entirely executed before this suit was brought.

In the specifications attached to the contract (which being of enormous volume are not printed in full in this record), the Secretary of the Interior is named as the individual by whom a number of acts—involving the exercise of but slight, if any, discretion,—are to be performed (*R. v. I*, p. 429).

If such "delegations" as are contained in these specifications are illegal, the Court must establish a rule that a great executive officer charged with responsibility for hundreds of decisions involving the policy of his department would be required to personally attend to the details of preparing and approving specifications—approving detailed drawings—direct-

ing performance of the work—granting extensions of time—determining what delays are excusable—approving changes in the contract—passing upon violations of the eight-hour law—deciding what officer shall approve special plans—deciding what changes are to be made owing to discovery of changed conditions, and approving items of prices involved in lump sum sub-contracts.

The unsoundness of such a position has been recognized even by counsel for the Government in the argument before the District Court in the *Mammoth* case, because while still contending that clauses in the *Teapot Dome* lease—which involve the exercise of much greater real discretion than the clauses to which we have referred are void, they nevertheless admitted that none of those clauses even though held to be void in itself, could be taken as sufficient ground for annulling the lease in its entirety.

Counsel's statement is quoted by Judge Kennedy (5 Fed. (2d) p. 345):

"Those provisions are void. I must be frank with Your Honor—those provisions, in my judgment, would be severable. In other words, if those were the only illegal provisions of the lease, take them down if you find them illegal, and strike them out, and let the rest of it stand."

Judge Kennedy in his opinion after quoting the above language, said:

"So that until the Interior Department were seeking to exercise affirmative authority in the manner and upon the things purported to be delegated to it, in the leases, no complaint could arise."
(5 Fed. (2d), p. 345.)

Precisely the same state of facts exists in this case.

No question has ever arisen under either of our contract or leases which involves the validity or effect of any "delegated" power, either of the nature of those above discussed, or of any other kind whatsoever.

We submit that there is not a single one of these pro-

visions which can render void upon its face and as a matter of law such a contract as this is.

And this is emphasized when it is remembered that, as a matter of fact, every one of these things were done by officers of the Navy—and exclusively by them (Rec., p. 571).

While in a technical sense there is hardly an act which a man, whether he be a private individual or a public officer, can perform in such a matter as this without some element of "discretion" (i. e., of plain, ordinary common sense) being involved, yet the authorities are clear to the effect that such "discretion" as these items permit is clearly not the kind of discretion which is meant by the prohibition of delegation of discretionary powers.

The discretion which cannot be delegated is the discretion which involves the exercise of original power as to whether or not a public enterprise shall be undertaken.

Such element of discretion as is involved in the performance of merely executive and business acts in relation to the details of the execution of this enterprise does not go to the essence of the matter and is not within any such prohibition.

"The distinction between the exercise of original power involving judgment and discretion as to whether a public enterprise shall be undertaken, and the performance of merely executive and business acts in relation to details and in the supervision of the work, is very well brought out in the case of:

Cass County v. Gibson, 107 Fed. Rep., 363 (C. A., 6th Cir.; Lurton, Day, and Clark, J.), citing

Klamroth v. Albany, 127 N. Y., 575;

Hitchcock v. Galveston, 96 U. S., 341.

This case approves specifically the doctrine of:

Reuting v. Titusville, 34 Atl., 916 (Pa.);

Shea v. Milford, 14 N. E., 764 (Mass.).

The doctrine of the Cass County case has never been overruled by the United States Courts.

To the same effect are:

Dexter & Carpenter v. U. S., 275 Fed., 566;
Biddeford v. Yates, 72 Atl., 335 (Maine);
Filbert v. Phila., 37 Atl., 575 (Pa.);
Woldenberg v. Sampson, 104 Pac., 184 (Wash.);
LeClaire v. Davenport, 13 Iowa, 210;
Decorah v. Dunsto, 38 Iowa, 96;
Mayor, etc., v. Wollman, 91 Atl., 339 (Ind.);
Spiegler v. Chicago, 74 N. E. 719 (Ill.);
Child v. Bowers, 21 Atl. 539 (R. I.);
State v. Milwaukee, 121 N. W., 658 (Wis.);
Re Triangle S. S. Co., 3 Fed. (2d) 896, citing
Cass Co. v. Gibson, and
Hitchcock v. Galveston.

Each of these cases involved the delegation of powers which could only be exercised by the use of discretion.

There can be no doubt under these authorities, we believe, that the meaning of the words "ministerial" and "administrative" is not and cannot be construed as excluding all judgment and discretion. The distinction is now clearly recognized between the discretion as to whether or not the contract shall be entered into, and the steps taken in its formal reduction to writing and in providing for its performance.

We submit:

First. That none of these clauses is void in itself and that they all come within the doctrine of the Cass County case; and

Second. That even if void none of them avoids the entire contract.

So far then as the terms of the contract of December 11th, and its accompanying specifications are concerned, it is submitted that the conclusion of the District Court was untenable; that the contract was and is perfectly valid so far as this ground of attack is concerned; and that as a corollary the lease of the same date, cannot be, as was said by the District Court

invalid because of its relationship to the principal contract.

2. As to the contract of April 25th, 1922:

In this contract (aside from the specifications) there are but four places in which the phrase "Secretary of the Interior" appears.

For reasons outlined in our discussion of the December 11th specifications, no importance attaches to the similar provisions of the April contract specifications.

All of the work done under the April 25th contract was done under direction of the Navy Department and was finally completed and accepted by that Department December 15, 1923, more than three months before this suit was brought (R. v. II., pp. 571, 575). The construction work under the December 11th contract was 95% completed at time of trial, was not ordered discontinued despite the March 8, 1924, letter from Mr. Doheny to President Coolidge (R. v. III., p. 1159), was carried on under the exclusive supervision and direction of the Navy Department, and, prior to the decree herein, was completed to that Department's satisfaction (R. v. II., p. 926, v. III., p. 1197). And "no officer or employee of the Interior Department had anything to do with supervising or inspecting this work" (R. v. II., p. 571).

We proceed to examine the four references to the Secretary of the Interior in the body of the April 25th contract.

(a) The first of these is in Article I, which provides that the Secretary of the Interior may call for a corporate bond at any time when he deems it necessary.

This provision is negligible so far as our present argument is concerned.

(b) We may also dismiss the last clause in this contract in which the Secretary of the Interior is alluded to, this being the provision of Article XII designating the Secretary of the Interior as the person who shall agree with the contractor as to the amount of certain

savings to which the Government might be entitled, etc.

Not a single controversy arose out of the operation of any of these clauses and no issues were pending thereunder when this suit was commenced.

(c) In Article V it is stated that if production shall decrease "to such an extent that the term of this contract shall be unduly prolonged, ~~then~~ the Government will in the discretion of the Secretary of the Interior grant additional leases on such lands as he may designate in Naval Petroleum Reserve No. 1," etc., etc. (R. v. I, p. 31). Separate discussion of this clause is unnecessary because it was never resorted to. We will comment on it in connection with the provision next mentioned.

(d) Article XI—(the so-called preferential right article)—provided that—

"If during the life of this contract future leases shall be granted by the Government within that portion of California Naval Petroleum Reserve No. 1, situated in Townships 30 and 31 south, Range 24 east, Mt. Diablo base and meridian, the contractor shall first be called upon by the Secretary of the Interior to meet such drilling conditions and to pay such royalties as the Secretary may deem just and proper, and in the event of his acceptance of such conditions and of his agreement to pay such royalties, the contractor shall be granted by the Government a preferential lease on such tracts as the Secretary of the Interior may decide to lease. In the event of the failure of the contractor to agree to the conditions and royalties as proposed by the Secretary of the Interior, then said lease or leases may be offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in such bidding" (R. v. I, p. 34).

With regard to these provisions in Articles V and XI, we ask the Court to note:

1. That whatever may have been originally intended as to the Secretary of the Interior possessing and ex-

exercising discretion in these matters, *as a matter of fact he never did exercise or purport to exercise any such discretion.*

There were never but two leases made after April 25, 1922, covering any portions of Naval Reserve No. 1. The first of these was the lease of June 5th, and the second was the lease of December 11th, both of which are attacked in this suit.

The lease of June 5th was authorized in writing by the Secretary of the Navy in the letter of April 25, 1922, Exhibit E of the amended bill of complaint (R. v. I, pp. 65-68). The lease of December 11, 1922, Exhibit D of the amended bill of complaint, was signed directly by the Secretary of the Navy (R. v. I, p. 65). Neither was made pursuant to any clause in the April 25th contract.

The lease of June 5th was also signed by Acting Secretary Finney, and the lease of December 11th was also signed by Secretary Fall; but while, in view of the President's order of May 31, 1921, these signatures were natural and proper, yet they did not add one jot of validity to the documents to which they were appended, nor would their absence have rendered them one whit less operative and binding upon the Government of the United States.

This is conceded by the courts below, as well as by Government counsel, both of whom—together with ourselves, concur in the statement that the Executive Order did not purport to and could not have transferred to the Secretary of the Interior the discretion as to the Naval Reserve matters vested by law solely in the Secretary of the Navy.

2. Since the leases of June 5th and December 11th, both directly authorized by the Secretary of the Navy, covered the entire area theretofore unleased in Naval Reserve No. 1, the Secretary of the Interior could never, after December 11th, have even purported to have exercised any discretion or power referred to in

the clauses above quoted with respect to Naval Reserve No. 1.

In other words, at the time of the commencement of this suit, and pursuant to the action of the Secretary of the Navy himself, the provisions now under consideration had become completely and permanently inoperative and ineffective.

PARTIES MAY MODIFY CONTRACTS ELIMINATING ULTRA
VIRES CLAUSES.

There is no question but that an executory contract containing a void clause—and by void we mean one which is simply unauthorized and *ultra vires* and not one which is *malum in se* or *malum prohibitum*—may be modified by the parties in such a way that the void clause is no longer operative or of any importance, the rights of both parties thereunder being waived and abandoned.

That is exactly what was done in this case as to these clauses of the April 25th contract, by the mutual act of the defendants and the Secretary of the Navy in making the leases of June and December and the contract of the latter month.

The rights of the defendants under the latter documents have never depended and do not depend in the least degree upon the question of whether the Secretary of the Interior could be delegated or ever acted as the agent to carry out the intent of the preferential right clause.

If, as a matter of fact, he himself alone had made the subsequent leases, relying for his right so to do upon the language of the clause of the April contract, a very different question would have been presented; but from the moment that a different program was adopted and these new agreements were entered into by the Secretary of the Navy himself, who had unquestioned power to make them, the preferential right clause ceased to exist either theoretically or practically.

The subsequent acts above alluded to produced exactly the same effect as though the defendants and the Government of the United States had entered, after the April contract was signed, into a new contract which provided in express words for the striking out and cancellation of the preferential right clause in its entirety from the April agreement. That such an act would have been valid beyond a doubt, our adversaries would not be heard to argue.

And they cannot successfully urge that the lease and contract of December, which not only do not contain the clauses which are assailed but which quash and end them forever as enforceable parts of the April contract, are void as a matter of law for the sole reason that the objectionable clauses originally existed as a part of the preceding agreement from which they had been eliminated by the later one.

Before concluding our consideration of the preferential right and its associate clause in the April 25th contract, we desire to point out that these clauses have by the very acts of the parties themselves been shown not to have been essential and indispensable parts of that contract.

The legal criterion which governs in this connection is that if a clause, although void in itself, is of such a nature that it does not appear that the contract would not have been made without the clause assailed, then the balance of the contract is not affected by any invalidity in the clause itself.

U. S. v. Bradley, 10 Peters, 343;

Navigation Company v. Windsor, 20 Wallace

U. S., at page 70;

Gelpcke v. Dubuque, 1 Wallace U. S., at page 222;

U. S. v. Hodson, 10 Wallace, at page 408;

Reagan v. The Trust Company, 154 U. S., at page 395;

Topliff v. Topliff, 122 U. S., 121;

McCullough v. Smith, 243 Fed. Rep., 823;

Board of Trustees v. Spitzer, 255 Fed. Rep., 126;

In re Johnson, 224 Fed. Rep., 185;
Mack v. Jastro, 126 Cal., 130;
Hedges v. Frink, 163 Pac., 884;
Mathews Slate Co. v. N. E. Slate Co., 122 Fed.
 Rep., 972;
Lincoln Savings Bank v. Allen, 82 Fed. Rep.,
 148.

The doctrine of the foregoing authorities is very strikingly applied in the case of

Burke v. Southern Pacific Railroad Co., 234
 U. S., 669.

In that case the Government issued a patent upon certain lands containing a clause which expressly excepted from the grant all mineral lands which might be included within the boundaries of the territory in question. It was claimed and proven in proceedings brought by a private locator that the lands upon which the grant had been made were mineral lands and therefore were clearly not covered by the patent which on its face did not purport to convey mineral but only non-mineral lands.

This Court held that although the exception in the patent was unauthorized and void, yet that it did not render the entire patent a nullity. The court upheld the grant and disregarded the exception.

Applying that doctrine to the present case, it will be at once seen that the parties themselves are the best judges of the indispensability of any given clause, and in this connection if it appears that the clause in question has been waived or otherwise made inoperative, such waiver or abandonment constitutes one of the best proofs of the lack of importance of the clause itself.

“The parties put a construction upon their agreement which abandoned the *ultra vires* provision, thereby enabling us to say that the condition was not in fact an indispensable one. Of course, it was not intrinsically illegal, *nor may it be said that it was malum prohibitum*. It was simply *ultra vires*; not specifically prohibited. We are

therefore justified to treat the agreement or contract as if this clause were not in it."

Board of Trustees v. Spitzer, 255 Fed. Rep., 136, D. C., N. D., Ohio, 1919.

No comment is needed to point out how perfectly the foregoing statement applies to the case at bar.

In the present instance, however, the record enables us to point to additional proof as to the lack of importance of the preferential right clause, which is the one upon which the Government places its principal, if not its only, reliance. For so far was this clause—which was inserted solely for the benefit of the Transport Company—not considered by it an essential and vital and indispensable element in the contract of April 25th, that even after the bids were opened and up to the day the contract was signed, the representative of the Petroleum Company, Mr. Cotter, urged and pleaded with the Government to disregard proposal B, containing this preferential right, which in its form as modified by the officers of the Bureau of Mines was in his opinion worthless, and to accept proposal A, which contained no suggestion of a preferential right (R. II, pp. 909-10).

Conclusive proof of the attitude of Mr. Cotter and of his company on this point is afforded by the letter of April 25th, signed by Assistant Secretary Finney and by Secretary Denby (R. v. I, 65).

So far as the provisions of Article V are concerned, the court will observe that they constituted nothing whatever but an expression of policy or intention on the part of the Government; that the entire question of whether any further leases should be made or not was left to the discretion of one of the parties to the contract, and that no actual rights of any sort whatsoever were obtained by the contractor thereunder.

The Transport Co. had completed the full performance of all of its obligations under the contract of April 25th, prior to the commencement of this suit (R. v. II, p. 575). At the time the decree was entered

the contract of December 11 had been 100% performed (R. v. III, p. 1427).

“Cancelling an executed contract is an exertion of the most extraordinary power of a Court of Equity” (*Atlantic Co. v. James*, 94 U. S., 207).

In *Illinois Trust and Savings Bank v. Arkansas City*, 76 Fed. Rep., 271, a city had contracted with a corporation for the construction of a water works system and had agreed to pay rentals for hydrants. The franchise was by its terms exclusive of competition.

The city refused to pay rent as provided in the contract upon the ground that the exclusive franchise was void and that therefore the whole contract was void.

The court held, first, that the exclusive feature of the franchise was unauthorized and void since the legislature only could make an exclusive grant of this nature. It also held that if a proper grant had been made to a new company of the right to use the streets for water works purposes, the original contracting company could not maintain a bill to enjoin such proceedings. It then said:

“But these principles and decisions are far from sustaining the position that after this contract has been substantially performed by the gas company, after the water works had been constructed according to its terms, and after the city had accepted and used them for years and has thus secured the substantial benefits of its grant, it can repudiate all the obligations it had the power to assume because it assumed one that was beyond its power. * * * If the gas company stood at the initiation of the execution of this contract defending against its specific performance, on the ground that the city had no power to make its right to use these streets exclusive, that defense might deserve some consideration. But now the gas company has constructed the works. It has executed the contract on its part as far as it has been possible for it to be executed. The exclusiveness of its right to the use of the streets of the city was granted for its sole benefit. If it

does not receive this benefit, the city suffers no loss. The only effect upon the city is that it gets the water works for a less price than it agreed to pay for them. No reason occurs to us why, under this state of facts, the gas company or its successors may not waive the receipt of the exclusive right, and recover the remainder of the consideration which the city promised to pay it. The grant of this exclusive right was neither immoral nor illegal. It was merely *ultra vires*. We know of no rule of law nor of morals which relieves the recipient of the substantial benefits of a partially executed contract from the obligation to perform or pay that part of the consideration which he can perform or pay, because the performance of an insignificant portion of it is beyond his powers. On the other hand, the true rule is, and ought to be, the converse of that proposition. It is that when a part of a divisible contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, the remainder may be enforced unless, it appears from a consideration of the whole contract that it would not have been made independently of the part which is void."

This case is cited and followed in *McCullough v. Smith*, 243 Fed. Rep., 823.

In *McPhee & M'Ginnity Company v. U. P. R. R. Co.*, 158 Fed. Rep., 5, a similar situation was presented.

"A contract or obligation which is executed by the promisee and is sustained by a legal and valuable consideration which the promisor had the power to give, may not be voided because the promisor also agreed to give another consideration which it was beyond its corporate power to bestow. The promisee may waive the unauthorized consideration and rely upon that which was within the power of the corporation."

Jenson v. Toltec Ranch Co., 174 Fed. Rep. 91, citing the *Illinois Trust & Savings Bank* case, *supra*.

"Upon principle, where a contract has been fully or in part executed, although *ultra vires* or illegal, but not *malum in se*, nor attended with

criminal liability, it should be enforced as far as executed."

Power Company v. Medford, 226 Fed. Rep., 926 (District Court, Oregon, 1915, Wolverton, D. J.).

Under the foregoing authorities:

1. The Transport Company had a perfect right to waive that part of the preferential right clause which purported to vest the Secretary of the Interior with any discretion—and did so.

2. Both parties to the contract had a perfect right to abrogate and disregard any provisions with regard to the delegation of this authority and to substitute for them a new and valid contract or act—and this they did.

The contract of April 25 being wholly executed on the part of the Transport Company, and no issue or question having arisen under or pursuant to these clauses, which had thus been waived so far as the Transport Company was concerned, and abrogated by the joint action of both parties, it does not lie in the mouth of the Government to endeavor to set aside the entire contract of April 25th—much less the subsequent one of December 11th, as invalid upon this ground. The claim that this latter contract can be avoided because of clauses in the former executed contract we submit is unsustainable.

AUTHORIZED OFFICER MAY RATIFY CONTRACTS MADE, OR CONTAINING CLAUSES THAT ARE, *ULTRA VIRES*.

It is clearly established by the authorities that the act of a municipal corporation which is sought to be accomplished in an *ultra vires* manner, may be validated by the subsequent act of the board or official in which the real power and jurisdiction resides.

In *San Francisco Gas Light Co. v. Dunn*, 62 Cal., 580, the board of supervisors of a city, having full jurisdiction to act, delegated certain discretion to a commission which was appointed pursuant to a certain contract.

It was held by the court that this delegation of discretion was *ultra vires*.

But a subsequent resolution of the board of supervisors themselves, under which a new contract was made covering the same point, was held to be effectual to carry out the desired intent.

While the present case is one in which the clause under attack was abrogated and eliminated, instead of being ratified, yet the principle of the case just cited, to the effect that subsequent action of the duly qualified authorities will do away with any defects in the prior proceedings, is pertinent to our discussion.

In *Hitchcock v. Galveston*, 96 U. S., 341, a similar situation was presented.

There it was urged that the proper municipal authorities of the city of Galveston had acted *ultra vires* in delegating certain powers to the mayor and other officials.

This Court did not agree that this delegation was *ultra vires*, but considered the matter placed beyond question by the fact that the contract was thereafter ratified by the municipal council after it was made.

CONTRACTS VOID IN PART NOT WHOLLY VOID.

No authority known to us holds that a promisor who has made a promise which is not *malum in se* or *malum prohibitum*, but is merely claimed to be void because of the application of the *ultra vires* doctrine, can maintain an affirmative suit to set aside an entire contract merely because such a clause is a part of it.

In much the greater number of the authorities involving this question, a specific issue is raised as to the validity of a given act which has either been done or is about to be done pursuant to the delegated power.

Of this class was:

San Francisco Gas Light Co. v. Dunn, 62 Cal., 580;

(in which, however, as above shown, the court held that the defect was removed by the subsequent act of the board of supervisors).

Mann v. Richardson, 66 Ill., 481;
Milarky v. Cedar Falls, 19 Ia., 21;
Matthews v. Alexandria, 68 Mo., 115;
Gale v. Kalamazoo, 23 Mich., 343;
Clarke v. The Mayor, 12 Wheaton, 40.

Doubtless a direct action in equity would be maintainable to set aside the clause itself if it constituted a cloud upon the rights of the municipality in respect of which no adequate remedy existed at law.

Oakland v. Carpentier, 13 Cal., 540.

But in the last mentioned case, while the court granted the prayer of the bill to set aside the franchise which was held to be illegal, it did not pass upon the question as to whether a lease and deed executed at the same time should likewise be invalidated.

In *Brummitt v. Water Works*, 33 Ut., 285, also cited by our adversaries, the court, while holding that a part of a certain ordinance was invalid, refused to hold that the rest of the ordinance was bad.

Of course there is no difference in this respect between the rule applicable to contracts and to statutes, and this Court has repeatedly held that a statute void in part is not necessarily void *in toto*; and that if the valid provisions in such a statute can be separated from those that are invalid or unconstitutional, only the latter are to be disregarded. *Albany Co. v. Stanley*, 105 U. S. 305; *Baldwin v. Franks*, 120 U. S. 678; *Field v. Clark*, 143 U. S. 649. And it has also been held that, when a statute is valid as to its general or proper application, but void as to some particular application of its provisions, it will be held void only in the particular application sought to be made of it. *Poin-dexter v. Greenhow*, 114 U. S. 270.

CONTRACT AND LEASE OF DECEMBER 11, 1922, NOT AFFECTED
BY "PREFERENTIAL RIGHT" CLAUSE.

And in the case at bar, where the clause attacked was never even a part of the contract and lease of December, to set aside which is the principal object of this bill, any claim that these instruments are rendered invalid because of the presence of such a clause in the preceding contract, especially when the December contract and lease effect the abolition and cancellation of the clause of the preceding contract relied upon as the basis for this attack, cannot, we submit, be maintained.

Let it be again emphasized that whether or not the contract of April 25th was rendered invalid by the clauses which have been discussed, the contract of December 11th was a new contract which, while it related in part to the same general subject matter and contained a recital referring to the preferential right, nevertheless was a new, complete and independent agreement resting for its validity upon the action of the Secretary of the Navy and not upon that of the Secretary of the Interior as the supposed delegate or representative of the Secretary of the Navy; and which was based upon many new and valuable considerations running to the Government, none of which was included in the contract of April 25th.

The theory which apparently was adopted by the District Court, that these documents were all indissolubly connected and that the invalidity of one of them would affect the validity of the others, is wholly untenable.

While it is of course true that if the December 11th contract had been made by the Secretary of the Interior, acting pursuant to the terms of the preferential right clause set forth in Article XI of the April 25th contract, the validity of the December 11th transactions would have depended upon the validity of the provision under which the Secretary of the Interior

purported to act, yet, as we have already pointed out, no such situation exists in the present case since the contracts of December depend for their effectiveness solely upon the subsequent and independent act of the Secretary of the Navy himself.

Any theory of this case which assumes that the lease of December 11 was executed simply pursuant to and for the purpose of carrying into effect the preferential right of the April contract, is foundationless.

If it were a true theory, then the only document which would have come into existence in this case would have been the lease itself. There would have been and could have been no new contract outside of or collateral to the lease under which the Government of the United States would gain any new rights in addition to those which it had acquired under the April agreement. But, as a matter of fact, there was not only the lease of December 11th, but the contract of the same date under which the Government acquired rights of much greater value to it and involving greater cost, expense, obligation, danger and risk to the Transport Company than any which had been contemplated by or provided in the April contract.

As is shown by the analysis of the evidence which we have heretofore made, the December contract and the transactions which culminated in the December contract and lease, were new and independent transactions based upon new motives and reasons, which led the Navy Department to believe them necessary to the national defense. And the lease itself was made as part of the consideration for this new contract based as it was upon new and extremely important considerations and not as a result of the execution of the preferential right in the contract of April. It is to be noted that if it had been made merely in pursuance of the "preferential right" the lease could not have included, as in fact it does include, a large area of land not embraced in the preferential right clause.

Although there is a natural physical and strategical connection between the first Pearl Harbor development, accomplished under the April contract, and the amplification of this development, performed under the December contract, there is no legal or contractual connection between the two.

If the April contract was valid, it must stand irrespective of any objections that may exist to the December contract.

And if the December contract and lease are valid, considered in the light of their own terms, then they must stand unimpeached and unimpeachable, whatever the court may consider as to the technical validity of the April contract. The only effect, legally speaking, which the December contract and lease had upon the April contract was the elimination of the last shadow of importance which Articles V and XI of the April contract might have possessed.

And yet, our adversaries would have the Court believe that this result, absolutely innocent and lawful in itself, had in some mysterious manner the effect of rendering unlawful the very contract of December 11th which accomplished this lawful result!

POINT XI.

There Is No Merit in the Contention That There Must Have Been a Conspiracy Because of the Observance of "Secrecy" in Connection With the Transactions Here Involved.

Plaintiff urged and the District Court found that the making of these contracts was characterized by a suspicious secrecy the purpose of which was to keep the facts from the public and from Congress, and that the secrecy had no relation to military affairs.

On this subject we should first observe that it was nowhere shown or charged that whatever secrecy was observed was suggested or instigated by the defend-

ants or any one connected with them. Nevertheless the so-called secrecy on the part of Government officials is urged as a reason for striking down defendants' contracts and leases.

Such measure of secrecy as there was—and there was in fact little except of a military nature, was adopted and continued, to the extent that it was continued, by the Navy Department. But the plans were known to, the subject of discussion among, and handled by, every official who had any duty to perform in connection with the subject in the two departments of the Government in any way concerned, and as we have already seen the first Pearl Harbor project was made known to the officials of nine corporations, five being oil companies and four engineering companies, and came to the knowledge of numerous others from whom subcontracting proposals was sought.

And on April 18th, the very day of the award of contract, and seven days before its formal execution, there was given to the public press for "immediate release" an authorized statement of the Secretary of the Navy (R. v. II, 519) announcing the character of the project and the award to the Transport Company (ib. 522-3).

Moreover, in little more than a month, on June 3, 1922, the April 25 contract was transmitted publicly to the United States Senate (S. Doc. 210, 67th Cong., 2d session, p. 11).

If a thing can be called suspiciously secret which was known to the President of the United States; the Secretary of the Navy, the Assistant Secretary of the Navy, the Chief of the Bureau of Engineering, the Chief of the Bureau of Yards and Docks, a corps of officials in the latter bureau, the Judge Advocate General, his assistants, the Solicitor of the Navy, and a Navy Council consisting of 14 Admirals; the Secretary of the Interior, two Assistant Secretaries of the Interior, the Director of the Bureau of Mines,

the Chief Petroleum Technologist, the Solicitor's office of the Interior Department, assistants in the Bureau of Mines; the officers, attorneys and directors of the defendant companies; the officers and attorney for the Standard Oil; the officers and attorney for the General Petroleum; the officers and attorney for the Associated Oil Company; the officials of the Union Oil Company; the officers, attorneys, and representatives of the White Engineering Company; the officers and representatives of Ford, Bacon & Davis; the Pittsburgh & Des Moines Steel Company, and The Foundation Company; was made the subject of voluminous correspondence by mail and uncoded telegrams; proposals for which were publicly opened; the substance of which was given to the newspapers before formal contract; and of which Congress was informed before work under the first contract could have been started;—then this was suspiciously secret. The converse of that proposition is of course equally true.

The whole plan of exchanging crude oil from the reserves for fuel oil and storage facilities therefor at strategic points, in accordance with which the contracts of April 25th and December 11th were made, and a copy of the former of these contracts, were fully and publicly disclosed to Congress with a message of the President of the United States on June 7, 1922, in which the President informed the Senate that the policy adopted by the Secretary of the Navy and the Secretary of the Interior was submitted to him prior to the adoption of that policy and the subsequent acts had at all times had the President's entire approval (Sen. Doc. 210, 67th Cong., 2d Ses., pp. III; 2; 10-11; 13).

In a special resolution the Senate provided on June 9, 1922, for the printing of 4,000 additional copies of the President's message and the accompanying communication from the Secretary of the Interior, which made public the aforesaid information (S. R. No. 305; 67th Cong., 2d Ses.).

The Navy Department for two reasons, fully shown by indisputable documentary proof, enjoined the treating of the project involved in these contracts as confidential. One reason was that it involved the military plans of our Government concerning the establishment of a thing important to the naval defenses of the Pacific at a strategic point and at a time when the evidence quite obviously indicates there existed a delicate international situation. The other reason was that the Navy, having been given by legislation power to do that which it thought the national security justified it in doing, feared legislative interference with the power previously given.

We take up the evidence substantiating the foregoing.

First: There will be found in the record letter from the Navy Department signed by Acting Secretary Theodore Roosevelt dated December 9, 1921, addressed to the Secretary of the Interior, transmitting plans covering a storage of 1,500,000 barrels of fuel oil in steel tanks at Pearl Harbor to be constructed and filled with fuel oil in connection with the exchange of royalty oil obtained from the naval petroleum reserves, which letter concludes:

“In view of the fact that this project is embodied in the war plans of the Navy Department it is requested that all matters in connection therewith be regarded in as confidential a manner as possible.” (R. v. I, 331.)

But the District Court says that the war plans had nothing to do with the so-called secrecy!

Admiral Gregory, called to the stand by Government counsel, testified—

“As regards the policy of the Navy Department with respect to the secret or public character of the matters embraced in the contracts in this case, the correspondence which came to the desk of the witness relative to the plans at Pearl Harbor were all marked ‘Secret,’ because they were a portion of the War Plans.” (R. v. II, 567.)

And in the face of that testimony from this high naval officer, put upon the stand by the plaintiff, the District Court says that what is called "secrecy" in this case had nothing to do with the war plans.

Again, testifies Admiral Gregory—

"The witness recalls having impressed upon Mr. Dunn, of the White Company, the secret character of these plans and the necessity of having them handled in the most confidential way; he told Dunn they were part of the War Plans * * *." (R. v. II, 568.)

Again, says Gregory, regarding this subject—

"In the United States Navy, there was in 1921 and 1922, and still is, a General Board," which adopts plans for such development. "These are known as the War Plans * * * and the Department does not care to have them given out." (R. v. II, 545-6.)

The Navy files, as Admiral Gregory's testimony showed and as certain documents introduced during that testimony also showed, in which the papers connected with these contracts were kept, are known as—

"Operations Confidential Files" (R. v. II, 551, 558),

the word Operations meaning the office of the Chief of Operations, the highest officer in the Navy Department at Washington.

The correspondence of the Navy Department, even that carried on within the Department itself, on this subject was marked in large capital letters with the word "SECRET," as will be observed by turning to exhibits on pages 551, 554, 557, 558, Record, Vol. II, introduced in evidence by plaintiff through Admiral Gregory.

Admiral Gregory testified that even as a witness in this case he was not at liberty to testify regarding the Department's fuel storage plans (R. v. II, 560).

Mr. Gano Dunn and Director Bain both testified in detail that the confidential character of this matter was enjoined upon them by the Navy.

Secretary Denby's letter of November 29, 1922, to the Secretary of the Interior, the first act on the subject of an extension of the Pearl Harbor project and the leasing in connection therewith of areas in Naval Reserve No. 1, concludes:

"It is requested that the amounts of storage projected be treated as confidential." (R. v. II, 618).

On January 18, 1923, Acting Secretary of the Navy Roosevelt wrote the Secretary of the Interior on the subject of having the fuel oil exchange made so as to immediately fill the Pearl Harbor tanks and marked the letter at the top "Confidential" (R. v. II, 805).

The Navy Department's plat of the Pearl Harbor station sent to the White Company actually doing this work was so deleted as to be hardly useful, pursuant to their ideas of military secrecy. This the Court will readily see by comparing an undeleted copy of the plat (Pl. Ex. 131, R. v. III, 1206) and the deleted copy of the same plat (Def. Ex. F-4, 1212).

The White Company was not permitted to take progress photographs of this work at Pearl Harbor, as is usual on construction jobs, that being forbidden by the bureau at Washington and by the officers in charge of the station at Pearl Harbor on the ground of military secrecy (R. v. II, p. 927).

Photographs of this work received by the White Company from the Navy Department were mutilated, large parts thereof being cut out and holes being cut right through portions of the photographs. This was part of the military secrecy (R. v. II, pp. 927-8).

It was conclusively proved by documentary evidence that the defendant companies made no secret of their lease. This fact is brought out by correspondence commencing with communications from Bureau of Mines men in the field and Mr. Ambrose at Washington.

Mr. Ambrose in a letter to Mr. Campbell dated Jan-

uary 16, 1923, said that the contract with the Transport Company is one—

“which the Navy considers confidential and of military value and is very anxious that it not be published.” (R. v. II, 878).

And again:

“Obviously, the Navy is not anxious for any more to be said about this than is absolutely necessary, and the Secretary has directed the representatives of the Bureau in Washington to maintain the whole matter confidential as this was requested by the Navy. As a result we have referred all inquiries to the Navy Department and are letting them make whatever announcements or give whatever information they desire * * *. I appreciate that this puts you in a somewhat difficult position, but inasmuch as the naval reserves are considered a part of the National Defense, and as long as the Navy requests us to keep this information confidential, I think that is the best way for us to keep in the clear in the matter.” (R. v. II, 878-9.)

This is a Government's exhibit written by a Government official summoned to the Court by the Government but not called to the stand.

But the District court says, following the contention of counsel who produced exactly that evidence, that the Navy Department ideas on military matters had nothing to do with secrecy.

On July 18, 1923, Acting Secretary of the Interior Finney (it will be remembered that Mr. Fall was no longer Secretary of the Interior at this time) wrote the Secretary of the Navy a letter which, together with Acting Secretary Roosevelt's reply, are interesting (R. v. II, 885,888).

Summarized, they show, first, that the defendants were not making any secret of their leases; second, that the leading facts regarding the December 11th contract (No. 4800) were, says plaintiff's witness Finney, “authoritatively published at time of execution

and the California press featured the news at considerable length" (ib. 886); third, that all but the intimate details of both contract and lease is already fully known to the industry; fourth, that maps issued by the larger California oil producing companies show Naval Reserve No. 1 as leased to the Petroleum Company, thus showing that the compilers have reliable information; fifth, that the Interior Department throughout was acting for the Navy Department.

And Secretary Roosevelt in replying said:

"Since the military features of the national defense enter largely into considerations of this nature, it is believed that a degree of secrecy has surrounded the whole undertaking that is probably not necessary."

And further that—

"As a matter of fact, the contracts have been recorded as public documents and are, therefore, available to any citizen of the United States who will expend the trouble and funds necessary to obtain copies in the customary official manner."

This correspondence followed receipt at Washington of letter from Mr. Campbell, Bureau of Mines representative in California by which it is shown that—

"Representatives of the Pan-American have apparently spread the information that they have a lease to the whole naval reserve No. 1 * * * The Pacific Oil apparently has its information directly from the Pan-American and has all of the Government land in the naval reserve marked 'Pan-American' on its maps." (R. v. III, 1183.)

We submit that what we have thus far shown demonstrates—

1. That everything regarding the confidential character of this matter was dictated by the Navy;
2. That it related to details of navy war plans;
3. That, regardless of what the layman might think of the judgment of naval experts, the Navy officers based their attitude on their ideas of what constituted war plans of a secret nature;

4. That the defendants had no connection with the apparent misconception of the extent of the secrecy but that that was confined to governmental circles and resulted from the understanding of the Navy's directions in the matter; and,

5. That the Government itself proved that instead of the defendant's observing undue secrecy, its course was exactly the contrary.

Finally, when Admiral Robison came into court to testify in this case, even though he came in response to a plaintiff's subpoena, he came with written orders from naval authorities restricting his testimony regarding the subject matter of these transactions. Mark that in the fall of 1924, this officer, when his reluctance to testify was observed, produced and handed to the Court a paper which we have not in the record because only the Court saw it, as counsel agreed was proper, but as regards which we have in the record that the document contained—

“orders from naval authority with respect to the subject” of his testimony at this trial and “with regard to what can and what cannot be disclosed” (R. v. II, 968) .

And when a subpoena duces tecum was issued for papers relating to these transactions, the response came in the form of two certificates from Secretary of the Navy Wilbur and Secretary of State Hughes, that the subpoena would not be honored and that to do so would result in disclosing—

“records of the department of the Navy” which are of a “confidential nature, containing matters of importance to the nation, the disclosure of which would in his opinion be injurious to the public interests and would prove prejudicial to the government,” (R. v. III, 1165-6), which view was concurred in by Secretary of State Hughes. (Ib. 1166-7.)

Second. We have said that the second reason actuating Navy officials, and in no way involving defendants, was their desire to avail themselves of pow-

ers given them by legislation without running the risk of being deprived thereof. The proof of this reason is found in two places in the record. The first is letter of November 4, 1921, from Rear Admiral C. S. Williams, Director of War Plans of the Navy Department, to the Chief of Naval Operations (R. v. III, 1058), in which the writer advises avoidance of undue publicity lest it result in decreased appropriation or the crippling of the reserve so "badly needed" by the Navy.

This might be commended by some. It might be severely condemned by others. But did any one charge that Admiral Williams was in a conspiracy with anybody in this case?

Whether his recommendation was good judgment or bad, based upon mistaken policy or wise, a subject for criticism or praise, it clearly shows that the high naval officials were the ones who were dictating the avoidance of publicity, and as none of them is charged with fraudulent conduct in connection with defendants contracts or with being in any conspiracy, how does that help the Government's contentions here?

The second piece of evidence on this subject is the testimony of Admiral Robison that he discussed with Fall, Ambrose and Bain in January, 1922, the fact that some members of Congress would make trouble if the matter were brought to their attention, and that his position was one of—

"insisting that if Congress had passed a law that gave the Navy Department definite power, they would be recreant in their trust, if it was wise for them to exercise that power, if they failed to do so, and that to be both wise and silent was exactly the witness' view." (R. v. III, 1061.)

It is not clear how the holding of that view by one not charged to have been in any collusion or conspiracy can be used to the detriment of these defendant companies.

As to Secretary Fall's position, on April 12, 1922, he urged the seeking of new legislation; a step which

thus early would have informed Congress of the policy (R. v. I, 393).

In conclusion of this subject we refer to another matter which while not directly connected with it was stressed by Government counsel who in their brief below quoted Admiral Robison's testimony that he—

“was perfectly well aware of the long continued policy of the Navy to advertise for bids on any ordinary construction,”

but

“This whole thing was an extraordinary performance taken all together—it was entirely out of the ordinary.” (R. v. III, 1074.)

We quote Admiral Robison's explanation of this on redirect examination:

“When witness said, in answer to one of Mr. Roberts' questions, that this contract was not ordinary but that it was extraordinary and unusual at that time and place, witness meant the circumstances of the particular period and the particular location were unusual and extraordinary.” (R. v. III, 1142.)

POINT XII.

The Loan of \$100,000 by Mr. Doheny to Mr. Fall (1) in No Way Affected the Transactions in Issue; (2) Was a Bona Fide Loan and Not a Bribe; and (3) Was Not Proved by Any Evidence Competent and Admissible Against the Defendant Companies.

(1) THE LOAN OF \$100,000 BY MR. DOHENY TO MR. FALL IN NO WAY AFFECTED THE TRANSACTION IN ISSUE.

We submit that we have shown conclusively by indisputable documentary and unimpeached oral evidence that the Secretary of the Navy actively, earnestly and completely participated in and dominated the negotiations preceding and the decision culminating in the execution of the contracts and leases, and as it is not charged that he was either a party to any fraud or a victim of any misrepresentation

practiced by these defendants or any one of them, or by anyone else, there is no escape from the conclusion that the Secretary of the Navy, after full and mature consideration and review of all relevant facts, and a detailed knowledge of the contents of the documents, officially executed, with full responsibility, the contracts and leases now before this Court. We submit, therefore, that whatever may be said of transactions between Mr. Doheny and Mr. Fall, of which it is not contended that any other Government official even had knowledge, the contracts and leases entered into between the United States, acting by its Secretary of the Navy, and the defendant companies, cannot be affected thereby.

If what we have just above set down is well founded upon the record at bar then, of course, questions relating to the competency and admissibility of evidence on the subject of a loan by Mr. Doheny to Mr. Fall become unimportant as that transaction is entirely immaterial to the issues in this suit.

(2) THE TRANSACTION WAS A BONA FIDE LOAN AND NOT
A BRIBE:

If in any view of the case the Court should be of opinion that consideration of a money transaction between Messrs. Fall and Doheny might have a material bearing on a just determination of the issues, then logically it would be necessary first to determine whether there is any evidence of such a transaction upon which the Court can judicially act. We submit that under the settled rules of evidence there is not. Before addressing ourselves to that point, and without waiving it, we prefer to present our contention that, assuming the admissibility of the evidence in the record, it shows that the transaction was a bona fide loan and not a bribe and was not intended to and did not affect official action.

The evidence upon which the Government particu-

larly relies is that given by Mr. Doheny before a Senate investigating committee. Neither his appearance nor his testimony was compelled. He came forward voluntarily and made a full statement of the situation to the Senate committee which, with the exception of one evasion, explainable but not commendable, and shortly thereafter voluntarily corrected (we refer to his point that the note was not a note until he could produce the signature as well as the body of it) is not successfully attacked.

This statement cannot be considered as is done in some cases as the statement of an adverse witness, who testifies under compulsion and in respect of whose testimony his adversary has a certain amount of latitude in the way of criticism, but it is the statement of a man who appeared and testified without compulsion or necessity.

As such, it is entitled to be believed in its entirety except and unless it be contradicted by other testimony in the record. And there is no such other testimony.

What is this testimony?

Mr. Doheny states that the transaction was a personal loan, to a life long friend, made with his own money. (R. v. I, p. 199.) In connection with this loan there was no discussion between Mr. Fall and Mr. Doheny as to any contract whatever. (ib.) This loan had no relation to any of the subsequent transactions. It was a loan made upon Mr. Fall's promissory note (ib.) and for which Mr. Fall offered to "give the ranch as security." (R. v. I, p. 210.)

This security was refused by Mr. Doheny who said that he would loan the money on the personal note of Mr. Fall. (ib.) The note was drawn in Mr. Fall's own handwriting, not only as to the signature but as to the body (R. v. I, p. 261). It was one of many similar friendly acts by which Mr. Doheny extended aid to an "army" of less fortunate friends (R. v. I, p. 258).

We emphasize in the strongest possible manner the

existence of an intimate personal friendship between Mr. Doheny and Mr. Fall.

This friendship is shown by uncontradicted evidence. It began some thirty years before in the mining camps of New Mexico. It existed at the time when the Mexican situation became acute and when Secretary—then Senator—Fall developed activities in that direction which were of great benefit to all American industries operating in Mexico, and later when, shortly before November 30, 1921, Secretary Fall told Mr. Doheny of his own personal difficulties.

Its nature was further demonstrated by the fact that Mr. Doheny entertained the idea of not only helping Mr. Fall by the advance of this sum of money, but of employing him after he had left the Governmental service—which it was expected he might do at a not distant date. There was, however, no agreement or understanding between them on this subject.

But this friendship, unquestioned as it has been for these many years constituted no basis for an attack upon governmental contracts in the preliminaries of which Secretary Fall's Department was active.

The friendship explains—and furnishes legitimate and natural reason for—the loan.

There are just two circumstances upon which more stress has been laid than upon all others put together as indicating bad faith in this transaction.

The first is, that the signature to this note was torn off by Mr. Doheny sometime after he received the note.

The second is that Mr. Fall received currency instead of a check at the time the loan was made.

How can it be considered a fatal circumstance that the signature was torn off the note under the circumstances testified to by Mr. Doheny (R. v. I, 260-2) and by Mrs. Doheny (R. v. I, 183-5), when as a matter of fact both the body and the signature of the note were carefully preserved and were produced at this trial, and in view of the fact that there was no earthly necessity for any note to have ever been made

by Mr. Fall if the transaction had been intended to be other than what Mr. Doheny said it was—a loan?

Do public officials who are bribed draw up notes in their own personal handwriting and give them to the briber?

And if the tearing off of the signature for the reasons that Mr. Doheny gave be claimed to be suspicious, the instant query arises—Why should the note have been preserved at all? Why was it not destroyed?

Had this been done the evidence of the alleged crime would have vanished beyond recovery. On the contrary the utmost care was used by Mr. Doheny that this evidence of the personal obligation on the part of Mr. Fall to himself should not vanish (*R. v. I*, 184), although with equal care he did everything in his power to protect his friend from what he believed might be serious hardship if he and his wife should suddenly die (p. 183).

There is no suggestion that Mr. Fall was told of the tearing off of the signature.

Mutilating a note does not have the effect of cancelling unless the same is done “with the intent to extinguish the obligation thereof.” The only effect is, in the event the question is subsequently raised, to put the burden of proving the circumstances of the mutilation upon him who seeks to enforce the note. Sec. 123, Negotiable Instrument Law; *United States v. Linn*, 1 How. 104, 111; 11 L. Ed. 64, 66; *Smith v. United States*, 69 U. S. (2d Wall.) 219; 17 L. Ed. 788, 791; *Roger v. Shaw*, 59 Cal. 260; *Brock v. Pearson*, 87 Cal. 581; *McCormick v. Shea*, 99 N. Y. Supp. 467; *Wallace v. Tice* (Ore.), 51 Pac. 733.

The belief on the part of Mr. Doheny that it was not wise to produce the body of the note without having found the signature was, of course, a deplorable error. But the fact is that he voluntarily corrected that error before there was any effect from it (*R. v. I*, 259 *et seq.*) And the fact remains that he and his wife did produce the note and the signature at the first

opportunity after the signature, which had been mislaid, had been found. He could have prevented his wife testifying, but—again voluntarily—he waived his right (R. v. I, 181).

The loan was made in cash and not in the form of a check, but at the same time there was taken for it—and still exists—a note which constitutes as much evidence of the transaction as a check which would have come back to the same possession and not been of record.

The transactions in suit post dated the loan by nearly half a year as to the first and more than a year as to the second—the latter including the principal lease.

Mr. Doheny's letter of November 28, 1921, had been written to Mr. Fall but an examination of it demonstrates that it was merely an answer to an inquiry based upon an hypothesis which never materialized. Hereinbefore we have analyzed this letter, traced it from inception to the end of it as a step in any negotiations, and shown that it never entered the realm of negotiation for the contracts here attacked or was treated as either a bid or a proposition.

There was but one matter under negotiation on November 28, 1921, and that was the question of whether relief should be granted defendants from the harmful effects of the excessive royalties which they agreed to pay upon a small lease.

The cutting down of the royalties which Mr. Cotter, for the Petroleum Company asked (R. v. I, pp. 156-158) was denied by the man who had received the loan.

New leases—as to which there is not a scintilla of evidence that they were of any value whatsoever over and above the royalties paid—were granted not only to the Petroleum Company but to the Midway Company—a wholly unconnected concern—which also was a sufferer from the high royalties agreed to be paid under the first lease (R. v. I, 159-162). These leases are not under attack in this case. Obviously, this small lease, executed, about two weeks after the No-

vember 28th letter, is the lease to which that letter refers. The chief force of our adversaries' contention in this connection is placed upon that reference. It is unnecessary to argue that if new leases based upon any corrupt understanding had been in contemplation between the sender and the receiver of that letter, no writing which would disclose the idea would have been openly sent by one to the other of the conspirators. And the other conspirator, had any evidence of such leases been furnished by his associate, would never have dreamed of passing it on to the Navy Department, of having it follow the proven routine and of having permitted it to be officially filed.

The theory of wrongdoing in connection with this loan demands proof that Doheny was getting something of advantage for himself or his companies at or about the time when the money was paid.

A man whose thoughts are intent on treachery to his own government for the sake of personal profit to himself does not hand over a large sum of money to an individual in the government service who has no power to act, who does not purport to act, whose tenure of office, the continuance of whose very life, is unfixed and uncertain, and wait more than a year for action.

And what resulted, according to the Government's theory, from this transaction? They have not claimed in their Bill, briefs, or arguments that the "relief leases" above mentioned, which were signed on December 14, after Secretary Fall had refused to reduce the royalties of the original lease, were obtained by the use of this money. No such supposition or claim has ever been made in this case. What then did Mr. Doheny get?

Five months afterwards, on April 25, 1922, after the perfectly *bona fide* efforts which Dr. Bain and Admiral Robison had made to obtain real competitive bids, the company of which Mr. Doheny was then president got the first Pearl Harbor contract. And the Court

below characterized this as of no value except for the alleged preferential right.

As an outgrowth of this contract, the Company got the lease of June 5th because Cotter insisted upon it. Neither Fall nor Doheny participated in its negotiation. The idea of it originated solely with Cotter without any instructions from, or even the knowledge of Doheny or of Fall. And the Court below characterized this lease as of no value.

One year and eleven days thereafter, the Petroleum Company got the first thing which is claimed by the government to possess any value, and that is the lease of December 11, 1922, given as a part of the consideration for the accompanying contract of the same date, both of which were the outgrowth of plans of the Navy and not of those of Fall.

The record is clear to a demonstration—no claim or contention to the contrary is made—that the entire project embraced in the December 11th contract and lease originated exclusively in the Navy Department (R. v. II, 581; 1012; 1022-23; 1024); negotiations which culminated in the execution of these documents were commenced under the express direction of Edwin Denby, Secretary of the Navy (R. v. II, 616-8; letter November 29, 1922); Denby and his representative, Robison, prepared this plan (R. v. II, 1023-4); Mr. Fall took no personal part in these negotiations; those who participated acted solely for the Navy and under its direction (R. v. II, 791, 799-800; 801); every decision in the matter was made by the Secretary of the Navy personally and through his personally appointed representative, Admiral Robison; Secretary Fall neither recommended, requested, nor influenced the making of these contracts or the negotiations leading up to them; he took part only, with Dr. Bain, in the preparation of a suggested royalty schedule, but, in effect, "washed his hands" of that matter and turned it over entirely to Admiral Robison for direct

negotiation (R. v. III, 1031); it was the Navy Department, of its own volition, that proposed and decided to lease the entire reserve, subject to the restrictions afterwards embodied in the lease (R. v. II, 1023); neither Secretary Fall nor any one in the Interior Department made any recommendation on this subject or even recommended the lease of an acre of land in that reserve at this time; Secretary Fall did not see Secretary Denby on the subject; Denby gave his instructions directly to Robison; Robison carried them out; under the personal directions of Denby (R. v. III, 1032) Robison negotiated the contract and lease and agreed to them and Denby approved that agreement (R. v. III, 1038-9); finally, "by direction of Denby" (R. v. I, 706) the contract and lease were submitted to the Judge Advocate General of the Navy and approved as satisfactory to the Navy's legal adviser; they were gone over "in detail and at length with the Secretary of the Navy" (p. 1038) and signed by him only after he was assured their contents were "identical with what he had gone over with the Admiral in detail" (R. v. III, 1040-1).

The picture therefore is that of a man handing over as a bribe on November 30, 1921, \$100,000, and getting nothing of value in return, nor any assurance thereof for more than a year thereafter.

And this theory is advanced although Mr. Doheny expected that Mr. Fall might leave the Government service—an event which, if it had taken place, would have ended at once and for all whatever power or influence it might have been expected at the time that he could have exerted in favor of Doheny's interests (R. v. I, 250).

But our adversaries hasten to reply when Doheny did get something he got something that was worth \$100,000,000.00, and he could well afford to wait and take the chances of a gamble of as small a sum as \$100,000 upon such a possibility.

And in so saying, they completely ignore the uncontradicted testimony given by Mr. Doheny, (who, by the way, had he not been entirely honest and frank, would never have dreamed of giving to the Government the ammunition for attack which was embodied in his \$100,000,000 statement) as to what he meant by this statement itself and as to what it involved.

The \$100,000,000.00, if made, would have accrued during 30 or 40 years. It would have been made after an investment of \$100,000,000 to \$150,000,000 in drilling alone. If drilling had been required at a rate of more than a well for every 10 acres, the expenses would have been increased by at least \$30,000 per extra well. Already (in January, 1924) \$32,000,000 had been spent in preparation for the development of the lease. The estimated profit included everything from the handling of the oil in every way—the piping, storing, refining it and selling it to the consumers. It was an off-hand estimate. (R. v. I, 240, 241-2.)

And this would have been the amount received after the investment of the enormous sums to which we have alluded in a territory only a part of which was proven.

On top of this the Transport Company was required to put up approximately \$14,000,000 in the construction and filling of the Pearl Harbor station, and to take reimbursement out of royalty oil produced from naval reserve leases.

Added to this, defendant assumed continuing obligations running over fifteen years, as to keeping oil available for the use of the Navy at Atlantic and Pacific ports. (R. v. I, 41 to 50.)

A profit was doubtless hoped for as a result of this lease. There is not a word of evidence in the record or in the way of possible inference that this profit was unfair or inordinate in any degree.

The situation presented by the Government's claim is the astounding and unprecedented one of characterizations of the gravest nature possible to make, touching the good faith and honor of a member of the Cabi-

net of the President, and the good faith and honor of one of the great business geniuses of this country, without a scintilla of proof that the transactions in respect of which these accusations are made were harmful to the Government or unduly favorable to the individual.

Small wonder that Judge Kennedy in the *Mammoth* case commented upon the

"unusual situations not ordinarily found in cases of this character * * * the significant lack of material damage to the Government which usually attends allegations of fraud, for in the case at bar no attempt has been made to show that the lease in controversy was in itself a bad lease for the Government, except perhaps theoretically by counsel." (5 Fed. (2d) 330, at p. 343.)

In the next place within two or three weeks after the money was loaned by Doheny to Fall, which loan is asserted to have been made in connection with benefits expected to arise out of the Pearl Harbor development and accompanying leases, what do we find Doheny's attitude?

One of complete repudiation of any intention to go ahead with the business.

This repudiation took place in his interview with Admiral Robison shortly after the middle of December. At that meeting Mr. Doheny told the Admiral that he had conferred with his associates and that they thought the undertaking was too risky, and that he had decided not to go ahead. (R. v. II, 996; v. III, 1116.)

He had "paid" his money, if our adversaries' theory is correct, and then just because his associates in the company looked unfavorably upon the project out of which alone our adversaries say he had hope of reimbursement, he decides to sacrifice his chances of payment and to drop the whole matter.

Was ever a bribery conspiracy approached or prosecuted in such a mood?

And it was Robison who by arguments based not upon Doheny's need but upon the country's need, succeeded in procuring from Doheny the promise of a bid. (R. v. II, 995-6, v. III, 1117.)

This incident was shortly followed by the chief alleged conspirator—Fall—turning the entire matter over to Dr. Bain and Asst. Secretary Finney, and telling them to go ahead with it as he would be busy with other matters. (R. v. II, 512, 745.)

Bain determined the list of companies to whom the Pearl Harbor project was to be submitted with request that those companies give the Government bids thereon. (R. v. II, 726.)

Bain in obvious good faith called upon the Standard Oil Company (728), the Associated Oil Company (731), the Union Oil Company (741), the General Petroleum Company (730; 740), as well as the Pan American Company (727), and communicated with the J. G. White Engineering Company (722-25), Ford, Bacon & Davis (729-30), the Foundation Company (770-1, 881), and the Pittsburgh & Des Moines Steel Company (770-1); and sought from these concerns active competition for the contemplated contract. (R. v. II, pp. as above.)

Bain and Finney, acting for the Navy, caused to be sent out the invitations for bids. (R. v. II, 751.)

These men accepted, as an order to which they were subject, Admiral Gregory's substitute theory by which the cost plus basis of bids was eliminated. (R. v. II, 750-1.)

Bain used every possible effort to induce his friend McLaughlin, vice-president of the Associated Oil Company—one of the Petroleum Company's chief rivals—to become interested in this project, a fact which is perfectly and absolutely inconsistent with any idea that efforts were being made to favor the Transport Company in this connection. (R. v. II, 751 to 759.)

Despite the criticism and arguments of our adversaries it is—we say it with entire confidence—impos-

sible for this court to say from the record which Dr. Bain made in his attempt to provoke real competition for the first Pearl Harbor contract, that any thought of favoring the Transport Company at the expense of others existed in his mind or in the mind of Secretary Fall from whom he had received his authority to go ahead. The fact that this company or that company may not have been included in the list of those who were supposed to have been qualified and best fitted to do the work, and who were therefore offered opportunities to bid, is wholly immaterial in the face of the other fact that a number of oil companies and great engineering firms, all of full ability and responsibility, were invited to bid and even urged to bid, supplied with full information and had exactly the same chances that the Transport Company had. This included all the great western oil companies which were in a position to handle a matter of such magnitude, and engineering companies which were competitors of the J. G. White Co. (R. v. II, 913).

THE "PREFERENTIAL RIGHT" CLAUSE IN THE APRIL 25TH
CONTRACT.

The District Court considered this of importance. It said that the contract was of no value and of little interest to the Transport Company without the preferential right (R. v. III, 1350) and that the lease of June 5th was not valuable (ib. 1354). It concluded that there was connection between Mr. Doheny's letter of November 28, 1921, to Mr. Fall, the loan of the former to the latter, and the preferential right clause in the April 1922 contract. The record wholly fails to support the District Court's theories.

The origin of the term "preferential right" in respect of Government oil land leases is found in Section 18 of the Leasing Act of February 25, 1920. Mr. Cotter, who was familiar with the land laws, being anxious to develop some way by which his company would have

a chance of being rewarded for the risks assumed in connection with the Pearl Harbor project, in the event its bid to be submitted April 15, 1922, was accepted, conceived the idea of making an alternative proposal under which, in consideration of added benefits to the Government, the company would "be given preferential right to lease from the Government any lands within Naval Petroleum Reserve No. 1, California, which the Government may decide to lease" (R. v. II, 909-10; v. I, 40).

Had contract embodying such a preferential right been entered into the Transport Company might have obtained something of value. The fact is, however, that the so-called preferential right clause actually inserted in the contract of April 25th was not that asked for but an entirely different thing. Mr. Ambrose of the Bureau of Mines recommended that this right be granted in a radically changed form; and when the contract was prepared for signature it only provided that the Transport Company should have the first right to take or not to take a lease on given lands of the reserve (not including the whole) if it would agree to conditions and royalties proposed by the Secretary of the Interior when and if any such lease was offered, and that if it did not so agree, irrespective of how unreasonable or onerous these conditions might be, the entire idea of a preferential right vanished, and the lease was to be submitted to competition and the Transport Company would have only the right, open to it without any such clause, to bid therefor on equal terms with other bidders.

This was a "preferential right" in name only. Secretary Denby saw that, for he commented to Admiral Robison upon the fact that all that needed to be done if the company did not accept terms laid down by the Government was to put the lease up to competitive bidding (R. v. II, 1003-4). Mr. Cotter instantly recognized that the proposed "preferential right clause"

gave his company nothing, and he urged the acceptance of Proposal A, which contained no such preferential right, and opposed the acceptance of Proposal B with the foregoing modification. In effect he refused to allow his company to sign a contract unless some definite assurance of a lease to some land was given him which would enable him to say to his company that he had obtained something of definite value in exchange for the difference represented by Proposals A and B. This attitude is not left in any doubt because it is confirmed by the letter of April 25, 1922, signed by both Acting Secretary Finney and Secretary Denby (R. v. I, 65-6).

As we have stated, the idea of this preferential right—Proposal B alternative bid—was the idea of Mr. Cotter (R. v. II, 856; 909-10; 928-9). There is no evidence that Secretary Fall or any person in the Interior Department suggested it or knew that such a bid was to be submitted. There is no evidence that Mr. Doheny suggested the preferential right idea or knew of it or was even in the United States at the time.

And it must be kept in mind that the preferential right, such as it is, was granted, not by Fall but by Denby (R. v. II, 1005), and that this was decided on without a word from Fall and before Fall had even been notified regarding any of the bids.

When Mr. Ambrose, a subordinate in Secretary Fall's Department, emasculated the preferential right condition contained in the Transport Company's Proposal B, neither Mr. Cotter nor any one else appealed to Mr. Fall or made any effort to obtain from him the benefit which the District Court believed had been agreed between Fall and Doheny to be furnished in the shape of this preferential right.

The change of language by Ambrose was not even reported to Secretary Fall. There was not the slightest evidence that it was reported to Mr. Doheny. As we have already shown, when Mr. Cotter found what

was the attitude of the Government officials having the matter in charge he endeavored to obtain the acceptance of Proposal A, or, failing that, something in the way of a definite assurance of a lease. This when finally granted was the lease of June 5th.

Let it be noted, moreover, that the Transport Company's Proposal A submitted April 15, 1922, was the lowest submitted; that without condition of any kind it was lower than that of the Associated Company for the same fuel oil and the same storage facilities.

Lastly, as to this phase of the case, as we have shown, the powers purporting to be granted by the preferential rights were never exercised by the Secretary of the Interior or purported to be exercised, to the extent of an inch of ground or a drop of oil.

SECRETARY FALL SUGGESTS LEGISLATION.

We turn again to an act of Secretary Fall's utterly inconsistent with the charged conspiracy, Secretary Fall's letter to Secretary Denby on April 12, 1922—a few days before the bids were to come in (R. v. I, 393)—in which he makes the suggestion that Congress be asked for further legislation—a suggestion that would, had it been followed, have ended any chance of the Pearl Harbor contract with an oil company, and therefore of any preferential right to any further leases in the Reserve ever falling into the hands of his supposed favorites, the defendant companies.

And who was it that refused to adopt this suggestion which would have stopped the whole proposal as then on foot? Admiral Robison and Secretary Denby of the Navy. (R. v. II, 1001-2.)

CONTRACT FROM DENBY.

Cotter, sole representative of the Transport Company handling the matter, demanded that Denby, Secretary of the Navy, should sign the contract upon the ground, expressly taken and insisted upon, that

Fall had no power or jurisdiction. (R. v. II, 916; 529.)

Fall agreed to this at once (R. v. II, 525, 526). It cannot be argued that Fall did this knowing that he could—and intending to—"dominate" Denby, for Fall was several thousand miles away from Denby and in no way communicated with, or in the slightest sought to influence, the Secretary of the Navy.

Denby, a man as to whom not one word of suspicion of wrong doing has been breathed in this case; upon whom there is no suggestion that any fraud or wrongful influence had been exerted—or of whom any request had ever been made by Fall or anyone else—was now concededly in control of the situation.

And this by the specific act of the representative of one of the parties to the alleged conspiracy.

Was any stone left unturned by the alleged malefactors to render nugatory the expected results of their alleged malefactions?

THE DECEMBER 11TH DOCUMENTS

These had their origin in the minds not of members of the Interior Department force, not in the brain of Secretary Fall, or Mr. Doheny, but in the strategic plans and deliberations of the chief heads of the Department of the Navy.

Doheny from another point of view was trying to find a way of relieving the oil situation in California, and preventing an undue depression harmful alike to himself and to the Government, as a crude oil producer. (R. v. II, 1015-24.)

Fall's only attention to Doheny's suggestion was to turn it over to Bain with instructions to "take it up with the Admiral," Robison, (R. v. II, 789), and "to do nothing except as the Navy wanted it done," Fall stating "that it was Navy business" (R. v. II, 790).

But the moving force which brought about this lease and contract was the determination of the General

Board of the Navy Department of the United States. (R. v. II, 581; 1023-4.)

And the specific individual to whose suggestions was due the fact that the lease when made covered the entire balance of the naval reserve No. 1 was Admiral Robison. (R. v. II, 1023.)

The one connection that Secretary Fall had with these negotiations was in preparing with Bain a tentative schedule of royalties as "affording ground for discussion" which was submitted to the Navy Department and to Mr. Doheny and was left entirely to the decision of the Navy without the slightest attempt by Fall to direct or even influence that deciding-department's action. (R. v. II, 794-5, 797-8, 798-800; v. III, 1031-39.)

Thus this contract and lease do not depend for their validity upon any act of the Secretary of the Interior or the exercise of any supposed power contained in the alleged "preferential right" of the contract of April 25th.

OFFICIALS CONNECTED WITH THE TRANSACTIONS

Actually connected with directing and carrying on the negotiations for the contracts and leases here involved; the preparation of specifications therefor; the work thereunder; the legal authority therefor; the legal form thereof; and the naval policy represented thereby, were the following Government officials against whom, we repeat, no charges have ever been made: (1) Edwin Denby, Secretary of the Navy; (2) Rear Admiral J. K. Robison, Chief of the Bureau of Engineering, U. S. N.; (3) Rear-Admiral L. E. Gregory, Chief, Bureau of Yards and Docks, U. S. N.; (4) Rear-Admiral Julian L. Latimer, Judge Advocate General, U. S. N.; (5) Commander Walter B. Woodson, Assistant Judge Advocate General; (6) Pickens Neagle, Esq., Solicitor of the Navy Department; (7) George Dyson, Esq., Attorney, Judge Advocate General's Office; (8) Lt. Keating, Assistant, Bureau of

Yards and Docks; (9) Captain Bakenhus, Acting Chief, Bureau of Yards and Docks; (10) Commander Sherman, Bureau of Yards and Docks; (11) Admiral David Potter, Paymaster General, Chief, Bureau Supplies and Accounts, U. S. N.; (12) Theodore Roosevelt, Assistant Secretary of the Navy (and in the absence of the Secretary, Acting Secretary); (13) E. C. Finney, First Assistant Secretary of the Interior (a presidential appointee and in the absence of the Secretary, Acting Secretary); (14) Dr. H. Foster Bain, Director of the Bureau of Mines (a presidential appointee); (15) A. W. Ambrose, Chief Petroleum Technologist, Bureau of Mines; (16) F. B. Tough, Assistant Petroleum Technologist; and (17) J. McG. Williamson, of the office of Solicitor of the Interior Department. Moreover the policy involved and the plan which culminated in defendants' contracts were the subject of correspondence among naval officials and were discussed and considered at meetings of the Navy Council at which were present such high officers of our Navy as Admiral Coontz, Chief of Operations, the senior naval officer, who was an adviser of the Secretary of the Navy (R. v. II, 975); Admirals Washington, McVay, Taylor, Robison, Potter, Stitt, Latimer, Moffett and Smith; Captains Bakenhus and Willard, Commander Rowcliff; and Major General Lejeune, Commandant, United States Marine Corps.

Aside from Mr. Doheny, those representing the defendants in negotiating and executing the contracts were (1) Joseph J. Cotter, vice-president and attorney; (2) J. C. Anderson, president of the Petroleum Company; (3) J. M. Danziger, vice-president of the Transport Company; (4) Gano Dunn, president, J. G. White Engineering Corporation.

We say again, small wonder that Judge Kennedy in the *Mammoth Oil Company* case remarked that—

“The court has been impressed with two unusual situations not ordinarily found in cases of this character: First, although a conspiracy is one of

the bases for the annulment of the lease, one alone of the many government officials having taken an active part in its consummation is charged with corrupt and ulterior motives. We take it, from the evidence and the expressed views of plaintiff's counsel, that although Denby, Roosevelt, Robison, Finney, Bain, Ambrose, and Eddy had more or less of an intimate knowledge of the entire transaction, and some of them, at least, an active and persuasive influence in bringing it about, they must be considered as absolved from any incriminating fault as to fraudulent motives. Counsel for the government in argument, being asked as to the basis of Admiral Robison's assertive attitude, charged it to superenthusiasm and zeal for the welfare of that defense arm of the government which he represented." (5 Fed (2d) 330, p. 343.)

ALLEGED UNDERSTANDING THAT MR. FALL WOULD BE EMPLOYED BY DEFENDANTS.

Finally, we come to consider the claim that there was an understanding reached "during the course of the negotiations for such contracts and leases" between Mr. Doheny and Secretary Fall that the latter would enter the employ of defendants after he ceased to be Secretary of the Interior, which "understanding" the District Court was of opinion was of itself sufficient reason for voiding the contracts and leases here involved (R. v. III, 1320-3).

Aside from the point of immateriality, as these contracts were directed and made by Denby and not by Fall, the complete answer to this is that there was no such understanding and there was no evidence thereof. All the evidence on this subject is that found in the testimony of Mr. Doheny before the Senate Committee in 1924 in which he said that he expected that if Mr. Fall "did not sell or turn over that land" (referring to the New Mexico ranch), "later on" Doheny "might employ him in connection with our affairs in Mexico, with which he is very conversant." (R. p. 245.)

There is not a word of testimony showing that this subject was ever talked over between Fall and Doheny, much less to show that any agreement or understanding had been reached by them. At most the testimony shows that Mr. Doheny in his own mind thought that at some future time, and then only in the event Mr. Fall's New Mexico enterprises had not been successful, he, Doheny, "might" employ Fall in matters in connection with which Fall's experience and ability would enable him to render valuable services. It is clear that the thought in Mr. Doheny's mind was that if Mr. Fall at some future time was so employed that employment would be of such importance that the compensation it carried would, regardless of any failure in Mr. Fall's enterprises elsewhere, enable him to eventually discharge his debt to Doheny.

Mr. Fall retired from the President's Cabinet March 4, 1923. This case was tried October-November, 1924. There was, of course, no evidence of any employment, such as the District Court said he found had been agreed upon, or of any step toward such employment. If it be said that this was probably due to the controversy eventuating in the filing of this suit, let it be noted that that controversy arose during the Senate investigation, conducted in the fall and winter of 1923, whereas, we repeat, Mr. Fall had returned to private life March 4, 1923, and was from that date free to take up any employment which might have been agreed upon.

Careful reading of those selected portions of the testimony on this subject which the District Court included in its opinion will fail to disclose the existence of that agreement or understanding which the District Court found in and of itself sufficient reason "why the contracts and leases should be voided." (R. v. III, 1320-23.)

Let us illustrate: A and B are litigants in a suit on trial before Judge C; A, observing the Judge's conduct and forming a high opinion of his legal attain-

ments, in his own mind determines that at some future date, after the Judge leaves judicial office, he will seek to retain him as an attorney for companies with which A is connected. No conversation on the subject occurs between the Judge and the litigant. No understanding or agreement is discussed, much less reached. It is simply an idea which A expects in the future he might put into execution. The District Judge in the instant case would strike down any judgment which the record in this hypothetical case showed as having been entered by that Judge in A's favor.

We respectfully submit that such a process of reasoning carries its own refutation.

- (3) THE LOAN OF \$100,000 BY MR. DOHENY TO MR. FALL WAS NOT PROVED BY ANY EVIDENCE COMPETENT AND ADMISSIBLE AGAINST THE DEFENDANT COMPANIES:

The evidence received by the trial court of this transaction was all inadmissible.

As to these corporate defendants the conversation between Mr. Doheny and his wife in their private apartment in New York was manifestly hearsay and the objections to its receipt (R. v. I, 181; 176; 175) and the motion to strike (R. v. III, 1195) should have been sustained.

The same is true with regard to the testimony given by Mr. Doheny in January and February, 1924, before a Senate committee in Washington. The contracts in suit were all executed in 1922. Mr. Doheny retired as president of both the defendant companies, and became chairman of their boards of directors, prior to the end of 1923 (R. v. I, 83-4). His testimony before the Senate Committee in 1924 was a narrative of past transactions. The District Court received it as part of the *res gestae* of the transactions involved in this suit (R. v. I, 193-5). The Circuit Court of Appeals held it to be admissible as a statement by an officer of defendant corporations acting for them and within

the scope of his authority, and also as a "declaration against interest" (R. v. III, 1501). We submit that—

(1) It is clear that the voluntary statement made by Mr. Doheny in 1924 was no part of the *res gestae* of the litigated acts (*Jones on Evidence*, *Horwitz' Blue Book Edition*, Sec. 344, quoting *Wharton*, page 810; *Cook on Corporations*, Vol. IV, Sec. 726; *Vicksburg & Meridian R. R. Co. v. O'Brien*, 119 U. S. 99; *Goetz v. Bank of Kansas City*, 119 U. S. 551, which last cited case is treated as authoritative decision on this point in a host of cases and by numerous text-writers; *Northwestern Union Packet Co. v. Clough*, 87 U. S. 528, the doctrine of which and of *Vicksburg, etc., R. R. Co. v. O'Brien*, *supra*, has been expressly reaffirmed by this Court in 121 U. S. 637; 124 U. S. 415, 424; 158 U. S. 234, 337; 245 U. S. 229, 250; 21 Wall. 157).

(2) The statements made before the Senate Committee were not those of an officer of defendant corporations acting for them and within the scope of his then authority as such officer (*Jones on Evidence*, 3d Ed., Sec. 255, pp. 383, 384; *Cook on Corporations*, Vol. 4, Sec. 726; *First Unitarian Society v. Faulkner*, 91 U. S. 415; *Goehring v. Stryker*, 174 Fed. 897; *Winchester, etc., v. Creary*, 116 U. S. 161; *Xenia Bank v. Stewart*, 114 U. S. 224); there is no implied authority for a director or chairman of a board of directors to make statements binding a corporation, except when acting as a board (*Cook on Corporations*, Vol. 4, Sec. 726; *Farmers Ginnery Co. v. Thrasher*, 144 Ga. 598; *Allington Co. v. Reduction Co.*, 133 Mich. 437; *Kalamazoo Co. v. McAlester*, 36 Mich. 326; *Green's Brice's Ultra Vires*, p. 503; *Soper v. Buffalo R. R. Co.*, 19 Barb. (N. Y.) 310; *Peek v. Detroit Novelty Works*, 29 Mich. 313; *Niagara Falls Bridge Co. v. Bachman*, 66 N. Y. 61). The declarant was no longer president of the companies and did not have the authority ordinarily implied from the holding of that position, and

declarations made after he ceased to hold that office are not admissible against the companies (*Walker Mfg. Co. v. Knox* (C. C. A. 6), 136 Fed. 334; *Kenah v. The Tug Markee*, 3 Fed. 45; *Woolsey v. Haynes* (C. C. A. 8), 165 Fed. 391; *Hudson Milling Co. v. Higgins*, 85 N. J. L. 268). As a stockholder Mr. Doheny was not authorized to make statements admissible against the corporate defendants (*Cook on Corporations*, Vol. 4, Sec. 726). A majority stockholder as such cannot by his statements bind a corporate entity.

(3) A witness testifying under oath is not acting as an officer subject to and carrying out authority derived from his principal, hence statements made by a "witness" while testifying are not admissible in any subsequent proceedings against the corporation of which he is an officer or agent (*Vohs v. Shorthill*, 124 Iowa 476; *Columbia National Bank v. Rice*, 48 Neb. 431, 67 N. W. 165; *Estey v. Birnbaum*, 9 S. D. 176; *Salley v. R. R. Co.*, 62 S. C. 128; *Louisa County Nat. Bank v. Burr* (Iowa), 199 N. W. Rep. 359; *Bangs Milling Co. v. Burns*, 152 Mo. 350, 53 S. W. 923; *Byrne v. Hafner Feed Co.*, 143 Mo. App. 85, 122 S. W. 350; *Rush v. Burns*, 152 Mo. 660, 54 S. W. 1103; *St. Charles Savings Bank v. Denker*, 275 Mo. 607, 205 S. W. 208; *Silzer & Co. v. Melton & Sons*, 129 Ga. 143, 113 S. E. 559; *Harrison County v. State Bank*, 127 Ia. 242; *Fletcher Cyclopedia Corporations*, Vol. 3, Sec. 2163).

(4) The evidence was not admissible as a declaration against interest and does not measure up to any test prescribed for this extreme exception to the hearsay rule (*County of Mahaska v. Ingalls*, 16 Ia. 81; *Smith v. Moore*, 142 N. C. 277, 7 L. R. A. (N. S.) 684; *Halvansen v. Moon*, 87 Minn. 18; *Rand v. Dodge*, 17 N. H. 343; *Churchill v. Smith*, 16 Vt. 560; *Humes v. O'Brien*, 74 Ala. 64; *Berkeley Peerage Case*, 4 Campbell's Reports 401; *Sussex Peerage Case*, 2 C. & F. 85; *Estate of Baird*, 193 Cal. 225; *Smith v. Hansen*, 34 Utah 171, 18 L. R. A. (N. S.) 520; *Life Ins. Co. v.*

Hairston, 108 Va. 832, 128 A. S. R. 989; *Tate v. Tate*, 75 Va. 522; *Massey v. Allen*, 13 Ch. Div. 558). Even if it be assumed that the declarations might have subjected declarant to prosecution, punishment, or penalty, they would be inadmissible (*U. S. v. Donnelly*, 228 U. S. 242, 57 L. Ed. 820). Assuming relevancy, a declaration against interest is admissible at the instance of either party to the suit irrespective of any question of privity (*Jones on Evidence*, 3d Ed., Sec. 323). Certainly the Court would not receive at the instance of defendants Mr. Doheny's declarations, and this simple test conclusively shows that they do not come within the rule respecting declarations against interest.

(5) Cases cited by plaintiff's counsel and by the Circuit Court of Appeals do not support the admission and upon examination are found to hold simply that declarations made by officers of corporations while transacting business for the corporations are admissible in evidence as admissions of the latter (*Xenia Bank v. Stewart*, 114 U. S. 224).

(6) Except for hearsay there was no evidence of the transmission of the sum of \$100,000, or any sum, by E. L. Doheny to A. B. Fall. Without that hearsay such testimony as that given by the witnesses Youngs (R. v. I, 165-8), Little (ib. 168-9), Hill (ib. 171-2), Mack (ib. 173), Benton (ib. 174-6), Harris (ib. 176-7), Flory (ib. 178-9), McInnes (ib. 179-180), and Brownfield (ib. 181) present nothing but a disconnected set of facts insufficient and ineffective to constitute legal evidence of any transmission of money from Doheny to Fall.

We submit that defendants' objection to this testimony (R. v. I, 165-6); 168; 172; 174-5; 176-7; 178; 179; 180) should have been sustained or their motions to strike (R. v. III, 1195) should have been granted and that all the erroneously admitted testimony should be ignored by this Court.

This court as recently as *U. S. v. Donnelly*, 228 U. S.

242, quoted the following words of Chief Justice Marshall in *Queen v. Hepburn*, 7 Cranch. 290, 295, 3 L. Ed. 348, 349:

“It was justly observed by a great judge that ‘all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and now revered from their very antiquity and the good sense in which they are founded.’”

Again, said the great Chief Justice in *Queen v. Hepburn*, as quoted in *U. S. v. Donnelly*, *supra*:

“‘The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all.’”

To Summarize:

We earnestly submit—

(a) That there was not before the Courts below, and there is not before this Court, any legal evidence of the alleged loan;

(b) That this Court should exclude from its consideration of the case all of the evidence above discussed;

(c) That clearly the statements made by Mr. Doheny when he appeared as a voluntary witness before a committee of the United States Senate do not constitute evidence in this case;

(d) That clearly, also, Mr. Doheny's personal conversation with his wife, at their home, does not constitute evidence in this case.

We further respectfully submit, all questions of the admissibility of the evidence aside, that—

(a) The Secretary of the Navy as matter of law had authority to make the contracts and leases in suit;

(b) The Secretary of the Navy as matter of fact made the contracts and leases in suit;

(c) The Secretary of the Navy was not party to any conspiracy, fraud or wrongdoing;

(d) The Secretary of the Navy was not the subject of any fraudulent representations, deceit, or undue influence.

From the foregoing it follows that irrespective of the relations existing, or any transaction had, between Mr. Fall, while Secretary of the Interior, and Mr. Doheny, the contracts and leases in suit in this case cannot be affected or invalidated.

And, finally on this subject, it should be and we submit it must be held that Edward L. Doheny did not give Albert B. Fall a bribe of \$100,000, or of any other sum, nor did these men ever so intend, nor are the surrounding circumstances consistent only with such an intent.

The rule is settled that "Where two constructions may be placed upon an act, that construction which will make it legitimate and honest will be preferred."

Boone County National Bank v. Latimer, 67 Fed. 27 (C. C.);

Alexander v. Fidelity Trust Co., 249 Fed. 1 (C. C. A. 3);

U. S. v. Mammoth Oil Co., 5 Fed. (2d) 330, 349;

Utah National Bank v. Nelson (Utah), 111 Pac. 906;

Jones on Evidence, Civil Cases (3d Ed.), Sec. 13, p. 18.

All of plaintiff's own evidence on the subject of the \$100,000 transaction proved that it was a loan and intended bona fide by the parties so to be.

POINT XIII.

Neither the Personal Loan Made by Mr. Doheny to Mr. Fall, Nor Any Other Fact Proven in This Case, Constitutes a Violation of Public Policy of Such a Nature as to Render Void or Voidable the Contracts or Leases Made and Executed by Secretary Denby.

The court will keep in mind:

(a) That there is no evidence in the case by which it is possible to sustain the conspiracy alleged in the Bill of Complaint.

(b) That Fall had no jurisdiction in the matter and that Denby, who did have such jurisdiction, exercised it in the manner shown.

(c) That one of the documents attacked was executed five months after the Doheny-Fall loan—that the second was executed more than six months thereafter, and the remaining two were signed one year and eleven days thereafter.

(d) With the foregoing facts in mind, it is evident that some theory had to be devised by which these legal and chronological gaps might be bridged. And this theory was found in the "public policy" argument, advanced by Government counsel as a last resort after they found that they could not prove the bribery conspiracy which they had alleged in their bill. This public policy theory was adopted by the District Court. We submit that it cannot be sustained.

(e) This public policy theory, stated in the way in which it must be stated in order to maintain the court's conclusions, is substantially as follows:

That although the court found that Secretary Fall did not have power, and Mr. Cotter before the contracts were executed so asserted specifically, to bind the Government by his signature to these contracts and leases—this power being solely granted to and retained by Secretary of the Navy Denby—

Although the court, though specifically re-

quested so to do (R. v. III, 1238-9), could not find that Secretary Fall was paid money with intent to influence him in obtaining these leases and contracts—

Although there is not a jot of proof or suggestion that Secretary Denby or any person either in the Navy or Interior Department were conspirators or wrongdoers, or were themselves deceived, defrauded, imposed upon or compelled by Fall or any other person—

Although there is no proof that Fall directed, recommended, requested or in any way caused these contracts and leases to be made by the Secretary of the Navy—

Although there is no proof that any of these contracts or leases were in any way unreasonable, damaging, harmful or unfair to the United States—

Nevertheless, that solely because of the personal obligation of Fall to Doheny, arising out of the loan, every contract and agreement thereafter entered into between defendant corporations and the United States Government—however great the lapse of time since the creation of the personal obligation— in the making of which Fall played any part, although that part was outside of any duty imposed upon him by any law and determined nothing, must as a matter of law, and even though it be not shown to be harmful or unfair to the interests of the Government—be deemed to be voidable at the latter's instance.

(f) We submit this is not the law.

While this argument in its narrower sense involves questions of pleading—for the amended bill contains no such averments or suggestions—yet we are more broadly considering it here.

The principal case upon which the plaintiff relied below is that of

Crocker v. U. S., 240 U. S. 74.

In this case there was specific proof of an agreement to bribe one Machen to procure the very contract which was attacked in the case. The facts appear fully in *Crawford v. United States*, 212 U. S. 183, 189.

Machen was officially vested with important duties regarding the making of this particular contract.

Each of these elements—although alleged in the Bill of Complaint and strenuously contended for at the trial of this case—is absent from the record now presented to this court.

The case of *Garman v. U. S.*, 34 Ct. Cls. 237, was one where it appeared that a reward was offered to a certain person for the specific purpose of securing an advantage from the Government.

In the present case the undisputed facts in the record do not support such a conclusion.

The case of the *Atlantic Contracting Company v. U. S.*, 57 Ct. Cls. 185, was one where, as stated in the plaintiff's brief below:

"The contract itself was tainted with fraud through the conspiracy between the three persons,"

one of these persons being the Governmental officer having the matter in charge.

The case of *Hume v. U. S.*, 132 U. S. 406, was one where the court reached "the natural and irresistible inference of fraud" through gross inadequacy of consideration—an inference which is impossible in the case at bar.

The case of *Seltzer v. Metropolitan Elec. Co.*, 199 Pa. 100, was one which arose on demurrer and in which the bill alleged a conspiracy among the very officials who had power to award the contract.

In this case the Bill of Complaint affirmatively denies the validity of the Executive Order, which alone could give Fall such power.

The case of *Herman v. Oconto*, 100 Wisc. 391, was the decision of a motion for judgment upon a bill which was held to sufficiently allege fraud on the part of certain of the officers who had jurisdiction to award the contract.

It has no bearing upon the case at bar.

The case of *The Washington Irrigation Company v.*

Krutz, 199 Fed. Rep. 279, involved a dictum in which the court said that:

"If *Krutz* (*i. e.*, the Register of the United States Land Office) had accepted the offer of *Schultze* while he was in office, the bribery of the one and the corruption of the other could not be questioned."

This dictum has no application to the case at bar, where there is no element of bribery, since Secretary Fall had no official jurisdiction over the subject-matter and since it has not been proven that he received any advantage in connection with these contracts.

The case of *U. S. v. Carter*, 217 U. S. 286, involved the same facts as those of the *Atlantic Contracting* case, to wit: the abnormal profit which the contractors had in some way been able to realize, and the evidence tracing one-third of *that profit* into *Carter's* (the Government officer having "large powers and considerable discretion") hands, with no credible reason for such result.

All that the *Carter* case holds is that an agent who secretly profits out of a transaction handled by him for his principal, will be compelled in equity to account to the principal for whatever he has thus received.

No such situation exists here.

The case of *Cobban v. Conklin*, 208 Fed. Rep. 231, was one where *some but not all* of the allegations of fraud were proved, the proven facts being an adequate basis for the relief prayed. The case does not touch upon public policy.

The case of *Cowen v. Adams*, 80 Fed. Rep. 448, simply holds that an unproved allegation of fraud does not preclude recovery if other sufficient allegations of fact are proved. No public policy point is involved.

It has no application to the present discussion.

The case of *Lundean v. Hamilton*, 184 Ia. 907 is similar to the *Cowen* case and does not involve "public policy."

The line of cases, of which

Providence Tool Co. v. Norris, 2 Wall., 45;
Trist v. Child, 21 Wall., 441;
Meguire v. Corwine, 101 U. S., 108, and
Oscanyan v. The Arms Co., 103 U. S., 261,

are illustrations, are all cases in which the court found that an *actual agreement existed* to pay for procuring a contract from the Government, to obtain legislation, to procure the appointment of a given person to a United States office, to bribe or corruptly influence officers of a foreign government, etc., etc., none of which elements exists in the testimony or findings in this record. This Court will readily recall that these were simply cases in which it was held that courts would not affirmatively enforce such contracts because of the tendency to evil such agreements may have. No one of these was a case of suit to cancel contracts on the ground of fraud.

To summarize, we respectfully submit:

1. That this court cannot find, upon the evidence in the record, that the loan made by Mr. Doheny to Mr. Fall was made in connection with any contract, agreement or understanding to procure the execution of any of the writings attacked, or otherwise in connection therewith, but that, on the contrary, it was a purely separate and personal transaction between the two men.

2. That it is conceded by the plaintiff that Fall, to whom the loan was made, did not have the power or discretion to make these contracts and leases.

3. That no case cited by the plaintiff, or which we have been able to find in the books, can be advanced as an authority for the proposition that the existence of a personal obligation on the part of a Government officer renders void or voidable contracts executed by another independent Governmental officer, who alone had power to act, and whose action was the result of the exercise of his own judgment, he not having been

imposed upon, misled, or in any way influenced by the officer under the obligation. *Ross v. Stewart*, 227 U. S. 530, 535.

POINT XIV

No Evidence of Conspiracy or Wrongdoing is Afforded by Correspondence Between Applicants for Leases and Various Government Officials, Nor was It Legally Admissible.

Over defendants' objection the trial court permitted counsel for plaintiff to read in evidence sixty-three letters (Exs. 173-236, R. v. II, 623-667) consisting of correspondence between Government officials and persons desiring to lease portions of the naval reserve lands, and those in political life who were endorsing such applications, written in 1921 and 1922, the latest in date being written in October, 1922, in which the several Government officials, writing replies to applicants for leases, stated at the time of the date of such letters that the Government did not intend to enter into further leases of lands within Naval Reserve No. 1.

The writers were not parties to this suit. The defendants were in no way connected with the correspondence. They had no knowledge of any of these letters. They could in no way be bound thereby.

It is submitted that correspondence in no way connected with the defendants was upon the plainest principles of the law of evidence inadmissible as against them or either of them.

Apart from the inadmissibility of the evidence it is apparent that the same was immaterial and that the statements made by Government officials in the exhibits referred to were absolutely and literally true when made. It will be borne in mind, first, that except for strip leases made upon bids received in response to advertisements, and the lease of June 5, 1922, made pursuant to the agreement therefor contained in the Finney-Denby letter of April 25, 1922, the Gov-

ernment at no time prior to the latter part of November, 1922, had decided upon additional leases in No. 1 Reserve. Beginning in the summer of 1922 the overproduction of oil in California made it unadvisable for the Navy to increase production from its lands if this could be avoided; the unchallenged policy of reducing drilling and production, as far as consistent with the protection of the reserve, had been adopted and was in force; the Government by reason of the non-drilling agreement between it and the Pacific Oil Company, had temporary protection in respect of certain areas in Reserve No. 1; the areas which are specifically referred to in the various exhibits above mentioned were not at the time subject to immediate drainage and the statement to that effect made in the letters of Government officials admitted in evidence was in good faith and undoubtedly thought, in the existing circumstances, to be the fact.

As we have hereinbefore several times shown in December, 1922, the Government for the first time decided to lease, if it could make an advantageous contract in consideration thereof, all of the unleased lands in Naval Reserve No. 1; this decision was made by the Navy Department; it was made in connection with the decision of the General Board of the Navy (R. V. II, 581), approved by the Secretary of the Navy, to enlarge the oil storage facilities at Pearl Harbor (R. pp. 581; 1023-4); this decision was dependent upon the obtainment by the Navy of an agreement satisfactory to it embodying what the Secretary of the Navy, and his personal representative Admiral Robison, determined to be considerations warranting such a lease. The record is clear and convincing that there was no understanding, agreement or plan for the leasing of **any part of Naval Reserve No. 1, after April 25, 1922—except the small part definitely agreed on that date to be thereafter leased, and which was leased June 5, 1922—until decision to make further lease was arrived at late in November, 1922, and consummated by the**

lease of December 11, 1922. So that, we repeat, there is nothing in the exhibits referred to under this point which in any way tends to support plaintiff's theory in this case.

POINT XV.

This Suit Can Not Be Maintained Without Proof of Pecuniary Damage to the United States Resulting From the Contracts or Leases Attacked.

A. The record contains no finding to the effect that these contracts or leases were harmful to the Government, or that the Government was in any way damaged thereby.

The District Court made no finding of fact or conclusion of law whatsoever upon this point.

Even as to the amount of royalties payable under the leases, the Court, while finding that Mr. Doheny and Secretary Fall acted in co-operation in fixing these royalties (R. v. III, 1417, 1420), and while finding in its conclusions of law that Messrs. Doheny and Fall "did conspire and confederate for the making of certain contracts and agreements of great benefit and advantage to the Pan American Petroleum & Transport Company," etc., did not make any finding to the effect that the royalties thus fixed were unfair or unreasonable to the United States, or that the contracts and leases, though beneficial to the Transport Company, were not also beneficial to the United States of America.

And there is no evidence upon which any such finding could be properly based, despite the estimates of profits to accrue from the December lease.

And whatever the Court thought upon this point, it was not willing to make any finding to the effect that whatever profits were expected to be gained were in any way unreasonable or unfair.

As to the Pearl Harbor contracts, no question of damage to the United States can be suggested, in view of the evidence that for each dollar spent the Govern-

ment had received \$1.10 in value. (R. v. II, 570.) As to the leases, *infra*.

It is interesting to note in this connection that even the District Court dwelt more largely upon assumptions than upon facts. Thus Judge McCormick said:

"It cannot be said that the United States has not suffered injury or loss of a pecuniary nature," &c. (R. v. III, 1279.) See also pp. 1340 and 1341.

B. The Court of Appeals, while alluding in passing to the suggestion of the District Court that the mere parting with property, even for full value, on the faith of false representations, constituted damage (which is not the law—*Smith v. Bolls*, 132 U. S., 125; *Sigafus v. Porter*, 179 U. S., 116), does not base its ruling upon any such fanciful claim, but relies entirely upon the *Heckman* case, the *Carter* case, and the *Hammerschmidt* case (R. v. III, 1507).

But the *Hammerschmidt* case was a criminal proceeding, in which an entirely different rule governs from that which applies to a civil cause.

The *Carter* case was not an action to set aside a contract, but simply a proceeding in Equity to compel a fraudulent agent to account for a commission or profit which he had made in violation of his trust.

And the *Heckman* case involved only the question whether the U. S. could sue as guardian of an Indian tribe to set aside a land grant, although it had no pecuniary interest in the matter.

None of these cases is in point; and we shall later show that certain other land patent cases which have been alluded to by our adversaries are equally inapplicable.

C. The position of the Courts below is submitted to be contrary to the rule established in this Court and elsewhere.

Even in cases of fraud the plaintiff is not entitled to relief without proof of damage.

This is, of course, not the rule in cases of criminal indictments, such as *Hammerschmidt v. U. S.*, 265

U. S. 182, upon which the Court below placed much reliance. And the distinction between such cases and actions in equity of the nature of the one at bar is frequently lost sight of. Nevertheless, this distinction is fully established by the authorities.

Eichelberger v. Mills Land Co., 9 Cal. App., 628, was an action to rescind a contract for the purchase of land on the ground that it was secured by fraudulent representations. In regard to the necessity of proof of damages to warrant rescission, the Court says:

“* * * Fraud, in order to warrant the rescission of a contract, must be accompanied by some appreciable loss or damage; for ‘courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral and involving no pecuniary or tangible injury.’ (*Wain-scott v. Occidental, etc., Assn.*, 98 Cal., 253, 33 Pac., 88) * * *.”

Atlantic Delaine Co. v. James, 94 U. S., 207, was a suit to cancel executed contract for fraud. Bill dismissed because the fundamental averment of fraud not sufficiently sustained by proof.

The Court makes the following general statement:

“* * * Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them * * *.”

Ming v. Woolfolk, 116 U. S. 599, is an action for deceit. In its opinion the court asserts the general principal that damage is a *sine qua non* of recovery.

See *Stratton's Independence v. Dines*, 135 Fed. p. 458.

In *Insurance Co. v. Bailey*, 13 Wallace, 616 at 622, it is said:

“Jurisdiction may also be exercised by courts of equity to rescind written instruments in cases where they have been procured by false representations or by the fraudulent suppression of the truth, if it appear that the rescission of the same is essential to protect the opposite party from pecuniary injury.”

In *Garrow v. Davis*, 15 How 272, plaintiff who held a contract for the purchase of land on which substantial payments had been made, but which had lapsed for default in payments, employed an agent to ascertain the lowest price the owners would take for the land under these circumstances, and then to negotiate with others for the sale of any option he might be able to secure. The agent entered into a fraudulent combination with defendant for the resale of the land to him. Suit to impress a trust on defendant's title for plaintiff's use.

It appeared that although the agent acted fraudulently as to plaintiff, nevertheless since he did not obtain the land at a reduced price thereby, but at its fair market value, plaintiff could show no damage as a result of his fraud. The court says on this point:

“To entitle themselves to relief, the complainants must prove fraud and damage; or to state the principle less abstractly, they must show that their agent disposed of what he was employed to sell, for less than its value, and that he did this fraudulently.”

In *Hyde v. Shine*, 199 U. S., 62, which arose on an indictment for violation of Sec. 5440, R. S. U. S. (now Sec. 37, U. S. C. C.), the court says:

“Whatever may be the rule in equity as to the necessity of proving an actual loss or damage to the plaintiff, we think a case is made out under this statute by proof of a conspiracy to defraud and the commission of an overt act, notwithstanding the United States may have received a consideration for the lands and suffered no pecuniary loss” (p. 82).

There are two important cases in which the matter arose in actions like the present, *i. e.*, suits of equity to cancel instruments pursuant to an alleged conspiracy.

The first of these is *U. S. v. San Jacinto Tin Co.*, 125 U. S., 273, 285, where suit was brought by the Government to cancel a land patent on the ground of fraud. The Court said:

"But we are of opinion that since the right of the Government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the Government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States."

The second of these cases was *United States v. Conklin*, 177 Fed. Rep. 55 (C. C. A. 9), where a similar suit was brought by the United States to cancel a patent. The Court, after discussing the language of *Hyde v. Shine*, *supra*, distinguished criminal cases from equity suits, like the one then in consideration, held that proof of damage to the Government was necessary, and declared that the criminal rule has no application to civil actions.

"The court recognizes the rule which prevails in courts of equity, that injury or loss of a pecuniary nature should be shown to warrant annulment or setting aside of muniments of title. * * * No such condition exists in the case at bar * * * as it does not appear that the Government was in any manner injured, we are unable to see how it could be harmed by reason of the failure on the

part of the grantors to acknowledge the execution of the deed."

In *Clarke v. White*, 12 Pet., 178, 196, the Court said:

"In equity, as at law, fraud and injury must concur, to furnish ground for judicial action; a mere fraudulent intent, unaccompanied by any injurious act, is not the subject of judicial cognizance."

D. The "Land Patent" cases relied upon by the plaintiff as establishing its theory that no pecuniary harm need be proven in connection with actions like the present, are not in point.

The principal cases are:

U. S. v. Trinidad Coal Co., 137 U. S., 161;
Causey v. U. S., 240 U. S., 286.

The *Trinidad Coal Company* case and the *Causey* case, both arose under the public land laws and were brought for the purpose of cancelling patents, the issuance of which had been obtained by fraudulent violation of specific provisions of the public land laws by the patentees.

They were actions brought not upon the general theory of fraud, remediable in equity, but to redress the violations of the provisions of specific statutes.

"The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions."

U. S. v. Trinidad Coal Co., 137 U. S., 161.

"The Government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people * * * and when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title, but also to enforce a public statute and maintain the policy underlying it."

Causey v. U. S., 240 U. S., 399; citing, *U. S. v. Trinidad Coal Co.*, *supra*; *Heckman v. U. S.*, 224 U. S., 413.

In these cases the United States did not occupy its position of an ordinary litigant, a position which the United States unquestionably occupies in this case, but the Government was acting in the land patent cases as sovereign.

The distinction between these cases and the ordinary rules governing equitable actions to rescind contracts has been carefully drawn elsewhere in this brief.

So far from showing that the leases were disadvantageous or that any damage resulted, their advantage and value to the Government was made manifest. In response to the attempt to show that bids received for small tracts covering practically proven territory in Reserve No. 2, for leases under which the royalties themselves were the only returns which the Government would receive, and involving none of the special and unique elements of consideration which this case presents, under which leases there is no evidence of the actual return to the Government, there is this uncontradicted testimony: "The average royalty received by the Government from all the leases in Naval Reserve No. 2 is 18 per cent," whereas the Government received, prior to interruption of operations by reason of this litigation, an average royalty of 28 per cent under the June 5, 1922, and December 11, 1922, leases involved in this case (R. v. II, 829). The plaintiff's attempted comparison of the Interior Department regulation royalties with the royalties reserved under the lease of December 11, 1922 (R. v. III, 1185), was met by the actual facts, stipulated to be true, showing that under the leases here involved up to September 30, 1924 (during a part of which time full operations were interrupted by this litigation), the Petroleum Company had rendered to the plaintiff, and the latter had received, nearly 200,000 barrels of royalty oil over what would have been yielded by regulation Interior Department royalties on the same production (R. v. III, 1194).

And it may also be noted in this connection that three tracts of land in Naval Reserve No. 1 were, as a matter of fact, offered for leasing by public competition pursuant to the conference held in October, 1921, and that no satisfactory bids were received for two of the three tracts offered, the highest bid being of a royalty schedule, running from $12\frac{1}{2}$ per cent to 20 per cent. These two tracts, lying in Sections 6 and 25, are a part of the December 11 lease (R. v. III, 1146-7).

In other words, however productive portions of this Naval Reserve territory might be, the judgment of the bidders at this particular competition was that these special areas of it offered no glittering possibilities.

And when we look at the contract of December 11, and attempt to realize the full value to the Government of the United States of the obligation of the Transport Company to keep 3,000,000 barrels of fuel oil in storage at various points over the entire length of the Atlantic coast line, without charge to the Government, at the Navy's disposition for a period of fifteen years—this being only one of the continuing obligations assumed by the Transport Company under the contract in question—some idea is gained of the considerations which, other than the mere royalties reserved in the leases, the Government obtained. A low value on this storage and on the rate of interest applicable to carrying charges will show a bonus running up into millions of dollars.

The Government had actually under subpoena and in court during the trial of this cause (Clerk's certificate, R. v. I, 103) several of the leading oil experts of the western coast, among them being Messrs. Paul Shoup, President of the Pacific Oil Company and of the Associated Oil Company; H. M. Storey, Vice-President of the Standard Oil Company of California; A. C. McLaughlin, Vice-President of the Associated Oil Company; D. M. Folsom, Vice-President of the General Petroleum Corporation; L. P. St. Clair, Vice-Pres-

ident of the Union Oil Company, all of these corporations being keen competitors of the Petroleum Company.

No men on earth were better qualified to give testimony as to the value and reasonableness of the two leases attacked in this suit.

Had they been called, their testimony would have been admissible.

And yet not a single question was asked of these men or of any other witness as to the fairness and adequacy of the consideration which the Government received for what it gave, or, what certainly was relevant and clearly would have been admissible, what, in their expert opinion, was the value of the leases when made.

To fortify its conclusions as to the lack of necessity for proof of pecuniary damage, the District Court alluded to the joint resolution of Congress, approved February 8, 1924, under which this suit was brought by special counsel as making it "questionable whether such doctrine (i. e., as to pecuniary loss) applies in this particular suit." (R. v. III, 1281.)

This amounts in substance to a statement that the declaration by Congress of its opinion concerning the nature of the contracts and leases now in suit should be given weight by a court in passing upon one of the issues involved in the determination of that precise point.

Mr. Justice Harlan, in *Koshkonong v. Burton*, 104 U. S. 678, said:

"When counsel in *Ogden v. Blackledge* (2 Cranch at p. 277) announced that, to declare what the law is or has been, is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point."

We close this discussion by quoting the comment of Judge Kennedy upon the remarkable situation presented in such a suit as this where no claim of pecuniary harm is made:

“There is the significant lack of material damage to the Government which usually attends allegations of fraud, for in the case at bar no attempt has been made to show that the lease in controversy was in itself a bad lease for the Government except perhaps theoretically by counsel.” *U. S. v. Mammoth Oil Company*, 5 Fed. (2d) 330, 343.

POINT XVI

The Transport Company, in any View of the Case, is Entitled to be Credited with the Value of the Royalty Oil Heretofore Voluntarily Delivered to It by the United States, up to the Amount of the Beneficial Expenditures Made by It Upon the Property of the Government and Under the Terms of the Contracts.

We submit that we have hereinbefore made it manifest that the decrees entered by the courts below should be reversed *in toto* and the case remanded to the District Court with directions to enter a decree dismissing plaintiff's amended bill. Should this Court so determine, then the action of the Circuit Court of Appeals in reversing the District Court's decree allowing defendants credit for their respective expenditures under the terms of the contracts and leases involved in this suit will require no attention here. Should this Court determine that for any reason plaintiff is entitled to cancellation of the contracts and leases, or any of them, then we submit that settled principles of equity and justice imperatively demand a reversal of the decree of the Circuit Court of Appeals and the affirmance of that of the District Court.

We earnestly contend that the Transport Company is entitled to the credit allowed it by the District Court irrespective of whether or not—

(a) The contracts under which these moneys were expended by the Transport Company were or were not authorized by law; or

(b) The contracts, even though authorized, were made in due manner and form.

It may be observed that if the law authorized the contracts, then even though their execution were irregular in form and manner, even the Court of Claims would protect the contractors to the extent of benefits received by the United States from expenditures made and that, *a fortiori*, this would be done in an equitable suit for rescission in which the United States is the plaintiff.

We emphasize that the United States has already paid each of the Companies in full for the benefits received by the United States from the respective expenditures made by the Companies, and is now trying to recover back these voluntary payments.

And each of the Companies has already paid the United States in full for the value of all oil received by it, except as to the balance in the Petroleum Company account (R. v. III, 1434).

In other words, the case is not one where the Companies are asking for affirmative action against the United States, but one in which, in the event their contracts are cancelled by judicial decree, they are simply seeking to maintain the status existing prior to the execution of the instruments, which has been reestablished by the payments made by the United States and the value furnished the United States by each of the Companies.

There is no recorded case of which we have knowledge which holds that where an individual, a municipality or the United States Government has received benefits under an instrument purporting to be a contract, and has paid to the other party the value of these benefits, it can be allowed in a court of equity to recover back these voluntary payments thus made. Nor is there any case known to us in which a defendant in

such a cause as this has been compelled to account twice for values received by it.

The very recent decision of this Court in *United States v. Royer* (45 Sup. Ct. Rep. 519, at p. 521) is strongly against such a judgment.

We come now to the details of the points relied upon in support of the Transport Company's position, and the separate grounds advanced by the Circuit Court of Appeals in rejecting the credit.

A. The principal reasons specified by the Court of Appeals for the reversal of that part of the decree which allowed the Companies credits for the expenditures at Pearl Harbor and upon the leased lands were the following:

1. "The maxim (*i. e.*, that he who seeks equity should do equity) is restricted to cases where the plaintiff is wholly without remedy at law, and is entirely dependent upon a suit in equity for relief (citing *Gilliat v. Lynch*, 2 Leigh., 493; *Scott v. Scott*, 18 Gratt., 150; *Dranga v. Rowe*, 127 Cal., 506). Here the plaintiff had a remedy at law, but resorted to equity to avoid a multiplicity of suits" (R. v. III, 1508).
2. The Circuit Court of Appeals further said that to allow defendants the equity granted by the District Court, would be—
 "to ignore the fundamental distinction between cases brought to determine rights as between the United States and citizens depending upon contracts made under the authority of the laws of the United States and cases in which the contracts have been made without authority of law or in violation thereof" (R. v. III, 1512).
3. The Court applied to this case the doctrine of *United States v. Trinidad Coal Co.*, 137 U. S., 160; *Heckman v. United States*, 224 U. S., 413; *Causey v. United States*, 240 U. S. 399, and other similar cases (hereinafter called the "Land Patent cases") and held that the Government in the present case was not seeking equity—

"but fulfilling its duty to protect the public domain and to compel compliance with fundamental laws of the United States" (R. v. III, 1512).

In answer, we urge—

B. The general principles governing the application of the equitable maxim are—

(a) That it is settled by this Court, and is an established general doctrine that in equitable suits to rescind contracts a defendant who has expended money or parted with value pursuant to the terms of the contract, has an equity by reason thereof which a Court of Equity will recognize and enforce as a condition of granting relief to the plaintiff.

We cite the case of—

Neblet v. McFarland, 92 U. S., 101,

which was an action of this description, in which this Court said:

"In cases of this character the general principle is that he who seeks equity, must do equity; that the party against whom relief is sought, shall be remitted to the position he occupied before the transaction complained of. A court proceeds on the principle that as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction. This is no doubt the general rule."

"Assuming that the transaction ought not to have taken place, the court proceeds as though it had not taken place and returns the parties to that situation. Even in such cases the court applies the maxim 'He who seeks equity must do equity' and will thus secure to the wrongdoer in awarding this relief whatever is justly and equitably his due."

2 *Pomeroy Eq. Jur.*, 3d Ed., Sec. 910, 1627;

Marsh v. Fulton County, 10 Wall., U. S., at page 684.

"The plaintiff will not be granted relief until he has placed the defendant in *statu quo*, and

the plaintiff must have done everything in his power to save the defendant harmless."

Story Eq. Jur., 14th Ed., Sec. 957;
Stoffela v. Nugent, 217 U. S., 499;
Dold Packing Co. v. Doermann, 293 Fed., 315;
Twin Lakes Co. v. Dohner, 242 Fed., 402;
Levy v. Kress, 285 Fed., 838;
Shafer v. Spruks, 225 Fed., at p. 482;
Shearer v. Ins. Co., 262 Fed., 868.

(b) In cases where, as here, the defendant has not only expended moneys pursuant to the terms of the contracts attacked, but where such expenditures have been beneficial to the plaintiff, the necessity for the application of this rule is emphasized because otherwise the plaintiff would be unjustly enriched if he were granted relief without allowing the defendant the value of the considerations advanced by the defendant under the contracts.

(c) In this case there is no question upon the findings and record that full value has been received by the plaintiff from expenditures made by the Transport Company under the express terms of the rescinded contracts, which by such beneficial expenditure has accounted to the United States for the value of the royalty oil, with the same effect as though it had paid in cash (R. v. II, 570; III, 1391-2; 1421; 1425; 1427-8).

And the United States has voluntarily made compensation for this value by delivering the royalty oil.

U. S. v. Royer, 45 Sup. Ct. Rep., pages 519, 521.

If such compensation had not been made, equity would have compelled it. But here it has been made.

(d) If the plaintiff be allowed to recover the gross amount of the value of the royalty oil delivered to the Transport Company, and be not required to deduct therefrom the value received by the United States, it will have been unjustly enriched by the decree herein, and will have made the Transport Company pay double the value of the royalty oil.

(e) Our proposition cannot be answered by the claim

that the District Court has found or that the evidence shows that the contract was tainted with fraud, violation of public policy, conspiracy, or other wrongful act.

For nothing is better settled than that this principle of equity for which we contend applies whether or not fraud or other form of bad faith be present, since it is not the province of a court of equity to act as a criminal court to administer punishment, but rather in such classes of cases to restore the parties to the situation which they would have occupied had the fraudulent contract not been made.

Thus in *Stoffela v. Nugent*, 217 U. S., 499, which was an equitable suit to set aside a deed and mortgage on the ground of fraud, this Court required the plaintiff, as a condition of obtaining the relief which he sought, to pay back to the defendant the amount of money which the defendant had advanced under the contract, with interest, saying:

"It is true that the defendant acted fraudulently and knew also what he was about. But a man, by committing a fraud, does not become an outlaw *caput lupinum* (*Nat. Bk. v. Petrie*, 189 U. S. 423, etc.). He may have no standing to rescind his transaction, but when it is rescinded by one who has the right to do so, the Courts will endeavor to do substantial justice so far as consistent with adherence to law. (See *Pullman Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138, etc.) If Nugent (the plaintiff) is allowed to have the land free of all charge, and the defendant's claim is extinguished, Nugent gets much more than he bargained for, and the defendant is deprived of his equitable interest in Nugent's covenant to pay the mortgage deed (*Jones v. Wilson*, 180 U. S., 440, etc.) and is made to lose a large sum really due to him, not from any necessity of justice, but simply because he has acted badly, and, therefore, any treatment is good enough for him."

The same doctrine was applied in *Dold Packing Co. v. Doermann* (C. C. A., 8th Cir.), 293 Fed. 315, in

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which an equitable suit was brought to cancel a lease upon the ground of fraud, in which the Court held that:

"There is another principle that should have been applied in this case as a condition to the rescission and cancellation of the contract. The complaining party must make restitution of the benefits which he has received under the contract. The Dold Company made expensive and valuable improvements to the Omaha plant. The parties recognized that they were needed. They were made in accordance with the provision of the contract."

"It would be spoliation, not justice or equity. A court of equity does not sit for the punishment of criminals. If a fraudulent grantee has violated the criminal law he may be prosecuted and punished in the criminal courts."

Loos v. Wilkinson, 113 N. Y., 485.

(f) This principle of equity requiring restoration of the defendant where possible to the condition he would have occupied had the contract not been made, is not, we submit, limited as the Court below limited it, to cases where the plaintiff is wholly without remedy at law. This is so irrespective of the fact that the Circuit Court of Appeals in so holding entirely ignored the joint resolution of Congress, approved by the President February 8, 1924 (43 Stat. 5), under which resort to equity in this case was required. See pages 342 and 347 hereof.

1. The authorities cited by the Circuit Court of Appeals (R. v. III, 1508) consist of three cases: *Gil-liat v. Lynch*, 2 Leigh (Va.), 493; *Scott v. Scott*, 18 Gratt. (Va.), 150, and *Dranga v. Rowe*, 127 Cal., 506, which are apparently taken from 21 Corpus Juris, p. 175, §153-n.

Neither of these cases involved the rescission of any contract between the parties, or any advances made by the defendants in reliance upon any contract and it is submitted that they have no application to the case now at bar.

2. In many cases this maxim has been applied in equity where the plaintiff had a remedy at law.

Thus in *Canal Bank v. Hudson*, 111 U. S., 66, 82, this Court held that—

“where a party lawfully in possession (*i. e.*, of real estate) under a defective title makes permanent improvements, if relief is asked in equity by the true owner, he will be compelled to allow for such improvements,”

and applied the equitable maxim. But under these facts the owner had a perfect remedy to sue at law in ejectment had he desired; and if he had brought such a suit a court might not have given any relief to the person making the improvements.

Armstrong v. Ashland, 204 U. S., 285;

The Court will note that these two cases afford a perfect instance of alternative remedies—one in equity and one at law, and the maxim was applied in the equitable suit although the plaintiff had a remedy at law.

This is the doctrine of the New Jersey Courts, holding that although ejectment might lie, yet—

“when a suitor appeals to a court of equity, he must abide by its principles and submit himself to its policy and practice before relief will be afforded. ‘He who seeks equity, must do equity.’”

Bourgeois v. R. E. Co., 82 N. J. Eq. at p. 215.

3. In every case where rescission of a contract is sought upon the ground of fraud, plaintiff has an alternative remedy at law; and yet in every such fraud case the maxim of equity is applied if the plaintiff elects to seek equitable relief.

“To such a court (*i. e.*, a court of equity) the Farmers Company has elected to appeal for relief and not to a court of law for its damages, as it might have done.”

Shearer v. Ins. Co., 262 Fed., 868.

“Courts of law and courts of equity as a general rule have concurrent jurisdiction in cases of fraud.”

Whitcomb v. Shultz, 223 Fed., 268 at 274 (C. A., 2nd Cir.);

Merry Realty Co. v. Real Estate Co., 230 N. Y., at page 316;

Gould v. Cayuga County Bank, 86 N. Y., at p. 84; 99 N. Y., at p. 337.

“The same principles (*i. e.*, as to restoration of consideration parted with by defendant) apply where rescission is exercised without the aid of equity.”

Williston on Contracts, Sec. 1529.

The learned author recognizes throughout the discussion the alternative remedy at law.

See also, 2 *Chitty on Contracts*, p. 392.

We submit—

That the fact that the plaintiff had a remedy at law, whether adequate or not, in no wise prevents the application of this principle of equity in case where the plaintiff, instead of suing at law, exercises his election to come into a Court of Equity.

(g) The equity which exists in the Transport Company's favor, does not depend upon whether a contract obligation, express or implied, can be held to have arisen running to the Transport Company by reason of the expenditures made by it.

Nor does this equity depend upon ability to show that any contract obligation, if it ever existed, can now be enforced by the defendant against the United States in any court.

Hereinbefore we have endeavored to show that there was ample power given by the law to the Secretary of the Navy to make all the contracts and leases attacked; but even if this were not so, the equitable maxim should, we submit, clearly prevent the United States from recovering now the value of the royalty oil already delivered by the United States to the Transport Company for which value the Transport Company has already compensated the United States as found by the District Court (*R. v. III*, 1391-2, 1421,

1427-8), in the form of beneficial expenditures on United States property.

As we have already shown, equity abhors unjust enrichment. This doctrine is applied to secure—

“to the defendant something to which he is justly entitled by the principles and doctrines of equity, although not perhaps by those of the common law, something over which he has a distinctly equitable right. In many cases this right or relief thus secured to or obtained by the defendant under the operation of the rule, might be recovered by him if he, as plaintiff, the parties being reversed, had instituted a suit in equity for that purpose. But this is not indispensable, nor is it even always possible. The rule may apply and under its operation an equitable right may be secured or an equitable relief awarded to the defendant, which could not be obtained by him in any other manner.”

Pomeroy Eq. Jur., 3rd Ed., Sec. 386. See also page 2480.

Another instance of this rule is referred to in *Canal Bank v. Hudson*, 111 U. S. 66, where, in equity, relief for the value of permanent improvements is given to a defendant occupying land without title, although if the owner of the land had recovered possession of it, a court of equity would not grant active relief to the defendant because there was no contract.

The citation from Pomeroy, above quoted, is approved in *Farmers Loan & Trust Co. v. Denver L. G. R. Co.*, 126 Fed., 51 (C. C. A., 8th Cir.); *Union Cent. Life Ins. Co. v. Drake*, 214 Fed., 548 (C. C. A., 8th Cir.); *Central Imp. Co. v. Steel Co.*, 201 Fed., 824; *De Walsh v. Braman*, 43 N. E. Rep. at 599—(Illinois Sup. Ct.).

In this last cited case the Court said:

“If a distinctly equitable right to which the defendant is entitled, even though not at common law, the Court will make it a condition precedent to the relief of the complainant that he shall grant to the defendant such equitable right. More es-

pecially is this true where the rights of the parties grow out of the same subject-matter or transaction."

"A Court of equity may condition, and ought to condition, its grant of relief upon such requirements as are just and equitable although those requirements may not be enforceable in any other way."

U. S. v. Debell, 227 Fed. 779—(in which this principle was applied against the United States itself);

Levy v. Kress, 285 Fed. 839;

Shearer v. Insurance Co., 262 Fed. 868.

A further illustration of the applicability of this rule is given by Mr. Pomeroy in the note to Section 386 in which he refers to cases where a contract, under statute, is void for usury—in which case a defendant who is sued to obtain an equitable decree of rescission of the usurious obligation, will be awarded the amount loaned by him, with lawful interest, although he is absolutely without remedy in any other way.

The same doctrine was declared in *Hubbard v. Todd*, 171 U. S. 501, where this Court said:

"This was not a proceeding to enforce an alleged usurious agreement, but it was petitioner who sought the affirmative aid of equity, which he could only obtain by doing equity."

C. The maxim applies even though the contracts and leases were void because of lack of power to make them.

(a) The Circuit Court of Appeals states that to apply the maxim would ignore the distinction between authorized contracts and cases—"in which the contracts had been made without authority of law or in violation thereof" (R. v. III, 1512-13).

All of the cases cited by the Court in this connection are cases where the other party attempted to enforce contracts affirmatively against the United States in the Court of Claims.

Such were the cases of—

The Floyd Acceptances, 74 U. S., 666, 680;
Whiteside v. U. S., 93 U. S., 247;
Hooe v. U. S., 218 U. S., 322.
Chase v. U. S., 155 U. S. 489;
Sutton v. U. S., 256 U. S., 575.

In some of these instances the suit was based upon the theory that the express contract was valid; in some the theory that an implied contract enforceable affirmatively arose out of the payment of value.

Inasmuch as no action could be affirmatively maintained against the United States under the limited jurisdiction of the Court of Claims unless a contract, express or implied, existed, and inasmuch as we have shown that the equitable maxim here invoked does not depend upon the existence of any such contract, express or implied, and inasmuch as the United States is the party who is taking the affirmative in trying to recover value heretofore paid by it for the benefits it has received under the contracts and leases, it is submitted that the cases cited are in no wise inconsistent with the equitable doctrine which the defendant invokes in this suit.

In cases where such equitable rights arise, it frequently is of the greatest importance to ask who is the actor?

If fraud is involved, the guilty party can not maintain an affirmative action against him who is defrauded.

But if the innocent party sues in equity, the Court will always recognize such equities as the guilty party possesses—

“In other words, in a suit brought by the innocent party, the Court, in determining the equity to which he is entitled, should take into account what belongs to the other party, and award it to him. But this is done not for the wrongdoer’s sake (*Pullman Co. v. Central Tran. Co.*, 171 U. S., 138, 150) but because equity refuses to give the innocent party more than he is entitled to. The rule, however, is different where the guilty one is the plaintiff.”

Diamond Coal & Coke Co. v. Payne, 271 Fed., 362, 365-6.

In *United States v. Royer*, 45 Sup. Ct. Rep., page 519, cited *supra*, this Court said:

“We need not determine whether respondent might have maintained an action against the Government for unpaid salary; but clearly the money having been paid for services actually rendered in an office held *de facto*, and the Government presumably having benefited to the extent of the payment, in equity and good conscience he should not be required to refund it.”

The Government has voluntarily delivered to the Transport Company crude oil equivalent to the full value of all Pearl Harbor work, and of the fuel oil supplied by the Company.

The Transport Company is not seeking affirmative relief.

The question is not whether the Transport Company could maintain an action against the Government for the unpaid cost of the construction work. But payment having been made in full by the Government voluntarily delivering crude oil of value equivalent only to actual cost of the construction work and of the fuel oil delivered therein, and the Government concededly having benefited to the extent of all payments made by it,—and on the other hand, the Company having, by its expenditures, once accounted for the value of all royalty oil received, does not the foregoing authority lend much weight to the proposition that in equity and good conscience, the Court should not take

affirmative action requiring the company to again pay the value of this royalty oil?

(b) If it be true in this case that the Transport Company has no affirmative remedy against the United States in the Court of Claims, this fact, instead of being an argument against the equitable credits which the Company asks of this court of equity, is submitted to be a strong reason for granting such relief, inasmuch as only by this means can justice be done.

“Such a court (*i. e.*, a court of equity) ought to render such decrees as will justly adjudge and settle all the equities of each of the parties to this litigation.”

Shearer v. Farmers' Life Ins. Co., 262 Fed., 868.

(c) The reason why the contract is rescinded is immaterial.

It may be void or voidable for fraud.

It may be because the contract was made by a public official who had no authority.

It may be on account of duress—or any other reason whatsoever.

In every case where an affirmative suit is brought in equity to obtain the equitable relief of rescission and incidental remedies, the maxim which we invoke is applicable, and the plaintiff should not be unjustly enriched by any decree which may be made.

The principle which should govern in every one of these cases is that of the placing of the parties—

“as far as possible in the situation in which they would have stood if there never had been any such transaction.”

Neblet v. McFarland (supra).

Public corporations are subject to the rule.

“If the City obtained the money of another by mistake, or without authority of law, it is her duty to refund it.”

Chapman v. Douglas County, 107 U. S., 348;

Pimintal v. San Francisco, 21 Cal., 363;

Argenti v. San Francisco, 17 Cal., 282;

Hitchcock v. Galveston, 96 U. S., 341.

"The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

Marsh v. Supervisors, 10 Wall, 676;

Central Transportation Co. v. Pullman Palace Car Co., 139 U. S., 60-61.

Logan County Bank v. Townsend, 139 U. S. 67, 75-6.

It applies against the United States.

U. S. v. Debell, 227 Fed., 779 (and cases *infra*).

"This general rule (i. e., as to doing equity) applies irrespective of the grounds for rescission. It applies equally whether the ground for rescission was default in performance by purchaser, mistake, illegality of the contract, fraud, or that a deed to the property was delivered without the grantor's authority."

39 *Cyc.*, 1378, and cases cited;

Thomas v. West Jersey R. R. Co., 101 U. S. 71;

Pennsylvania R. R. Co. v. St. Louis R. R. Co., 118 U. S., 317.

The distinction which the Court below asserted between authorized and unauthorized contracts, does not apply where the United States is the actor in equity—where it has already compensated the defendant for the advances made, thus restoring the *status quo*—and where the defendants ask that this status be maintained and that they be not compelled to account twice for values they have received.

D. As to the claim that the United States "is not seeking equity" but is "fulfilling its duty to protect the public domain and to compel compliance with fundamental laws of the United States" (C. C. A. Opinion, R. v. III, 1512)—

The proposition has been expressed in somewhat different form by counsel for the Government in their brief in opposition to granting relief, in which they said that—

"In a suit brought by the United States of America to enforce a public statute and to maintain the public policy underlying it, the granting of relief will not be conditioned upon the reimbursement of the fraudulent defendant."

Answering this point, we note:

1. The question of fraud may be immediately dismissed from consideration, for, as we have shown, it is settled law that rescission in equity, even though based upon fraud, does not relieve the successful plaintiff of his duty to restore to the defendant amounts beneficially expended under the contract rescinded.

2. The point to be considered is, therefore, whether this action is brought to enforce a "public statute and its underlying policy," and whether any such supposed policy is so important as to deprive the defendants of the right to these credits.

3. When we inquire what the "public statute" and "public policy" is upon which the Government places such great stress, we find that they rely upon the claim that these construction contracts amounted to the establishment of a new fuel depot without specific legislation authorizing one at that place. We have fully discussed this point (*supra*, p. 145).

Disregarding for the moment the fact which our adversaries continually disregard, to wit, that whatever lack of statutory authority existed after March 4, 1913, was amply supplied when the Act of June 4, 1920, had been passed, their argument amounts only to this—

That Congress believed it wise to reserve to itself the power to designate the place where any new fuel depots were to be located and that because of such "public policy" as was involved in this conclusion, they repealed a former statute which left the matter in the hands of the Secretary of the Navy, and left the entire matter blank until further appropriation bills or express legislation of some other sort should be adopted; and that Congress must have been deemed to have

taken this matter so seriously that any private citizen who should thereafter contract with the Secretary of the Navy to build a fuel depot, and should actually build it with his own money, and has been repaid the amount expended, must be sternly refused the benefit of the equitable maxim which we are invoking because of his temerity in so doing, even though the United States becomes the actor in an affirmative proceeding to set aside the contract upon the simple ground that no such power existed.

4. Such an argument is in violation of the ordinary principles of equity and justice which would be applied even in cases of moral turpitude, is not supported by authority, is based upon suppositions contrary to the facts of the case, and will, we believe, be repudiated by this Court.

Truly it would give a surprising definition and effect to the term "public policy."

Presumably no statutes, whether affirmative or negative, whether important or unimportant, or of whatsoever nature they may be, are enacted by Congress without some reason.

And this is so in cases where no statute at all is enacted or a former statute is repealed, thus leaving some particular subject-matter without legislation.

If these "reasons" are always to be considered as matters of "public policy" within the sense of the language used by the Court below, then it must follow that the so-called "public policy" upon which the Court of Appeals and Government counsel rely, is always present in every instance where a Federal statute is under construction. And hence that whenever a contract is set aside because of lack of power, the defendant must be denied equitable relief however clearly it would otherwise be his due.

Such, we submit, is not and cannot be the law.

A mere reason of expediency or good judgment, while it may relate to the public business, does not attain the dignity of so important a general principle of "public

policy" as to overturn the universally applied principles of justice and equity.

And an ordinary statute relating to the administration of the Government's business is not a "public statute" within the sense of the term as used in the cases relied on by the Government, and hereinafter discussed.

United States v. Trinidad Coal Co., 137 U. S., 160, 170;

Heckman v. U. S., 224 U. S., 413, 447;

Causey v. U. S., 240 U. S., 399, 402;

We think we have already shown—

(a) That as a matter of fact the contracts in question did not provide for the establishment of any new fuel depot; and

(b) That if they could be construed as having done so, nevertheless the statute of June 4, 1920, gave the Secretary of the Navy ample power in that regard.

But, further than that, it is, we submit, true that even if there were a complete absence of power in the Secretary of the Navy to authorize the construction of the Pearl Harbor plant, nevertheless, there is no warrant in any statute or any decision for holding that the Transport Company, which did actually go ahead and construct the plant upon Government property, to the Government's unquestioned benefit, is barred by any consideration of "public policy" from being entitled to retain the value which the Government delivered to it as against such construction, and from thereby avoiding the necessity of paying the Government twice for the value of all royalty oil received by it.

We proceed now to the cases upon which the Government and the Court of Appeals relied in support of the public statute and underlying "public policy" argument.

All of the authorities upon which the Government counsel and the Court below relied in this connection are cases arising under various public land laws of the United States.

These cases—of which the *Trinidad Coal Company*, *Heckman* and *Causey* cases, *supra*, are the chief illustrations—are clearly exceptions to the general rules of equity, which rules, as this Court has declared, must always apply even as against the United States “except as limited by special statutory provisions.”

U. S. v. Detroit Lumber Co., 200 U. S., at p. 339.

In these cases (which we will hereafter call for convenience “land patent cases”) special statutory provisions, based upon important considerations of real public policy, existed.

The points to be noted as to these cases are that—

a. They did not involve contracts voluntarily entered into between the United States and others.

They are cases of land patents issued under the terms of mandatory statutes which gave the entryman as an act of grace from the sovereign, a right to his patent if he complied with the terms of the statute.

b. They were not entered into upon a business or commercial basis.

“In making regulations for disposing of them (*i. e.*, the lands) Congress took no thought of their pecuniary value, but in the discharge of a high public duty and in the interests of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by association of persons at prices below their actual value.”

United States v. Trinidad Coal & Coke Co., 137 U. S. 16.

c. These statutes contain specific provisions as to the conditions upon strict compliance with which only the entryman could become entitled to his patent.

Thus the *Trinidad Coal Co.* case involved violation of the provisions of Section 2350 of the Revised Statutes, providing that—

“The three preceding Sections shall be held to authorize only one entry by the same person or association of persons and * * * no associa-

tion of persons any one of which shall have taken the benefit of such Section either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof."

The patents issued in the *Trinidad Coal Co.* case were attacked upon the ground that this prohibitive clause had been violated, and the patents were set aside upon this ground.

The Court did not require the United States to refund to the defendant—

"moneys which it is alleged were furnished by the defendant to the several persons to whom patents were issued."

and disposed of the case upon the specific ground that—

"the controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions."

It is submitted that there is no similarity whatever between the *Trinidad Coal Co.* case and the one at bar.

In the *Heckman* case (224 U. S., 413), the violation of another positive and prohibitory statute was involved, to wit:

"That no full-blooded Indian * * * shall have power to alienate, sell, dispose of or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act," etc.

The United States maintained a bill on behalf of the Indians to set aside certain conveyances as being in violation of this statutory prohibition.

It is submitted that no similarity exists between that situation and the one in the case here at bar.

In the *Causey* case, 240 U. S. 399, a homestead entry was made by Causey—

"by taking an oath as was required that he had not, directly or indirectly, made or would not make

any agreement whereby the title which he might acquire would enure, in whole or in part, to the benefit of another."

This affidavit was false, and under the law, the making of it constituted the crime of perjury.

Sec. 2294, 8 Fed. St. Ann., 572.

It should be noticed, in this connection, that the Homestead Law originally contained a section expressly providing that if a patent was obtained in violation of the statutory conditions, the patentee should not be entitled to the return of the moneys which he had paid as a condition of cancelling the document which he had thus fraudulently and perjurally obtained.

While this section was subsequently repealed, it was the basis of the doctrine which was carried through the subsequent decisions.

In *Washington Securities Co. v. United States*, 234 U. S. 76, the issue of the patent was obtained by fraudulent proof to the effect that the lands were agricultural in character, and, therefore, subject to entry under the Homestead Act, whereas, in fact, they were known to be "valuable coal lands."

In *United States v. Poland*, 251 U. S. 221, the only other decision of this Court cited by the Circuit Court of Appeals, the patent was obtained by fraudulent violation of the prohibitions of the Homestead Act, to the effect that no one settler should enter and acquire more than 160 acres in a single body. This was done through the filing of a false perjurious affidavit.

Again, we have a case of fraudulent violation of the express prohibitions of the land statutes.

d. In the present case no violation of any such mandatory, prohibitive or criminal statute is involved.

So far as the law is concerned, the Court below simply held that the Secretary of the Navy had no authority to make these contracts.

In none of the above cases was the United States ask-

ing in addition to its prayer for cancellation, for the return of money or of things of value which had been delivered by it to the defendant in consideration of benefits received by the United States from the defendant.

e. In all of the Land Patent cases cited by the Court below the United States was acting not in its commercial but in its sovereign capacity.

In the case at bar, so far as the Transport Company is concerned, the transaction in question was a contract whereby labor and materials were to be furnished to the United States in the construction of a storage plant and fuel oil was to be delivered into that plant. We submit that clearly the United States was acting in its commercial—its private—its business—capacity and not as a sovereign.

“If it (*i. e.*, the United States) comes down from its position of sovereignty and enters the domain of commerce it submits itself to the same laws that govern individuals there.”

Cook v. U. S., 91 U. S., 389;

See Hollerbach v. U. S., 233 U. S. 165.

That a construction contract is a commercial contract was held in *U. S. v. Fuller Co.*, 296 Fed., 180 (Dist. Court, Kan.), citing the foregoing authorities.

“We have many times decided that when the United States, through their duly authorized agents and officers, enter into contract arrangements and stipulations with their citizens in matters pertaining to the public service and in the mode provided by law, they *pro hac vice* relinquish their sovereign character and submit themselves to those rules of justice and right which all just governments administer and enforce between man and man.”

Mann v. U. S., 3 Ct. Cl., 404;

U. S. v. No. Am. Comm. Co., 74 Fed. Rep., 151.

There was no statutory compulsion upon the government or upon any official to enter into the arrangements attacked in the present case. There was no express

provision of law under which anybody had a right to demand that if he had performed the statutory conditions he was entitled to have these contracts or leases made. These instruments were executed in the exercise of the discretion vested in the Secretary of the Navy and stand upon the considerations that actuate the government or any official thereof in acquiring supplies or property of any kind for the United States.

All such matters are purely commercial. And no such matter involved any such relationship as to make the private contractor a trustee for the government, or as to govern the transaction by any rules other than those applicable between private individuals.

"No cases have been found which hold that a person who is not the officer or representative of the government occupies, in dealing with it, the position of, or a position akin to, that of a guardian or trustee. When the government enters into a contract with an individual or corporation it divests itself of its sovereign character as to that particular transaction and takes that of an ordinary citizen and submits to the same law as governs individuals under like circumstances."

U. S. Bentley, 293 Fed. Rep., 235; citing

Cook v. U. S., *supra*;

U. S. v. Products Co., 300 Fed., 451;

Lyons v. U. S., 30 Ct. Cl., 352.

"The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf and obligations which would be implied against citizens under the same circumstances will be implied against them."

Bostwick v. U. S., 94 U. S., 53.

f. The Circuit Court of Appeals fell, we submit, into clear error when it said that

"in the present case, although the suit is in form a suit to cancel leases of the public domain, the United States is not seeking equity. It is but fulfilling its duty to protect the public domain and to compel compliance with fundamental laws of the United States" (R. v. III, 1512).

The learned Court forgot, we think, that if the United States were not "seeking equity" in this case it certainly could have no status to maintain a demand against the Transport Company for an accounting for the value of royalty oil delivered to it, or to obtain an injunction or receivership in connection with the subject-matter of the litigation.

Furthermore, it is not merely seeking to cancel leases of the public domain, but two contracts, providing in part for construction work and in part for supplying oil, involving only personal property.

The lands which were covered by the leases had long been expressly withdrawn from the public domain and had been set aside for purposes connected with the practical operation of the United States Government in its executive branch, precisely as is the case in the instance of every post office, navy yard, warship and other physical appurtenance of the conduct of the Government.

Unless every article of physical property owned by the United States and actually utilized in the conduct of its executive business can be considered a part of the "public domain," and to such an extent that every contract made by the United States in relation thereto is attended by such sanctity that the United States is not subject to the rules of equity which govern all private individuals, then contracts relating to these Naval Reserve lands must be considered as within the rule amply covered by the authorities herein cited, to the effect that when the United States acts in its proprietary capacity and not in its sovereign right, it must be bound by the same rules, which, in order to do justice, are applied in the case of private litigants.

And this point can be made even more emphatic in the case of the two contracts since these contracts had to do with facilities provided upon property which had for years been set aside and used by the United States solely as a Navy Yard. Under one of the contracts the Transport Company delivered, and the Government

accepted, and retains, 1,453,274 barrels of fuel oil—at an actual cost shown and agreed upon in this case (R. v. III, 1201; v. II, 809-11; 816; 818). How defendant's right to reimbursement for that cost can be connected with the public domain is not evident.

The term "public domain" in the sense in which it is used by the Government counsel can have no possible meaning which results in said contracts being governed by special, harsh, unjust and punitive rules.

In bringing this suit the United States is not seeking to "compel compliance with fundamental laws of the United States" except in the broad sense applicable to every case which involves not the violation of an express statutory prohibition, but the mere interpretation of a general law. There are no such laws of the United States involved in this action as were involved in the land patent cases.

Hence, we submit that not merely is the United States bound by the general rules of substantive law which would affect an individual, but that it is also bound by all rules regulating the remedy invoked which would apply if an individual were the plaintiff.

"When the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject-matter. The absence of legal liability in a case where, but for its sovereignty, it would be liable, does not destroy the justice of the claim against it. When the question concerns what would be paramount claims against a vessel libelled by the United States were the vessel in other hands, the moral right of the claimant is recognized."

U. S. v. Thekla, 266 U. S. at page 340.

In this case a judgment for damages against the United States was entered and approved by this Court, although the claim could not have been asserted affirmatively against the Government.

The Western Maid, 257 U. S. 419, serves to empha-

size the correctness of our position here and the support which *The Thekla*, *supra*, affords to that position. In the former of these cases the Court held that the United States could not be held liable for damages resulting from collisions the fault of vessels owned by it absolutely or *pro hac vice* and employed by it in public purposes, when the libels were brought by the owners of the vessels collided with. The Court held that "The personality of a public vessel is merged in that of the sovereign" and as "the United States has not consented to be sued for torts" it could not be said that in a legal sense it has been guilty of a tort. As the libel in admiralty was in substance a tort action against the owner of the vessel, and that owner the United States, the suits could not be maintained. In the earlier case of *The Siren*, 7 Wall. 152, the Court held that the proceeds of the sale of that vessel, which at the time of collision with the sloop Harper was being operated by the United States, were subject to the claim of the Harper's owners for damages. "The ground of that decision was that when the United States came into court to enforce a claim it would be assumed to submit to just claims of third persons in respect of the same subject matter. 7 Wall. 154." In a word, *The Siren*, as the *Western Maid* recognizes, is authority for holding that while a ship-owner could not enforce his claim by the institution of an original action against the Government, nevertheless when the sovereign comes into court and institutes action to enforce a claim it submits itself to any judgment which justice requires shall be entered in that proceeding in respect of the subject matter. *The Thekla*, 266 U. S. 328, reaffirms the doctrine of *The Siren* and distinguishes that of *The Western Maid*.

In respect of the subject-matter of *The Thekla* case it is to be noted, first, that Congress had not given consent to be sued; and, second, that Congress had not authorized any officer of the Government to contract that the Government would respond in damages re-

sulting from collision committed by a Government vessel. Nevertheless, said this Court:

"It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act." 266 U. S. 328, 341.

Also—

"The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and on the other hand the reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest. As has been said in other cases the question of damages to the colliding vessel necessarily arose and it is reasonable for the Court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States." (266 U. S. 339-341)

Here the United States not only came into court to assert a claim but it did so pursuant to an express law so directing as to these very contracts and leases (43 Stat. 5). Moreover, by that statute a suit in equity was imperatively directed: "The President * * * is authorized and directed immediately to cause suit to be instituted and prosecuted for the annulment and cancellation of the said leases [of June 5 and December 11, 1922] and contract [of April 25, 1922] and all contracts incidental or supplemental thereto [of December 11, 1922], to enjoin the further extraction of oil from the said reserves under said leases or from the territory covered by the same, to secure any further appropriate incidental relief," etc. Only in equity could a suit for cancellation, injunction, and further appropriate incidental relief be instituted and prosecuted. Whatever may be said regarding the invalidity of a legislative direction to the President in respect of the executive function of taking care that the laws be executed (Constitution, Art. III, Sec. 3), it is undoubted

that by law the Congress may direct what courts and character of proceedings shall be resorted to by the United States in respect of matters pertaining to the disposition and regulation of property belonging to the United States (Art. IV, Sec. 3, Clause 2).

Counsel in this suit did not select Equity to avoid a multiplicity of suits. They acted under legislative mandate, regarding the specific subject-matter of this suit, which directed a suit to accomplish that which came within the exclusive jurisdiction of a court of equity. Having gone into that Court to assert its claim the action carried with it the acceptance of the full power of that Court to decide all questions in accordance with the principles of equitable jurisprudence. By that act the United States so far took the position of a private suitor as to agree that justice should be done with regard to the entire subject-matter of the suit.

A similar principle is asserted in *U. S. v. Stinson*, 197 U. S. at page 205.

“With a few exceptions growing out of considerations of public policy, the rules of law which apply to the government and to individuals are the same. There is not one law for the former and another for the latter”—

McKnight v. U. S., 98 U. S. 179, in which the Court refused to allow money, paid by the United States under an assignment of claim which was void, to be recovered.

“Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors seeking, in the administration of the court of equity, relief.”

Brent v. Bank of Washington, 10 Pet. at 614:
U. S. v. Arredondo, 6 Pet., 712.

This principle has been applied in many cases in the lower courts, and in some of these cases rights have been enforced against the United States which could not have been enforced against it had the other party been the actor.

U. S. v. Debell, 227 Fed. 779;
U. S. v. Oklahoma Gas Co., 297 Fed. 575;
Judson v. U. S., 120 Fed. 643;
U. S. v. White, 17 Fed., 565;
U. S. v. Budd, 43 Fed., 464;
Church v. Church, 71 Fed., 252;
U. S. v. Commercial Co., 74 Fed., 145;
U. S. v. Diamond Coal Co., 254 Fed., 286;
U. S. v. Commissioners, 254 Fed., 543.
Mountain Copper Company v. United States
 (C. C. A. 9), 142 Fed. 625, 629;
United States v. Dominion Oil Company, 241
 Fed. 425 (D. C. S. D., Cal.).

"The underlying principle of all the decisions is that when the sovereign comes into court to assert a pecuniary demand against a citizen the court has authority and is under duty to withhold relief to the sovereign except upon terms which do justice to the citizen or subject as determined by the jurisprudence of the forum in like subject-matter between man and man."

Walker v. U. S., 139 Fed. at 413.

g. The Circuit Court of Appeals felt that if it upheld the allowances of credits to the Companies, as provided in the District Court's decree, it would "require the Court to exercise functions which belonged to the legislative branch of the Government * * * and to make judicial disposition of the public resources of the United States" (R. v. III, 1512).

But if this were a sufficient reason against applying the maxims of equity to protect a defendant in cases where the United States has voluntarily gone into equity, then this maxim could never be applied in favor of a defendant in an equity suit brought by the Government.

As we have already shown, no such limitation exists.

If the United States seeks to rescind a contract, it must restore or maintain the *status quo*, even though the defendant could not bring an affirmative action in equity or at law to reimburse himself.

In the *Thekla* case (*supra*), this Court enforced a moral right against the United States and "judicially disposed" of many thousands of dollars, although the party in whose favor this disposition was made, could not have maintained an affirmative action against the Government.

And so it is in every case where an equity exists—even in favor of a wrongdoer—provided that the United States has elected to seek relief from a court whose function it is not to punish but to do justice as to all points involved in the controversy.

h. Again, even in the *Heckman* case, involving as it did a mandatory statute, this Court held that the Court might provide for a return of the consideration, if this could be done "consistently with the cancellation of the conveyances and with securing to the allottees the possession of the restrictive lands in accordance with the statute."

Heckman v. U. S., 224 U. S., 447.

This part of the opinion was entirely overlooked by the Court of Appeals.

In the present case a provision directing that the consideration advanced by this defendant under the terms of the contracts, and thereafter repaid it by the United States, be allowed to be retained by this defendant, can in no possible manner adversely affect the right, if any, of the United States to set aside the contracts attacked.

i. So far as the Transport Company's claim to this credit is concerned, it involves no questions as to the public domain.

The questions have to do solely with the value of personal property.

On the one side, the Transport Company is debited with the value of royalty oil coming not merely from the lands covered by the leases made to the Petroleum Company but from all leases made upon any part of the two Naval Reserves.

(We wish to make it clear that long prior to the making of these contracts, many leases had been made by the Government upon various parts of Naval Reserve No. 2, which lies adjacent to Naval Reserve No. 1, and that a very large part of the royalty oil received by the Transport Company under both of its contracts, was acquired by the Government, not under any leases made to the Petroleum Company, but as a result of these separate and independent leases on different property made with a large number of lessees.)

On the other side, the Transport Company claims to be credited with the expenses incurred under a contract for fuel oil and storage facilities therefor at the Naval Station at Pearl Harbor.

The transaction is submitted to be clearly a commercial question and directly within the doctrine of the authorities distinguishing between the position of the United States acting commercially and the United States acting in its sovereign capacity.

U. S. v. Bentley, 293 Fed. Rep., 235;

U. S. v. Commercial Co., 74 Fed. Rep., 151;

U. S. v. Products Co., 300 Fed. Rep., 451.

j. Since the only effect of the construction which the lower Court has given to the statutes here involved is to make the contract *ultra vires*, and since no question of violation of any real public policy is involved, the principle of the *Causey* and other cases cannot, it is submitted, apply.

Chapman v. Douglas Co., *supra*.

k. This cause is covered by the observations of this Court in *United States v. Detroit Timber Co.*, 200 U. S., pp. 321, 339.

“In passing upon transactions between the Government and its vendees, we must bear in mind the general principles of equity, and determine rights upon those principles, except as they are limited by special statutory provisions.”

In the case now at bar there is no such special statutory limitation upon the operation of the equitable rule.

l. The governmental agencies having charge of this suit had no power to elect the forum or the remedy. That had been done by a law expressly passed for this suit (43 Stat. 5, Joint Resolution, approved by the President February 8, 1924).

m. The United States, pursuant to this special law, invoked the jurisdiction of equity not merely to avoid multiplicity of suits but to obtain advantage of equitable remedies (affirmative decree of rescission, accounting, injunction, receivership, etc.), which it could not enjoy at law.

It seeks equitable relief and not merely protection against a duplication of proceedings at law.

There are only two defendants.

The mere desire to join these two defendants in one suit would, it is submitted, not give a court jurisdiction by itself if it did not otherwise exist (239 Fed. at p. 411).

And in the plaintiff's bill it avers inadequacy of legal remedies as its first ground for asking equitable intervention (R. v. I, 22).

n. It is earnestly submitted that the refusal to apply the principle that he who seeks equity must do equity in favor of the Transport Company as against the United States, under the facts and the authorities above referred to, is not consistent with the law as laid down by this Court and other Federal authorities, is contrary to the practice in cases of this nature, is not supported by the authorities relied upon, and would convert a court of equity into a tribunal for the administration of penalties instead of a tribunal where purely equitable doctrines are applied.

"The relief which a court may grant should not be harsh or oppressive on the defendant, or in any other manner work injustice."

Levy v. Kress, 285 Fed., 838.

"A Court of equity * * * ought as nearly as possible to do equity. Its province is not the infliction of punishment."

Shearer v. Insurance Co., 262 Fed., 868.

In good faith the Secretary of the Navy decided that contracts providing for the exchange of crude oil from the naval reserves for fuel oil and other petroleum products, and storage facilities in which to keep and from which to handle the same for naval purposes, could and should be made (R. v. 702; 982-3). The legal adviser provided by the law for the Secretary of the Navy formally advised him of the legality of this (R. v. II, 702). Officers and directors of the defendant were informed of that legal opinion and of the decision of the Secretary of the Navy in the premises (R. v. 727). The President and the Congress of the United States, as well as the head of its Navy Department, with full knowledge that this great and expensive work was in progress, permitted it to proceed to the end that the Government might have the manifest advantage thereof (Sen. Doc. 210, 67th Congress, 2d Sess., June 7, 1922, pp. 2; 10-11; 13; also R. v. III, 1159-61). The work has been completed, 1,500,000 barrels of fuel oil are in storage at Pearl Harbor. The Government has delivered to the company all the crude oil called for by the contracts. In such circumstances no equitable principle and no theory of public policy can possibly warrant a court of justice in holding that the Government may retain the benefits accepted by it under these contracts, and at the same time require the defendant to yield back that which has been delivered to it in consideration thereof.

POINT XVII.**The Circuit Court of Appeals Also Erred in Refusing to the Petroleum Company the Credit Allowed by the District Court.**

1. In support of this proposition the Petroleum Company relies upon each and every argument included in Point XVI relating to the position of the Transport Company.

2. It also desires to refer particularly to the cases of *Pine River Logging Co. v. United States*, 186 U. S., 279, *Woodenware Co. v. United States*, 106 U. S., 432, and *Union Naval Stores v. United States*, 240 U. S., 284.

These cases, which are illustrations of a number of other cases cited by Government counsel, were particularly alluded to by the Circuit Court of Appeals in its opinion (R. v. III, 1513) as a basis for holding that the Petroleum Company was in the position of trespasser upon Government lands and, therefore, had no right to retain the cost of improvements made upon those lands.

None of these cases is applicable for the reason that in none of them did the party sued by the Government take possession and make expenditures pursuant to the terms of any contract which the Government had executed or purported to execute, which contract required the defendant to do the things which he did.

The rule which the Court invoked has reference solely to the cases of trespassers—not under contract.

The rule which the Petroleum Company invokes in this case is the rule applicable to all situations where contracts came into existence, where they are sought to be rescinded, where expenditures have been made by the defendant pursuant to the compulsory terms of these contracts, and where these expenditures are beneficial to the party seeking the aid of equity. In such cases, the maxim which we invoke applies.

In the case at bar, the United States is not suing in its capacity as *parens patriae*, i. e., to assert a right affecting public welfare, but in its private capacity as a property owner. *Denver, etc., R. R. Co. v. U. S.*, 241 Fed. 614, 618-19, in which the Circuit Court of Appeals, 8th Circuit, held that when the Government comes into court as a land owner asserting a property right it "has no special privileges as a litigant. Its rights are no greater, no higher, no better, and no less than those of an individual."

That the expenditures made by the Petroleum Company were made on the leased lands, were necessary in the development and operation thereof under the terms of the leases and in order to comply with and perform those terms, were made "under proper supervision, in an economic and efficient manner, and the said improvements were all of the full value paid therefor to the lands covered by the aforesaid leases" of June 5 and December 11, 1922, that the expenditures were properly accounted for and vouchered, and the work actually cost the amounts allowed by the District Court, are all facts admitted by plaintiff (*R. v. III*, 1199-1201) and found by the District Court (*ib.* 1428). That the Secretary of the Navy had ample legal authority under the Act of June 4, 1920, to lease lands in the naval reserves is too clear for argument and has never been disputed. That he made the leases of June 5 and December 11, 1922, is proved beyond doubt. In these circumstances we submit there is no principle of equitable jurisprudence justifying the right of the Government to the useful and necessary improvements on the leased land and denying the right of the defendant to obtain the equivalent thereof which it has already received (*R. v. III*, 1199-1200).

3. As to both the Petroleum Company and the Transport Company, every dollar was paid pursuant to the compulsory provisions of the contracts and leases.

4. In both cases an equity is raised by such payment which should be applied so as to require the plaintiff to maintain each defendant in the position occupied before the contracts and leases sought to be rescinded were made. This position has been reestablished by the receipt of oil, etc., by the Petroleum Company from the leased lands.

5. In neither instance is there physical or legal difficulty or new affirmative action involved.

6. To require the Petroleum Company to yield back the value of every barrel of oil extracted from these lands, under the leases, and to enrich the Government by turning over to it the valuable permanent improvements, necessary to the production of that oil and to the lands' continued operation, is not, we submit, justice nor equity, but the imposition of an excessively harsh penalty—a thing abhorred by equity.

Conclusion.

The entire record is before this Court on writ of certiorari for its examination:

“It is undoubted that by the operation of the writ of certiorari, * * * the entire record is before us with power to decide the case as it was presented to the Circuit Court of Appeals, by reason of the writ of error issued out of that Court. Certain is it also that the Judiciary Act of 1891 contemplates that, as a general rule, where under its provisions a case comes to this Court on certiorari, * * * it will be disposed of so that the mandate of this Court, to avoid circuitry, will go directly to the Circuit (District) Court.”

Lutcher & Moore Co. v. Knight, 217 U. S. 257, 267.

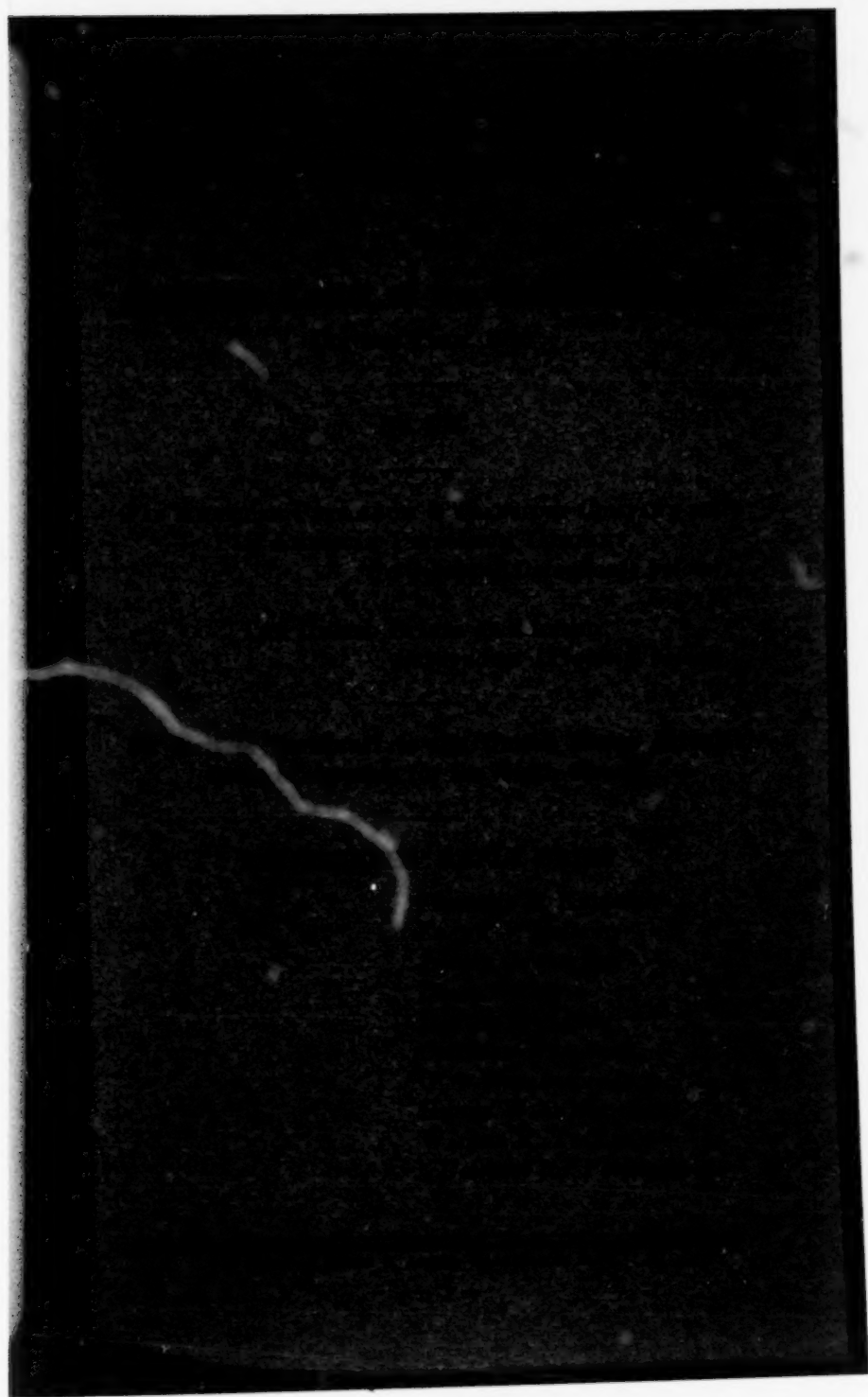
To the same effect are *Delk v. St. Louis & S. F. R. R. Co.*, 220 U. S., 580; *The Conquerer*, 166 U. S. 110.

We respectfully submit that the decrees of the Circuit Court of Appeals and of the District Court should

be reversed and the cause remanded to the latter Court with directions to dismiss the bill.

FREDERIC R. KELLOGG,
FRANK J. HOGAN,
JOSEPH J. COTTER,
DEAN EMERY,
HAROLD WALKER,
CHARLES WELLBORN,
OLIN WELLBORN, JR.,
HENRY W. O'MELVENY,
WALTER K. TULLER,
Counsel for Petitioners.

September 13, 1926.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1926

No. 305.

PAN AMERICAN PETROLEUM & TRANSPORT COMPANY and
PAN AMERICAN PETROLEUM COMPANY,
Petitioners (Defendants below),
v.

THE UNITED STATES OF AMERICA,
Respondent (Plaintiff below).

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF

We ask the Court's permission to call attention to
the following points:

I.

As to the Interpretation of the Law of June 4th, 1920.

Since the filing of briefs in this case the Circuit
Court of Appeals, Eighth Circuit, on September 28,
1926, rendered opinion in the case of *United States v.*
Mammoth Oil Company, which case involved a lease of

Naval Reserve No. 3, known as the Teapot Dome, and a contract, incidental to said lease, for the construction, in exchange for crude oil from that reserve, of storage facilities at the naval station, Portsmouth, New Hampshire, and the filling thereof with fuel oil. In that case the Circuit Court of Appeals, Eighth Circuit, Kenyon and Van Valkenburgh, Circuit Judges, and Cant, District Judge, opinion by the first named, said, on the subject of the authority of law for such a lease and contract, the following:

“II.

“LEGALITY OF THE LEASE AND CONTRACT

“These instruments were made under the authority of the Act of Congress of June 4, 1920 (hereinbefore set out). The Government contends that this Act is not an independent Act; is dependent on other general statutes preceding it, and must be construed in connection therewith. Appellees' contention is that the Act is full and complete, covering without reference to other statutes the method of doing the things therein provided. The Act of June 4, 1920, deals entirely with the naval petroleum reserves. These had been only incidentally referred to, if not practically excluded from the Act of February 25, 1920. The purpose of the Act of June 4, 1920, was to preserve the oil in these naval reserves for the benefit of the Government in such manner as Congress at that time deemed wise, viz., to place the matter almost exclusively in the hands of the Secretary of the Navy. It is of vital importance that the Government's oil in these reserves shall not be drained away for the benefit of private enterprise, but that it shall be preserved in the interest of national defense. This Act is as broad as an Act dealing with this subject could well be. It con-

fers upon the Secretary of the Navy wide discretion as to administering the naval reserves, directing him to take possession of the properties within the same as are or may become subject to the control and use by the United States for naval purposes and 'to conserve, develop, use and operate' these properties 'in his discretion.' He may do this directly or he may do it by 'contract, lease or otherwise,' and he is further given the right to use the oil that may be secured by contract, lease or otherwise, or to 'store, exchange or sell' the same.

"Counsel for appellees argue that the language of this Act compels the Secretary of the Navy to employ all of the methods suggested, and that the term 'in his discretion' applies to the method by which he shall 'conserve, develop, use and operate.' We do not agree with this view. It is apparent that, although the conjunction 'and' is used, Congress intended that the Secretary should employ any or all of these methods as his discretion should dictate. Certainly if the oil can be properly conserved in the ground the Secretary of the Navy is not under compulsion to develop the properties. What he does must be for the benefit of the United States. That is the limitation of his discretion. If he shall determine that the oil cannot be properly conserved within the ground, then he has the right to develop, use and operate the properties directly or by contract, lease or otherwise. Having decided in the exercise of a wise discretion that it is for the interest of the Navy, and therefore of the United States, to develop and operate the properties, he may do this directly, which will require the expenditure of money, or he may do it by contract or by lease. Having made a lease, which in its very nature implies the taking of the oil from the ground, and such oil being crude and not fuel oil in proper condition to be used by the Navy, he may store it. He may sell it, in which case the proceeds must be turned

into the Treasury of the United States or he may exchange the same. While appellant concedes that the right to exchange crude oil for fuel oil is proper and legal, it denies the right to exchange the crude oil for storage facilities for fuel oil.

"If the Act of June 4, 1920, as it seems clear it did, authorize the Secretary of the Navy to store the fuel oil, it would follow that it could be stored at established fuel depots, and if none such existed then places for the storage of the oil would have to be fixed and provision made for storage tanks. It would not be an arbitrary discretion exercised by the Secretary of the Navy if he in exchanging royalty crude oil for fuel oil provided also for an exchange of crude oil for storage tanks. There was no restriction upon the Secretary of the Navy as to the amount of oil that he might have extracted from the ground either directly or by contract or lease. The argument does not appear to us sound that under this Act it must be held that the Secretary of the Navy could exchange oil for anything, such as battleships or airplanes, or else that it was limited to exchange of crude oil for fuel oil. If such limitation was intended it would have been a simple matter to have expressed it in the Act. It is not for the Court to supply the same. The purpose of the Act was to protect the oil of the Government. It would not be in consonance with the purpose of the Act to exchange the oil for battleships or airplanes, or land to raise a food supply for the Navy, or materials to weave cloth for the uniforms of marines, but it would be consonant with the purpose of the Act to provide storage places for the oil. And under the Act express authority is given to store the oil and gas products received from the Naval Reserves. It may be that the use of the oil certificates provided in the lease in payment for the construction of storage tanks was intended to prevent the proceeds of the sale of the oil going into the Treasury of the United States. If

Congress, however, had passed an Act that permitted this, then the Navy Department had the right to exercise the power so granted.

"Nor do we think the Act invaded the exclusive right of Congress to appropriate funds for naval uses. There is a distinction between the appropriation of moneys by Congress, and the use of Government property incidental to administration under an adequate grant of authority. We are convinced that the appropriation of \$500,000.00 is not a limitation upon the construction of storage tanks. Certainly it does not limit the amount of royalty oil to be exchanged for fuel oil. The appropriation ended July 1, 1922, but the right to arrange for the extraction of oil in the method provided by the Act was not limited to July 1, 1922. If the Secretary of the Navy attempted to develop and operate the naval reserves directly this appropriation would undoubtedly be necessary to commence such operations. It would have been necessary then to call upon Congress for further money, but the appropriation was not necessary where the properties were to be developed by contract or lease. If the Secretary of the Navy should find it essential to immediately develop a naval reserve in order to prevent waste of the oil or depletion thereof by wells on adjacent property, and said oil could not be used for the current needs of the Navy, it would be his duty to store the same or sell or exchange it in his discretion. If it could not be sold it must be stored, and the appropriation of \$500,000.00 under circumstances easily imaginable and entirely possible would obviously be inadequate to provide storage facilities, and were Congress not in session no relief from that source could be found. We think the appropriation in the Act referred to expenditures made necessary if the Secretary in his discretion entered into a direct development and operation of the properties.

"That the Act of June 4, 1920, even though a

rider to an appropriation bill, was complete in itself, and that it did not repeal, nor was it dependent on, other Acts with relation to the public lands, is our conclusion. It constitutes an exception thereto. In *Washington v. Miller*, 235 U. S. 422, 428, the Supreme Court said: 'Where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general.' In *Witte v. Shelton et al.*, 240 Fed. 265, 268, this Court said: 'Specific legislation upon a particular phase of a single subject is not affected by a subsequent law relating to a general subject which neither refers to the earlier law nor is repugnant to nor inconsistent with it, but the two laws must stand together, the former as the law of its specific phase of the subject, and the latter as the general law relating thereto. *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1; *Townsend v. Little & Others*, 109 U. S. 504, 512; *Kepner v. United States*, 195 U. S. 100, 125; *Rodgers v. United States*, 185 U. S. 83, 87; *Hemmer v. United States*, 204 Fed. 898, 903; *United States v. Mathews*, 173 U. S. 381.

"This special statute, not repealing the general statutes, the two stand together, one as the law relating to a special thing, viz., the naval reserves,—the other relating to general public land matters. It was therefore unnecessary that there be competitive bidding or advertising as to the making of the lease and contract, and other statutes with relation to the method of transacting the general public business of the United States were not applicable to this situation, the special statute fully covering the situation.

"It is urged that the lease is void because the Secretary of the Navy had abdicated the powers conferred on him by the Act. This record shows

great activity on the part of Secretary Fall in leasing Naval Reserve No. 3, and more or less passivity on the part of the Secretary of the Navy. Fall's letter to Doheny of July 8, 1921, (hereinbefore set out) and Denby's letter to Fall of October 25, 1921, in which he said: 'That all leases and contracts, except as provided in paragraph 6, will be arranged and consummated by the Interior Department, copies (of some being furnished to the Navy Department as a matter of information and record only,' would seem to come close to the assumption of exclusive authority by the Secretary of the Interior, and an abdication on the part of the Secretary of the Navy of the powers granted by the Act of June 4, 1920. The Executive Order of May 31, 1921, however, while giving great power to the Secretary of the Interior, did not of necessity remove absolutely the administration and control of these reserves from the Secretary of the Navy in such a way as to violate the Congressional Act. In fact, it seemed to retain just enough control in the Navy to be within the law of June 4, 1920. It provided that no general policy as to drilling or conserving lands located in a naval reserve should be changed or adopted except upon consultation, and in cooperation, with the Secretary or Acting Secretary of the Navy. The President had no authority to transfer from the Secretary of the Navy to the Secretary of the Interior powers which Congress had provided should be exercised by the former. The validity of this Executive Order does not seem to have been seriously questioned in the presentation of the case to this Court. It was proper, of course, for the Secretary of the Navy to act through competent subordinates. Of necessity this must be so. We conclude that enough control was exercised by the Secretary of the Navy through Admiral Robeson to preclude a court from holding that the entire power granted by the Act of June 4, 1920, to the

Secretary of the Navy had been assumed by the Secretary of the Interior.

"The Act of June 4, 1920, creates no power in the Secretary of the Navy to establish fuel depots. That is a matter for Congress, long so recognized. The lease, however, does not necessarily involve the establishment of fuel depots other than those existing. It does involve the providing of facilities for storage. Such storage might have been at fuel depots already established, and so construed the lease and contract are not open to the objection that by their terms they established fuel depots. Exceeding power granted does not destroy it. We are not satisfied that the acts contemplated by the lease were beyond the authority granted to the Secretary of the Navy, and the supplemental agreement must be considered as merely a necessary incident of the lease.

"The work thus far done in constructing storage facilities has been at the Portsmouth Navy Yard. The record does not disclose whether or not this Navy Yard was a fuel depot.

"The Circuit Court of Appeals for the Ninth Circuit in the *Pan-American Petroleum Co. et al. v. United States*, 9 Fed. (2d) 761, has held that contracts with reference to another naval reserve, executed under the authority of the same Act and involving a similar question of legality, were not authorized by the Act.

"With great respect for the ability and learning of that distinguished Court, we find ourselves unable to arrive at the same conclusion as to this lease and contract. That case is now in the Supreme Court of the United States and this legal question will there be settled. We content ourselves with saying that on this branch of the case, as at present advised, we are in accord with the conclusion reached by the trial Court, that the authority granted by the Act of June 4, 1920, is sufficient to authorize the lease and contract in question."

II.

As to the Exchange Power.

Our adversaries admit that the statute gave the Secretary power to exchange crude oil for fuel oil (Govt. Br., p. 209).

In the face of this admission, how can they successfully contest the right of the Transport Company to the credit of \$1,986,142.47 (R. III, p. 1432) representing the cost price of fuel oil actually delivered by the Transport Company to the Government, and found as a fact by the District Court (*to which finding no assignment of error was made by the Government upon its cross appeal*) to have been

“accepted and retained by the United States of America, and is still retained by it, and that the same was and is of value and benefit to the United States of America equal to the cost to the said defendant of furnishing and transporting the same as aforesaid” (R. III, 1427-8),

together with the further credit of \$259,569.11, being interest thereon?

These credits were disallowed by the Court of Appeals.

Can any argument based upon the *Causey* and other land patent cases be of such force as to entitle the Government to retain this merchandise—this personal property—without allowing the Transport Company to be compensated for its value out of the royalty oils voluntarily delivered to the Transport Company by the Government?

And if this be—as we respectfully insist it must be—true, then does it not irresistibly follow that not

only under the language of the statute which we have before discussed, but by virtue of the Government's own interpretation of it, the Secretary had ample power to acquire by exchange, not merely this fuel oil, but as a corollary, the storage facilities, without which the fuel oil exchange could not have been effectuated?

The exchange power, while it could not be used to acquire paper dolls, jewelry, battleships, etc., certainly extended to the acquisition of those things which were clearly necessary or proper in the execution of the discretionary Naval Reserve and petroleum powers vested solely in the Secretary of the Navy. And each and every article acquired in the instant case, was thus necessary and proper.

III.

As to the Nature of the Contracts of April 25th and December 11th.

Our adversaries argue that they were not exchange contracts.

They do not, however, meet, or even allude to what we consider the controlling authority of

Postal Telegraph Cable Co. v. Railroad Co., 248 U. S., 471.

Unless that case can be distinguished, the claim that reference to pecuniary values for the purpose of ascertaining the quantum of goods to be included in an exchange contract deprives the contract of its quality as an exchange contract, must fail.

In this connection it may be noticed that whereas on page 215 they say that the contracts "use the language of sale rather than that of exchange," yet on page 218

they say that "if the transaction were to be a sale, it must be a sale for money."

If both these statements are correct, then the contracts were neither exchange contracts nor sale contracts.

At this point one may well inquire within what legal classification counsel would have the Court believe that these agreements should be included.

IV.

As to the "New Fuel Depot" Argument.

This is one of the principal bases for the attack made by the Government upon the legality of the contracts and upon the right of the Transport Company and the Petroleum Company to their respective credits.

But they make no attempt in their brief to controvert the *facts* which we have set forth at pages 145 to 151 of our principal brief.

And since these facts show that the contracts in question not only did not establish a new fuel depot at Pearl Harbor, but that a fuel depot had existed there for many years amplifications of which were provided for by these contracts, it is submitted that their entire argument, aside from the questions of law involved, fails for lack of foundation of fact.

We wish to comment on the statement in Government's brief, page 231, to the effect that Admiral Robison and Admiral Gregory testified "that the contracts called for the erection of complete fuel depots."

Admiral Robison's testimony was that "the project at Pearl Harbor was for a complete *unit*," etc.

Admiral Gregory said that the project covered by

the two contracts are what in the Department are called depots for coal or depots for other fuel; but that "as to whether they are really fuel depots, *it is a part of the station work*" (R. III, 576-7).

In other words, the testimony of both these gentlemen, instead of supporting our adversaries' statement, shows that the so-called new depot was nothing more than a new unit as a part of the existing depot or station.

V.

As to the Defendants' Credits.

We desire to make more emphatic than has been done in the principal brief the point that all of the expenditures of both defendants were not only found *as a fact* by the District Court to have been beneficial to the United States (R. III, pp. 1421, 1427-8), *but that the Government in its cross appeal did not assign error as to these findings of fact* (R. III, pp. 1549-6) but limited its alleged errors to those of law. The Court of Appeals based its decision as to these credits, entirely on legal grounds and did not suggest any error in the facts as found.

The land patent cases, *Causey v. United States*, etc., and the Court of Claims cases, *Sutton v. United States*, etc., furnish, as we have before seen, the basis of the Government's argument.

A recent decision of this Court (*United States v. Minn. Mut. Inv. Co.*, 46 Sup. Ct. Rep., at p. 503) emphasizes the point which we have made as to the ground on which the *Sutton* case should be distinguished, for it again draws the distinction between express contracts or contracts implied in fact, which alone can be enforced in the Court of Claims, and

claims "based merely on equitable considerations and implied in law," which cannot be thus enforced—but which, as we have elsewhere shown, are taken into consideration by courts of equity.

As to the land patent cases, the more that our adversaries attempt to evade our arguments, the more clearly, we submit, it appears that contracts made by the Government with private individuals, not under compulsory statutes but at arm's length, in which the minds of both parties voluntarily meet as to the propriety and sufficiency of the consideration and all other terms, are commercial contracts and are not within the class of land patents issued under compulsory statutes for the purpose of bringing about a development of the country, in connection with which, as this court has said:

"Congress took no thought of their (*i. e.*, the land's) pecuniary value."

We have omitted to point out that the doctrine of the *Causey* case seems to have had its origin not in a judicial repudiation of the equitable maxim, but in the provisions of Section 2262 of the Public Land Laws, 8 Fed. Stat. Ann. 537.

This statute was subsequently repealed, but as originally enacted, it provided:

"If any person taking such oath swears falsely in the premises, *he shall forfeit* the money which he may have paid for such land and all right and title to the same."

Under this section came the early case of *United States v. Minor*, 114 U. S., 233. See also *United States*

v. Detroit Lumber Co., 200 U. S., 321. But the influence of this forfeiture provision, though no longer technically effective, has evidently been important in the subsequent decisions upon which the Government relies.

The suggestion that *United States v. Debell* has been overruled by *Heckman v. United States* is unfounded, as will appear from an examination of the last part of the *Heckman* opinion, in which, although the parties who would be necessary in order to provide for a return of the consideration were not then before the Court, nevertheless it was expressly held that

“On a proper showing as to any of the transactions, that provision can be made for a return of the consideration consistently with the cancellation of the conveyances and with securing to the allottees the possession of the restricted lands in accordance with the statute,”

steps would be taken to bring them before the Court.

The ruling in the *Debell* case is in line with that of this quotation.

In the present case no possible difficulty exists. All the parties are before the Court, the values have already been delivered to the Transport Company and to the Petroleum Company, and no mechanical or other difficulties exist opposed to a ruling that the status thus created should not be disturbed.

VI.

As to the *Thekla* and Other Admiralty Cases.

On pages 340 to 342 of our principal brief the attention of the Court has been called to the cases in admiralty, including the important recent decision of *United States v. Thelka* (266 U. S., 340) in which claims of private individuals, which could not be directly enforced against the United States, have been thus enforced where the United States itself becomes the actor and submits itself to the jurisdiction of the Court.

It is interesting to note that our adversaries do not even allude to these cases in their answering brief. The undisputed doctrine which they thus establish is submitted to be of much importance in the present case. Other cases in the same general connection, not heretofore cited in our brief, are:

Richardson v. Sugar Co., 241 U. S. 44;
Porto Rico v. Ramos, 232 U. S., 627;
Gunther v. Railroad, 200 U. S. 274;
Clark v. Barnard, 108 U. S., 436,

in which the doctrine is laid down that the immunity from suit, which is a privilege of a sovereign, is voluntarily waived when it affirmatively becomes a party to a suit in a court which has jurisdiction of all matters connected with the subject matter of the action.

VII.

As to the Effect of Fraud Even If It Could Be Found to Exist, Upon the Defendants' Right to Credits.

May we in addition to the points already included in our principal brief, call attention to *Crocker v. United States* (240 U. S., at p. 81), one of the mail bag fraud cases involving bribery, in which this Court said:

“It results that no recovery could be had upon the contract with the Postmaster General because it was tainted with fraud and rescinded by him on that ground. But this was not an obstacle to a recovery upon a *quantum valebat*.”

If an affirmative suit in the Court of Claims could be maintained against the United States despite bribery, we submit that in the present equity suit the Court should fully protect defendants' equities despite whatever findings could, under any circumstances, be made as to the existence of fraud or conspiracy.

VIII.

As to the Difference Between the Government's Sovereign and Commercial Capacities.

Our adversaries' arguments have not taken into consideration the fact that the Naval Reserve lands, upon their withdrawal from location, ceased to be public lands or in the public domain.

Barker v. Harvey, 181 U. S., 481.

They became dedicated to the functioning of a particular governmental agency which although—as is

the case with all governmental agencies—it acts for the benefit of all of the people, yet, nevertheless, in making voluntary contracts with private citizens, does so as a matter of commerce (*Cook v. United States*, 91 U. S., 389; *Bostwick v. United States*, 94 U. S., 53) and not in any sovereign capacity.

So clearly is the distinction drawn between the position of the Government as a sovereign on the one hand and as a private party and private litigant on the other, that an act done by it as sovereign does not defeat its rights as a private contracting party.

United States v. Horowitz, 267 U. S., 461.

IX.

As to the "Appellee's Statement of the Facts."

In our principal brief we presented, without argument, statement of what appeared to us to be all of the material facts, with appropriate record references in each instance, doing this complaint to the rule on the subject and for the purpose of assisting the Court, with the knowledge, of course, that the Court would have recourse to the record for verification of every material statement. We now note below a few instances which characterize the Government's "Statement of Facts," with the like knowledge that the Court will have recourse to the record of the real facts.

1. In stating the steps taken chronologically prior to the making of the contracts, Government counsel make no mention of the letter of April 12, 1922, from Secretary Fall to Secretary Denby recommending the seeking of further legislation. When in their brief they come, however, to what they call the "wilful dis-

regard of legal advice" (page 90) (under which head it is insisted that because Government officials construed the law differently from the construction thereof given by attorneys for private corporations, therefore the Government officials could not proceed to function under the law as they understood it without being subject to the charge of bad faith), counsel make their first reference to this letter of April 12, 1922, in these words (page 91):

"By a letter dated April 12, 1922 (Pl. Ex. 102; R. I-393-394) Fall suggested to Secretary Denby that it would be advisable to obtain further legislation from Congress, in order to be certain of the legality of the plan. This request was not in good faith because at that very time, Fall was criticising Finney and Bain for not already having closed a contract with Doheny. Secretary Denby did not follow out the suggestion because Robison told him the Government was certain of a bid from Doheny, and that it was, therefore, unnecessary to have such legislation in order to get a bidder."

It will be noticed that counsel were meticulously careful to give reference to the pages of the record whereon the April 12th letter is found, but with care equally meticulous they refrain from giving any references to that part of the record where the Court could find that at that very time Fall was criticising Finney and Bain for not having closed a contract with Doheny, for the simple reason that the statement is entirely without foundation in the record. Finney and Bain testified on the subject. Finney, a witness for the plaintiff, on direct examination testified:

"A few days before the Secretary's (Fall's) departure (on April 13th), Dr. Bain and Mr. Fin-

ney were in his office and Mr. Fall asked them how the proposed Pearl Harbor matter was getting along; they told him that the bids were not to be opened before April 15th; he expressed some disappointment, witness thinks, at that, stating that he desired to close the Teapot-Sinclair matter and this matter at the same time or about the same time, and was a little impatient, apparently, at the delay in the Pearl Harbor matter. Dr. Bain and Mr. Finney explained that the delay had been occasioned by the various changes which were made in the specifications; that it had been necessary to give considerable time to the Pearl Harbor matter so that the bidders could apprise themselves as to the conditions and that the last order had fixed April 15th as the day of the opening of bids and that bids could not be opened before that time. The Secretary did not make any suggestion as to any other way of closing the matter up other than by waiting until the bids came in and were opened." (R. v. I, 392.)

Let us now turn to *all* of the testimony of Dr. Bain on this subject, which we find on pages 771-2 and page 847 of volume II. That testimony we quote:

"Secretary Fall left Washington for Three Rivers, New Mexico, April 13, 1922; some days before that he asked witness how they were getting along on the Pearl Harbor project, and stated that he had nearly completed the negotiations with the Mammoth Oil Company, which resulted in the lease of Naval Reserve No. 3. When Dr. Bain told Mr. Fall that nothing more could be done until after April 15th, he said, 'Well what have you been doing all this time, and why can't you?' Dr. Bain told him that after the change in the proposals of February 15, and the determination that no bids would be accepted except on a lump sum

basis, that it had been necessary to get out additional plans and details, which took some time, and to send out new proposals, and that since this placed on the contractor a very large responsibility, it was necessary to allow the contractor time to visit Hawaii or to have it visited, to determine the matters of foundations, sites, materials, labor, and things of that sort, before he could make a bid, and that accordingly the date for the receipt of those bids had been put forward to April 15. This apparently was the first time that Secretary Fall realized that the change in the original proposals involved material delay, and he expressed impatience over this. He asked witness whether there was not some way to facilitate action. He asked witness who was going to bid, and was told, to the best of Dr. Bain's knowledge, who would bid. Dr. Bain told the Secretary the Pan American, the Associated, and the Standard would bid, and that the Foundation Company and the Pittsburgh & Des Moines Steel Company would probably bid on parts of the work; he also told the Secretary about the connection that it was expected the engineering companies and oil companies would have; up to that time, the witness knew, not only that the White Engineering Company would bid in connection with the Pan American Company, but that Ford, Bacon & Davis would bid in connection with the Associated, and he told the Secretary that; he told the Secretary what he had understood from the representatives of the Foundation Company; as respects an arrangement with the Standard Oil, the witness cannot state positively that the Foundation Company's representatives told him that he had made an arrangement with the Standard Oil Company, but that representative said something which gave witness that impression." (R. v. II, 771-3.)

On cross-examination this witness, having identified a letter which he wrote to Mr. McLaughlin, vice-president of the Associated Oil Company, suggesting that Mr. McLaughlin come to Washington for conferences in advance of submitting a bid on April 15th, testified that—

“letter was written after Dr. Bain’s conference with Secretary Fall referred to in his direct examination, in which the Secretary expressed his anxiety to get the thing closed, and his impatience that it would have to wait until April 15” (R. v. II, 847).

It will be noticed immediately that nowhere in the foregoing is the name Doheny mentioned, nor, except for the fact that Mr. Fall was informed that the Pan American Company was expected to be one of the bidders, was there any reference to the “Doheny company.” It is certainly unnecessary for us to do more than present the actual record, as above, to demonstrate the utter want of foundation for the statement that Fall was criticising Finney and Bain for not having closed a contract with Doheny.

As to the statement in the Government’s brief, immediately following that which we have been treating, that Secretary Denby did not follow Mr. Fall’s suggestion because Robison told him the Government was certain of a bid from Doheny and that it was, therefore, unnecessary to have such legislation in order to get a bidder, we quote this from the record:

“Witness (Admiral Robison) saw the original of the letter from Secretary Fall to Secretary Denby, dated April 12, 1922, (Exhibit 102), recommending submission to Mr. Kelley of the

House of Representatives of an amendment to the then pending Naval Appropriation bill, and he talked with Secretary Denby on the subject of that letter shortly after its receipt; that conversation was that the bids were coming in in three days anyway, and witness believed that the promise that he had gotten from Mr. Doheny would be kept, and that under the circumstances he figured that the loss of time, which was vital, was unnecessary; that it would pay to wait three days before taking any action on Secretary Fall's letter, and then if there was not received any bids, that would be time enough to act, but if bids were received, why, this pessimistic view of the situation would be shown to be pessimistic; the Navy Department did not take any action on Secretary Fall's letter of April 12, 1922, and witness presumes it was placed in his files." (R. v. II, 1001-2.)

2. There is no justification for the statement made by counsel (page 96, Government brief) that "Doheny and the officials of his company" believed and acted on the belief that Fall had the power, and that the power to act rested in him alone, in respect of contracts relating to naval petroleum reserves. Indeed one of the outstanding facts in connection with the "negotiations and dealings up to the contract of April 25, 1922," was the insistence of Mr. Cotter, vice-president of the Transport Company, in charge of this matter, that Secretary Denby must be specifically a party in and to the contract (R. v. II, 424; 525; 528; 876; 915-16).

3. In their endeavor to uphold their contention that Secretary Fall originated the plan for exchanging royalty oil from the reserves for fuel oil and tanks therefor, Government counsel (brief, page 13) deny

that the *prior* discussion in Navy Council meeting had any connection with this subject or any reference to royalty oil or to the naval reserves. It is only necessary to turn to the record on the subject (V. II, 978), where will be found a stenographic report of the minutes of the Navy Council meeting in which Secretary Denby expressly refers to royalty oil (which could alone have come from the naval reserves) and Admiral Griffin responds that Secretary Fall said he was going to sound them out on that, obviously meaning, what later correspondence shows, that Secretary Fall intended to ask oil companies on the Pacific Coast if they would furnish storage for fuel oil in exchange for crude. What possible reference had "royalty" to the use by the Navy of its cash appropriations for fuel, and the purchase therewith of oil together with tanks in which to hold that oil? What possible connection had Secretary Fall with that matter?

4. On page 16 of the Government's brief it is stated that the words "or otherwise" in letter from Denby to Fall dated October 25, 1921, "*were not inserted by Denby, as counsel for the Appellants erroneously state at page 25 of their brief.*" The record:

"In point 5 in the policy letter, the last two words 'or otherwise' were not in the letter as originally written; those words were put in by Secretary Denby after the witness reported to him that Secretary Fall recommended it" (R. v. 2, 965).

5. On page 28 of the Government's brief it is stated that before Fall left Washington on December 1, 1921, he handed Doheny's proposition (contained in the latter's letter of November 28, 1921) to Bain and

told Bain to try his hand at evolving a plan along those lines. A statement intended to convey the same impression is also made on page 29 of the brief. The record:

“To the best recollection of the witness, Secretary Fall had handed the letter of November 28, 1921, to him; witness does not remember what Mr. Fall said when he handed witness that letter, but the Secretary had told witness shortly before that, that either he had asked Mr. Doheny or Mr. Doheny had volunteered to have, an estimate made of the cost of putting up storage to the extent of a million and a half barrels, and that estimate, such as it was, appeared in the letter of November 28, 1921.

“Secretary Fall, before he left Washington for the West on December 1st, had told Dr. Bain to prepare a plan for carrying out the wishes of the Navy, and when the various papers referred to came along, including the letters of December 9th and December 14th from the Navy (Exhibits Nos. 62 and 66), which came to Secretary Finney after Secretary Fall had left, they were turned over to the witness with instructions to try to work out a plan which would accomplish what the Navy wanted, and it was pursuant to these instructions that witness asked Mr. Finney to write the letter of December 16th to Cotter.” (R. v. II, 719.)

And on cross-examination:

“as to the November 28th letter, Dr. Bain’s only recollection on that is that at the time Secretary Fall went away, he handed Dr. Bain the estimate made by Mr. Doheny’s engineers; that was the only thing that stuck in his mind, and that is the letter of November 28th; before he went away, and at the same time he handed witness this paper, Secretary Fall gave witness instructions that

when the Admiral and the Navy Department sent over the plans, *'we should proceed to develop a method of carrying out the Navy's wishes in this matter.'* "

And that throughout, it may be fairly said, was Fall's only instruction regarding any of the transactions here.

To cite that testimony as justification for the statement that Fall instructed Bain to try his hand at evolving a plan along the lines of Mr. Doheny's November 28th letter is so far-fetched as to require no comment. As the Court now knows, Bain's instructions at all times were to assist the Navy in doing what the Navy wanted, and when, in Fall's absence, the Navy requested assistance to carry out a plan decided by the Secretary of the Navy on December 5, 1921, and not before, Bain proceeded "to develop a method of carrying out the Navy's wishes" in the matter.

6. On page 55 of the Government's brief it is stated that it was quite obvious that the Foundation Company, and an other engineering concern, were unable to make arrangements to dispose of royalty oil and therefore nothing was heard from them after they got plans and specifications. We do not know from what this alleged fact becomes obvious as the only evidence on the subject comes from a letter written by the Foundation Company, in which that Company states:

"In connection with the proposed construction work in Hawaii, which we understand is to be paid for in crude oil * * *, *we have an assurance of a source of disposal of this oil*, and, therefore, request a set of plans and specifications for the work proposed with a view to making you a formal tender on it." (R. v. II, 881.)

Until the bids were opened April 15th it was expected that the Foundation Company would submit a bid (R. v. II, 770; 881). And bids from that company and from the Pittsburgh & Des Moines Steel Company were expected until the moment of the opening of the bids (R. v. II, 771). Indeed, a representative of the last named Company was present at the time bids were opened (R. 771).

7. The words in italics in the following paragraph are omitted from the *quotation* made from the record on page 65 of the Government's brief, the subject being the proposition contained in Mr. Doheny's October, 1922, memorandum suggesting the construction of pipe lines and a refinery on the Pacific Coast:

"Admiral Robinson testifies that when 'this proposition was originally brought to' his attention, 'by Secretary Fall,' as stated in the foregoing memorandum, Secretary Fall told the witness that Mr. Doheny was much concerned over the state of the oil market in California, and had some sort of a proposition to advance looking toward the stabilization of prices that might be made to the Government's advantage, as well as to his own; witness told Secretary Fall that anything that came 'to our advantage' was of interest to witness and that is about all there is to it, because the witness was not furnished with any details; *witness does not remember exactly what, if anything, Secretary Fall said with regard to the Navy's interests or part in that matter, but there was no question that it was a matter for Naval decision.*" (R. v. II, 1021-2.)

8. It is stated on pages 69-70 of the Government's brief that we attack the Government's contention that Fall and Doheny, dealing directly and personally, fixed the royalties of the December 11th lease, but that we (defendants' counsel) "do not refer to Robison's testimony (R. III-1131-32) that Fall told Robison that 'he (Fall) and Mr. Doheny had been in personal contact on the subject * * *.'" It is only necessary to refer to pages 230-233, inclusive, of our brief to show that we devote a whole chapter to this subject, to Robison's recollection of what Mr. Fall had said to him, and to our refutation by documentary evidence from the Government's own files of the Government's unfounded contention that there had been any personal or direct dealings between Doheny and Fall as regards this matter.

9. One more illustration: On page 88 of the Government's brief, in quoting in black face type from an official document, which quotation is made for the purpose of upholding the claim that these contracts were improperly kept secret, counsel close their quotation just prior to, and without including, the following found in the same document:

"As a matter of fact, the contracts have been recorded as public documents and are, therefore, available to any citizen of the United States who will expend the trouble and funds necessary to obtain copies in the customary official manner." (R. v. II, 888.)

But we must not further burden the Court. The above instances are but typical. They serve to illus-

trate the necessity of that recourse, which we know the Court will have, to the record for the facts.

Respectfully submitted,

FREDERIC R. KELLOGG,
FRANK J. HOGAN,
JOSEPH J. COTTER,
DEAN EMERY,
HAROLD WALKER,
CHARLES WELLBORN,
OLIN WELLBORN, JR.,
HENRY W. O'MELVENY,
WALTER K. TULLER,
Counsel for Petitioners.

End



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1926. No. 305.

*Pan American Petroleum & Transport Company and Pan
American Petroleum Company, Appellants,*

vs.

The United States of America, Appellee.

BRIEF FOR APPELLEE.

I. APPELLEE'S STATEMENT OF THE CASE.

In its bill in equity Appellee asks the cancellation of contracts with Appellants dated April 25 and December 11, 1922, and leases dated June 5 and December 11, 1922, and incidentally asks for temporary and permanent injunctions, receivership and an accounting.

The prayer for cancellation is based on (1) alleged fraud tainting all the contracts and leases, (2) an alleged fraudulent conspiracy to secure the contracts and leases, (3) alleged illegality and lack of authority, and (4) the allegation that the contracts and leases were not negotiated or executed in the manner authorized by law and purported to bind the Government to performances which are unlawful and illegal.

By the contract of April 25, 1922 (R. I-27-40) the Transport Company agreed to build storage at the United States Naval Station at Pearl Harbor, Territory of Hawaii, for 1,500,000 barrels of fuel oil and fill the storage tanks with said amount of fuel oil, both the storage facilities and fuel oil to become the property of the United States upon delivery to the Transport Company of crude oil accruing to the United States from leases of oil lands in Naval Petroleum Reserves Nos. 1 and 2 in California, of a value equivalent to the cost of constructing the storage and supplying the fuel oil. Wharfage, dredging the harbor, etc., were involved in the construction of the storage facilities. The contract provided that the Government should deliver the crude oil to the Transport Company month by month as it was produced until all claims of the Transport Company under the contract were satisfied, but that in the event deliveries decreased so that the fulfilment of the contract was likely to be unduly prolonged, then the Government might grant additional leases on lands in Reserve No. 1 sufficient to maintain deliveries at the approximate rate of 500,000 barrels per annum. The Transport Company was authorized to supply the fuel oil in any amount it elected "provided that the total amount required to be supplied under this contract be furnished and the transaction completed within the time that the Government has furnished sufficient royalty oil to pay for the fuel oil and storage facilities herein called for." In the event the construction was completed at a less cost than a certain amount fixed by reference prices the saving was to be credited to the Government by reducing the amount of crude oil necessary to be delivered by the Government. A preferential right to any future leases made within certain territory in Reserve No. 1 was granted to the Transport Company in the following language (Art. XI):—

"Art. XI. It is further mutually understood and agreed that if during the life of this contract future

leases shall be granted by the Government within that portion of California naval petroleum reserve - No. 1, situated in townships 30 and 31 south, range 24 east, Mount Diablo base and meridian, the contractor shall first be called upon by the Secretary of the Interior to meet such drilling conditions and to pay such royalties as the Secretary may deem just and proper, and in the event of his acceptance of such conditions and of his agreement to pay such royalties, the contractor shall be granted by the Government a preferential lease on such tracts as the Secretary of the Interior may decide to lease. In the event of the failure of the contractor to agree to the conditions and royalties as proposed by the Secretary of the Interior, then said lease or leases may be offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in said bidding." (R. I-34.)

The statement on page 4 of the brief of Appellants that the preferential right was to exist for only 500 days is not correct. It is apparent from the method of payment provided for in the contract that the life of the contract was indefinite and might run over a number of years. In the Transport Company's proposal there was a promise to complete the construction within 500 days, but that did not determine the life of the contract.

The lease of June 5, 1922 (R. I-68-83), was a quarter section in Reserve Number 1, and was granted at the request of Appellants to enable them to perform more speedily the contract of April 25, 1922. It was given without competitive bidding and pursuant to a covering letter purporting to be an addition to the contract of April 25, 1922 (R. I-65).

The contract of December 11, 1922 (R. I-41-50) referred to the April 25th contract; recited that the Navy desired to procure additional fuel oil and storage facilities at Pearl Harbor and elsewhere of a value of approximately \$15,000,000; recited the preferential right of the Transport Company

to leases in Reserve No. 1 and that existing leases were not producing sufficient royalty crude oils to accomplish the purposes of the April 25th contract. It was agreed that as a supplement to the contract of April 25th the Transport Company should deliver the fuel oil required under the April 25th contract into the Pearl Harbor tanks when and as directed by the Secretary of the Interior, should construct for the Government at Pearl Harbor additional storage facilities up to 2,700,000 barrels in capacity at cost and complete the same within two years from delivery of plans and specifications if requested by the Government. The Transport Company further agreed to furnish petroleum products other than fuel oil required by the Navy at Pearl Harbor at market price; to furnish without charge until the expiration of the contract storage for 1,000,000 barrels of fuel oil at Los Angeles and fill the same with fuel oil; to bunker Government ships from said 1,000,000 barrel supply at cost; to transport royalty oils derived from the leases in Reserves Nos. 1 and 2 to Los Angeles free from any pipe line charge; to maintain, subject to the demands of the Navy, for the period of 15 years, 3,000,000 barrels of fuel oil at Atlantic Coast points; to furnish such reasonable amount of crude oil products and storage facilities therefor at such points as should be designated by the Government under similar terms and conditions; to give the Navy the privilege of purchasing fuel oil produced from Government lands in Reserves Nos. 1 and 2 which it might require above the amount received in exchange for its royalties at 10 per cent. less than market price at tidewater; to sell the Navy refined oil products at 10 per cent. less than market prices.

The Government agreed (1) to lease to Transport's subsidiary company, Petroleum Company, all unleased portions of Number 1 Reserve, (2) to deliver to the contractor all royalty oil, gas and casing-head gasoline produced or to be produced from Reserves Nos. 1 and 2 until all obligations

under the April 25th contract and the instant contract were discharged and "in any event for a period of 15 years from the date of the expiration of said contract of April 25, 1922, the Government to be given credit by contractor for such crude oil delivered by the Government at the published field price thereof on date of delivery and for such gas and casing-head gasoline at the prices and under the conditions fixed in the various leases, any surplus of Government credits thus accruing are to be satisfied by delivery of fuel oil or other petroleum products, by construction of additional storage facilities, or to be payable in cash, as the Government may at that time elect (R. I-48)."

It will thus appear that the Government was under the obligation of delivering to the Transport Company all royalty crude oil from the Naval Reserves for 15 years after the expiration of the contract of April 25, 1922 (the life of which might extend for years) regardless of the fact that the defendant Transport Company might have already been paid in full under both construction contracts; and it is therefore apparent that the statement of Appellants at the top of page 7 of their brief that the Government agreed under the contract of December 11, 1922, "to deliver to the Transport Company as and when produced from Naval Reserves Nos. 1 and 2, California, crude oil at the posted field price thereof in amount equal to the cost of the construction of the storage facilities, without profit, and the market price of the oil delivered into those facilities, plus transportation at going rates" only partially states the obligation of the Government, the completeness with which it parted with the petroleum products from Naval Reserves Nos. 1 and 2, and the long time during which the Government would be bound to the Appellant companies.

The lease of December 11, 1922 (R. I-50-65) given as part consideration for the contract of the same date, demised the entire unleased portion of Reserve No. 1 to the Petroleum

Company for twenty years and so long thereafter as oil and gas is produced in paying quantities and provided that the lessee should pay a royalty according to a schedule ranging from 12½ to 35 per cent. No drilling was to be done without the consent of the Government on lands located in the western half of the reserve. All discretionary matters reserved to the Government were to be exercised by the Secretary of the Interior.

Attention is called to the fact that the Appellants inaccurately state (Appellants' brief, pp. 8-10) that cancellation was sought and awarded upon the ground of a conspiracy to defraud, thus ignoring the finding of the District Court that there was also fraud as a distinct ground apart from the ground of a conspiracy to defraud and that cancellation and an accounting were awarded upon both grounds.

The Court of Appeals summarized the conclusions of law of the District Court as follows (R. III-1496):—

“* * * that the payment of \$100,000 by Doheny to Fall was *contra bonos mores* and against public policy; that it is immaterial whether the directors and stockholders of the Transport Company knew of said payment; that the making of said payment constitutes a fraud upon the United States and renders voidable all contracts and transactions made subsequent thereto between said corporation or its codefendant and the United States; that Doheny and Fall conspired and confederated for the making of certain contracts and agreements of great benefit and advantage to the Transport Company, to wit: the contract of April 25, 1922, Exhibit 'B,' of the complaint, the contract of April 25, 1922, Exhibit 'E,' the lease of June 5, 1922, the contract of December 11, 1922, and the lease of December 11, 1922; that the contract of April 25, 1922, Exhibit 'B,' was not let upon competitive bidding; that that contract and the contract of December 11, 1922, Exhibit 'C,' the lease of June 5, 1922, and the lease of December 11, 1922, are voidable at the option of the United States and should be delivered up to be

cancelled; that the contract of April 25, 1922, Exhibit 'B,' and the contract of December 11, 1922, are null and void and of no effect because they constitute unlawful delegation of authority to the Secretary of the Interior contrary to the terms and provisions of the Act of June 4, 1920, and they should be surrendered for cancellation; that the executive order of May 31, 1921, is, in so far as it attempts to transfer the discretionary power of the Secretary of the Navy to the Secretary of the Interior, ineffectual and in excess of the executive power of the President; that the lease of June 5, 1922, was part of the consideration of an illegal contract, to wit: the contract of April 25, 1922, Exhibit 'B,' and the same should be delivered up for cancellation; that the lease of December 11, 1922, constituted part of the consideration given by the United States for the contract of December 11, 1922, which contract being wholly void and illegal, the said lease also is void and illegal and should be delivered up for cancellation; that the defendants should cease to trespass upon the lands of the United States and forthwith surrender possession thereof and be enjoined and restrained from further operations or activities of any kind on said lands and from removing any materials, tools, machinery, etc., therefrom.

"In view of the equities between the parties, the Trial Court concluded that the defendants should be paid for and allowed credit for moneys actually expended in the construction of the storage facilities at Pearl Harbor and that a complete account should be taken between the plaintiff and the defendants to determine the total and gross amount of oil petroleum products the defendants have taken from the lands covered by the lease of June 5, 1922, and the lease of December 11, 1922, and the money value of such products so taken, and upon ascertaining the total gross quantity of such products and of the pecuniary value thereof, such sum to be found due, if any, upon such accounting, should be paid by the defendants to the plaintiff, and that in such accounting the defendants be entitled to be credited with the cost price of the storage facilities so completed and installed

a contention as to whether those claims were valid. No plan for administering these Naval Petroleum Reserves was provided by Congress until the General Leasing Act of February 25, 1920 (41 Stat. 437), in which act a method of compromise with holders of placer mining claims in the Naval Reserves was prescribed. (See Sections 18 and 18a of this act at p. 295 of this brief.) But no plan was provided for administering land in the reserves not covered by placer claims and the statement by counsel (Appellants' brief, p. 13) that this act committed the administration of the reserves to the Secretary of the Interior is not accurate.

Under that act a large portion of Reserve No. 2 had been leased in compromise of alleged placer claims. No. 1 was comparatively free of such claims. Then the Act of June 4, 1920, which is quoted in full at page 298 of this brief, was passed.

In order to protect the northeastern border of Reserve No. 1 from drainage by drilling outside its boundaries, the Navy Department, prior to the incumbency of Secretary Denby, had determined to do a small amount of offset leasing (R. I-124).

Secretary Denby continued this policy, insisted that the leasing be by competitive bidding (Pl. Ex. 272; R. III-1174), and by his orders bids were asked from proposed lessees for this offset leasing on April 14, 1921 (R. I-114, 115, 129). The invitation was for the drilling of 22 offset wells in two rows in a 900 foot strip along the northeast border of Section I-31-24 (R. I-115). This leasing was under the Act of June 4, 1920.

Before an award had actually been made upon the bids so submitted (viz., on May 31, 1921), the President of the United States had made the Executive order which is quoted in full on page 299 of this brief.

A draft of this order was transmitted by Secretary Fall to Secretary Denby on May 11, 1921 (R. I-311). Secretary Fall evidently expected the order to go to the President in

the form in which he had drawn it, for he transmitted with his letter not only the draft of the Executive order, but a draft of a letter to be signed by Secretary Denby transmitting the order to the President for his signature (Def. Ex. 1; R. I-457). Certain Navy officials were doubtful of the wisdom of having the order drawn in the manner suggested by Fall, and as a result of conferences the draft was ultimately changed, and as changed submitted to Fall by Assistant Secretary of the Navy Roosevelt; Fall agreed to the changes, and the draft as changed was presented to the President by the Assistant Secretary of the Navy and signed by the President. (R. II-944, 945, 946.)

2. Origin and development of fuel oil storage plan.

Shortly thereafter, pursuant to the policy declared by the Executive order, the Navy forwarded the bids for the proposed offsetting leases to the Secretary of the Interior (Pl. Ex. 54, R. I-313). The bids were opened by Assistant Secretary Finney and scheduled by Dr. Mendenhall of the Interior Department (R. I-315) (Def. Ex. K-a; R. I-470). Finney left Washington (R. I-315), and Fall assumed to settle a controversy that had theretofore arisen over a claim to a certain portion of said Section 1 by the United Midway Oil Land Company, which claim had already been denied by Secretary Payne and Assistant Secretary Finney (R. I-313).

Dr. Mendenhall, of the Geological Survey, who had been chosen at the suggestion of Assistant Secretary Finney to act as adviser to Secretary Fall in naval reserve oil matters (R. I-312, 313), and Commander Stuart, of the Navy, who was then and had for some time been in charge of oil reserve matters for the Navy (R. I-112, 113, 114), disapproved of Secretary Fall's proposed settlement of the claim and got into a controversy with him over the settlement (R. I-116, 125, 126, 315, 472). Admiral Griffin, of the

Navy, also objected to the proposed settlement and participated in the controversy (R. I-116, 125, 472).

The upshot of the matter was that, although it had been determined from the bids submitted that Mr. Doheny's company, the Pan American Petroleum Company, had bid the highest royalties, Fall awarded fourteen of the offset wells to Doheny's company at its bid, and eight wells to the United Midway Company at the same royalty rates (R. I-117, 125, 126, 127, 315). This settlement was the subject of correspondence between Secretary Fall and President Harding, the matter of the United Midway claim having been referred to Fall by the President (Def. Exs. L & M; R. I-470-75), and was evidently the subject of some negotiation between Fall and Doheny on the footing of the intimacy which then existed between Fall and Doheny (R. I-134, 473).

Referring to the settlement which he had made, Secretary Fall wrote to Mr. Doheny on July 8, 1921, a letter thanking him for his generosity in permitting Fall to make the settlement, and in this letter said (Pl. Ex. 12; R. I-133):—

"I have settled the matter today and have signed your leases, sending them over to you by Mr. Cotter."

In the same letter, he quoted from his letter to President Harding concerning the settlement, in which he had said:—

"Thus my position is that of * * * a trustee for the Navy for the public lands upon which there is no private claim within the naval reserve."

and went on to say to Mr. Doheny:—

"There will be no possibility of any further conflict with the Navy officials and this Department, as I have notified Secretary Denby that I should conduct the matter of naval leases under the direction of the President, without calling any of his force in consultation unless I conferred with himself personally upon a matter of policy. He understands the situation and **that I shall handle**

matters exactly as I think best and will not consult with any officials of any bureau in his department, but only with himself and such consultation will be confined strictly and entirely to matters of general policy."

Appellants throughout their brief repeatedly stress the close personal relations between Fall and Doheny (pp. 20, 66, 181, 275-76).

Within two months after the Executive order was signed, Secretary Fall originated the plan which was afterwards carried into execution with the defendant Transport Company, of "exchanging" royalty oil from the naval reserves for fuel oil in tanks, the royalty oil to constitute the consideration for both the fuel oil and the tanks in which it was to be stored. He wrote to Secretary Denby on July 23rd making this suggestion (Pl. Ex. 13; R. I-136). On July 29th Secretary Denby wrote that he was glad to acquiesce in Fall's suggestion, and that such an arrangement would be of great benefit to the Navy (Pl. Ex. 14; R. I-137).

The statement (Appellants' brief, page 21) that the Navy Council had already considered such a plan, is, we think, incorrect. What the Navy was then considering was whether it should purchase oil tankers for storage of fuel oil, or should in making contracts for its current use fuel oil have the contractor include in his bid the cost of storage of the oil until the Navy should need it for current use. The discussion was of the use of the Navy's cash appropriation, and had no relation to the naval reserves or the use of the royalty oil therefrom. The consideration given Fall's suggestion of July 23rd, as stated on pages 21 and 22 of the Appellants' brief, shows that it was a new idea to the Navy Department.

Almost immediately thereafter Fall went West (R. I-129, 316; II-830; III-1110), for the avowed purpose of conferring with oil men on the Pacific Coast (R. II-481) and remained away from Washington until October 17, 1921 (R. I-316;

II-830; III-1110). On August 5th he saw, by appointment, in San Francisco, Commander Landis, a retired naval officer then in charge locally of the California naval reserves, with the title Inspector of Naval Petroleum Reserves (R. I-129); and in conversation with Landis stated that Mr. Doheny had been in Washington complaining that in his judgment the royalties in the lease granted to his company, above mentioned, in July, were too high, and Fall said that he thought probably they were (R. I-130). While on his trip he reported in writing to the President that he had interviewed oil men and that the Navy could at any time upon notice to him secure storage and fuel oil, to be paid for out of royalty oil (Def. Ex. P; R. II-482).

Before Fall returned to Washington, viz., on October 1, 1921, Captain J. K. Robison was appointed Chief of the Bureau of Engineering, with the rank by virtue of his office of Rear Admiral (R. II-951). Robison wrote an intimate and friendly letter to Doheny on October 6, 1921, advising Doheny of his appointment (Pl. Ex. 23; R. I-145). Robison's friendship with Doheny was also one of long standing and intimacy (R. II-952, 953, 954); and is freely admitted in the brief of Appellants (pp. 23-24, 188).

On or about October 18, 1921, Secretary Denby apparently discovered that Commander Stuart was in charge of the Fuel Oil Office, although in fact Stuart had been in charge of that office when Denby came in as Secretary in March of that same year and had ever since functioned in that capacity (R. I-113, 114, 121; II-954, 955). This is one significant fact in connection with the alleged close touch which Denby kept with oil matters. After speaking to Robison about the matter, Denby detached Stuart from his special duties in charge of the Fuel Oil Office and returned him to the Bureau of Engineering, issuing a Department order putting fuel oil matters under the Bureau of Engineering of which Robison had just become Chief (R. I-114, 117, 118, 122, 123, 124; II-955).

At almost the same moment Secretary Denby, in a Navy Council meeting, made the following statement with regard to the naval reserves (Pl. Ex. 273; R. III-1176):

"We can't prevent granting oil leases. I by executive proclamation had it placed under the Interior Department. We are not in position to organize a new department to dig wells. I want the Interior Department when a tract is to be opened in part or full, I want them to do it for the best interest of the Navy. **That matter of leasing is most difficult and dangerous thing to be done. It is full of dynamite. I don't want to have anything to do with it.**"

At about the time of this statement by Secretary Denby, Admiral Robison, then newly in charge of naval oil reserves for the Navy, conferred with Secretary Fall concerning the policy to be pursued therein (R. I-146; II-959, 960; III-1051). As a result of that conference Fall and Robison in collaboration prepared a draft of a letter which was submitted to Secretary Denby and signed by him on October 25, 1921 (R. III-1111). This letter may be found in full as Pl. Ex. 24; R. I-146. Certain portions of it are of great importance as showing what was represented to Secretary Denby to be the purpose and policy concerning the reserves, and as showing that Fall and Robison even at that early date were formulating the policy without much reference to Secretary Denby.

Admiral Robison testifies (R. III-1052, 1053) that it was agreed between him and the representatives of the Interior Department that Naval Petroleum Reserve No. 2 had been so checker-boarded with private claims and leases under the Act of February 25, 1920, that it could not be saved; and that it was determined not to drill Naval Petroleum Reserve No. 1 except for protective purposes.

Certain paragraphs from this letter are important. They are as follows:

"1. That arrangements will be made by the Interior Department to have naval petroleum reserves Nos. 1 and 2 drilled with offset wells in every case where adjacent property is drilled." (R. I-147.)

It will be noted that the reference in this paragraph is solely to offset wells, and not to any general leasing. This is enforced by paragraph 2 which reads as follows:

"2. That the amount of drilling with consequent exhaustion of the reserves shall be kept as low as practicable without risking the depletion of the reserves by other parties." (R. I-147.)

Paragraphs 3 and 4 deal with an exchange of crude oil for fuel oil and with the use of any overplus for obtaining fuel oil in storage at Pearl Harbor, Hawaii, and other points.

Paragraph 5 is extremely important. It reads:

"5. That the Interior Department will exercise its best efforts to obtain for the Navy as large royalties and as favorable terms as practicable by public competition **or otherwise.**" (R-I-147.)

Admiral Robison testifies with regard to this paragraph that when the letter was drawn the words "or otherwise" were omitted, and that Secretary Fall requested that they be inserted (R. II-965; III-1111, 1112). These words were inserted by Robison pursuant to Fall's request and before the letter was submitted to Secretary Denby (R. III-1111-12); and were not inserted by Denby, as counsel for the Appellants erroneously state at page 25 of their brief. Admiral Robison explains that he agreed to the insertion because he thought that some of the leasing would be done under the Act of February 25, 1920, and that as compromise leases were made under that act not by competitive bidding, the words "or otherwise" were inserted to take care of this contingency (R. II-965; III-1112).

This explanation is wholly unsatisfactory. It goes without saying that this letter did not refer to any such matter, and that unless the words "or otherwise" had been inserted, Fall's hands would have been tied and he would have been unable to make any leases by private negotiations (which was afterwards done with Doheny) and that the Government would have been protected. Admiral Robison's statement as to what explanation he made to Secretary Denby on this subject is extremely unsatisfactory. It is (R. II-965, III-1112):

"Witness told Secretary Denby that the handling of public lands was something that was so frequently done by the Interior Department that he thought they had better be given a chance to do it in their usual way." (R. II-965.)

"Witness told Secretary Denby that these had been included at the instance of the Interior Department, particularly to provide for the cases of pending claims on oil lands in the reserve. It had been explained to witness that where there were pending claims, those were to be settled under the Act of February 25, 1920. Of course, witness knew that it wasn't so, that such pending claims are always settled by the grant of a lease on some part of the reserve." (R. III-1112.)

Paragraph 7 indicates very clearly, as had every action taken by the Navy down to that time, that the Navy had, as Secretary Denby indicated on October 18th, surrendered all powers to the Interior Department so far as making any leases was concerned. It provides:

"7. That all leases and contracts, except as provided in paragraph 6, will be arranged and consummated by the Interior Department, copies of same being furnished to the Navy Department **as a matter of information and record only.**" (R. I-148.)

By letter of October 30th Secretary Fall expressed his compliance with the policy set forth in the foregoing letter (Pl. Ex. 24-A; R. I-149).

At the conference between Fall and Robison about the middle of October, 1921, two very significant things happened. In the first place Robison called Fall's attention to the fact that the royalty oil from the Naval Oil Reserves was being sold for cash and the cash turned into the Treasury where the Navy could not make it available except by appropriation of Congress. As he puts the matter, he did not know how to put a stop to this (R. II-959). At that conference Fall called Robison's attention to his, Fall's, letter of July 23, 1921 (Pl. Ex. 13; R. I-136) referred to above, and said that he, Fall, would help the Navy in this matter (R. II-959, bottom, 960, top). At this conference there were present not only Robison and Fall, but Dr. Bain and Mr. Ambrose of the Bureau of Mines (R. II-713).

The second significant thing that happened was that Fall, in discussing the plan to use royalty oil as a consideration for procuring fuel oil in storage, stated that he had been "considering a plan for using the royalty oil for tankage * * * " and said, referring to an earlier conference with Doheny, "he was satisfied that Mr. Doheny would make a bid" (R. II-831).

In Appellants' brief no criticism is made of the Trial Court's findings Nos. 17 and 18 (R. III, 1399-1400) to the effect that conferences were had between Fall and Doheny prior to October 25th relative to the subject matter of Fall's letter to Secretary Denby of July 23rd, and relative to the procurement of tankage and fuel oil by the use of royalty oil. These findings were supported by the correspondence between Fall and Doheny (Def. Ex. F-5; R. III-1154; Pl. Ex. 33; R. I-162), and by Dr. Bain's testimony (R. II-831).

In accordance with the agreed policy, the matter of first importance was the procuring of fuel oil for current use in exchange for royalty oil. It having been determined that No. 2 Reserve was not available any longer as a reserve, and that it should be drilled up to get the oil out and prevent de-

pletion of the remaining unleased sections, Secretary Fall, in November, inquired of all the then lessees whether they would take additional leases under the Leasing Act and put in train the making of additional leases to all then existing lessees (Pl. Ex. 27; R. I-151, 152).

On or about November 28, 1921, there was pending at least one business transaction between Fall, representing the Interior Department, and the Appellant, Petroleum Company.

We have above set forth how the Appellant, Petroleum Company, obtained a lease for fourteen wells in the northern part of Section 1-31-24 in July, 1921, and have shown that Mr. Doheny had been complaining to Mr. Fall in the summer of 1921 that the royalties were too high. In October or November, 1921, a representative of said Company and a representative of the United Midway Company who had received a lease for the balance of the strip in question, called on Assistant Secretary Finney and asked for relief, stating that the gas pressure was off this land, that the wells were pumpers and that the companies could only operate at a loss under the high royalty they had bid (R. I-322; II-488). Finney advised them that as the leases had been let by competitive bidding he did not think such relief could be granted but told them to put their petitions in written form (R. I-322; II-489). This was done and the petitions were filed on November 22 and 23, 1921 (Pl. Exs. 31 and 32; R. I-156 and 159).

The relief asked was by way of reduction of royalties under existing leases which had been granted after competitive bidding to the concerns offering the highest royalties. Finney at once saw the impropriety of reducing the royalty which had been fixed by open and public competition, and expressed this view to Fall (R. I-322; II-489). Of course there was nothing for Fall to do but to concur (R. I-322; II-490). Fall had shown as early as August, in a conversation with Commander Landis, that his thought was that Mr.

Doheny's company should be relieved (R. I-130). Before Fall left for the West on December 1st, therefore, he gave definite directions to Finney as to what should be done (R. I-322; II-490), viz., that the petitions for relief by reduction of royalties under existing leases should be refused. This was formally done some time after Fall left for the West (Pl. Ex. 59; R. I-324). In addition Fall directed that Pan American and United Midway Companies should be given relief by granting them leases on additional territory in Naval Reserve No. 1 at a lower rate of royalty, thus averaging their royalties as between the existing leases and the new ones (R. I-322; II-490); and such relief leases were granted on December 14, 1921 (Pl. Exs. 57 and 58; R. I-323-24). Of course this was a mere indirect method of doing what could not be accomplished directly without serious criticism. Incidentally, it might be mentioned that the United Midway Company, which held the lease (Pl. Ex. 58; R. I-323, 324) adjoining the Pan American lease (Pl. Ex. 57; R. I-323) and was one of the applicants for relief (Pl. Ex. 32; R. I-159) some months later, and before the contract of April 25, 1922, was made, assigned its leases, original and relief, to the Pan American Company (Pl. Exs. 100, 101; R. I-391). We find nowhere in the Record any justification for the statements that the relief granted was granted upon the recommendation of Finney or that Secretary Denby directed the relief leases to be made. Admiral Robison testified without contradiction that he told Fall that the relief applications should be refused (R. III-1049).

We have already adverted to Fall's reference at the October 25, 1921 conference to his prior meeting with Doheny and his conviction that Doheny would make a bid under Fall's plan for using the royalty oil for tankage. This expected bid was received on November 28, 1921, and was in the form of a letter, which reads as follows (Pl. Ex. 33; R. I-162):—

"PAN AMERICAN PETROLEUM & TRANSPORT CO.

"Office of the President

"NEW YORK, November 28, 1921.

"The Honorable the Secretary of the Interior, Washington, D. C.

"DEAR MR. SECRETARY:

"Along the lines of your suggestion, I have made some inquiries regarding the cost of constructing tanks for the storage of one and one-half million barrels of fuel oil at Pearl Harbor. I find that the best price obtainable for these tanks, the Government to stand the cost of transporting the material from the ship's side to the tank site, and the cost of grading and otherwise preparing the tank site, is \$19,960 per tank, or \$.0363 per barrel of storage capacity.

"The present price of crude oil in the field in California is \$1.13 per barrel. The present cost of fuel oil delivered at Pearl Harbor is \$1.90 per barrel.

"The cost of 1,485,000 barrels of fuel oil delivered at Pearl Harbor at present rates would be \$2,821,500, which added to the cost of constructing the 27 tanks necessary to store this amount of oil, which is \$538,920, makes a total of \$3,360,420.

"Therefore, were we to construct the tanks and furnish the oil on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserve and to be leased to us, it would require a return to us in royalty crude valued at \$3,360,420, or 2,973,823 barrels, figured at to-day's price. Of course, interest on the money invested should also be figured until final adjustment is made through the payment of royalty oil.

"I suppose you will turn this matter over to First Assistant Secretary Finney, who, with Rear Admiral Robison, may arrange the details of it during your absence, and as I also expect to be absent,

I am confidentially furnishing Mr. Cotter with the information so that he can intelligently discuss the matter with Mr. Finney.

Cordially yours,

E. L. DOHENY."

(Bold-face type ours.)

Three things should be noted in connection with the above letter. The first line of it clearly demonstrates that Fall and Doheny had been in conference about this matter. As Fall and Doheny had conferred prior to October 25, 1921, upon the fuel oil storage plan, it can not be said that the conference referred to in the first line of the letter was a subsequent conference in November, 1921, as Appellants endeavor to do (Appellants' brief, p. 237).

The third paragraph clearly indicates that in Fall's conference with Doheny the leasing of lands in the Naval Reserves to Doheny's company had been discussed as a part of such a contract. The same paragraph clearly demonstrates that **so far as the construction and furnishing of fuel oil was concerned Doheny's company was only to receive the cost of the same plus interest and that no profit from this branch of the business was to be expected.** This latter matter assumes great importance in view of certain testimony of Admiral Robison, hereafter to be mentioned.

Lastly, it is to be noted in connection with the foregoing letter that Mr. Doheny assumes that the **principle** of the matter has been settled and that it remains only to work out the details of the arrangements. It is also quite evident from the letter that Mr. Doheny was familiar with Mr. Fall's intended absence in the West. (It is admitted that Fall left for the West December 1, 1921.) (R. II-490.)

Appellants have insisted and still insist that the above letter (Pl. Ex. 33; R. I-162) was a mere "estimate" (Appellants' brief, pp. 27, 278). That it was not so we think can be demonstrated from what occurred. It will be noted that in

the letter Mr. Doheny states that he is "confidentially furnishing Mr. Cotter (Vice-President and Attorney for Pan American) with the information so that he can intelligently discuss the matter with Finney" (R. I-163). The letter was received by Fall presumably on November 29th, the day after it bore date. On that date Cotter was in Fall's office. What did Fall do with Doheny's letter? He sent it on November 29th, by the hand of Cotter, to Admiral Robison. The letter of transmittal is Pl. Ex. 34; R. I-163, and is as follows:

"NOVEMBER 29, 1921.

"MY DEAR ADMIRAL:

"**Mr. Cotter** will wait upon you with data, etc., with relation to oil tanks and royalty oils in connection with Pearl Harbor demands.

"**I have asked him also to hand you, for your inspection, the original of a letter from Colonel Doheny addressed to myself, containing a resume of the data.**

"**Should you think best to accept this proposition then of course it would be necessary, in my judgment, to turn over to Col. Doheny, if we can do so, leases upon further wells or area in the naval reserve in which he is now drilling. If this is done it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan American.**

"The gas pressure is lessening to such a degree that the output of the wells of the two latter companies, as well as of other companies drilling in this neighborhood, is decreasing and is very disappointing. The two companies named are pumping their wells and of course they are not making any money but will experience a loss in the payment of the fifty-five per cent. royalty to the Government.

"**If you approve the proposition, will you kindly indicate to me such approval by simple endorse-**

ment upon Col. Doheny's letter to myself, signed by yourself. Your simple O. K. will be sufficient.

"Very sincerely yours,

"ALBERT B. FALL."

(Bold-face type ours.)

The portions of this letter which we have printed in bold-face type show first, that Cotter was sent with the letter to Admiral Robison. In the letter Fall refers to Mr. Doheny's letter as containing a "proposition" ready for acceptance—not an "estimate." Fall is careful to call to Robison's attention that if the proposition is accepted the Government will have to give Doheny's company additional leases at better royalties than those then being paid by the company in Reserve No. 1.

At the end of the letter Fall again calls the matter a "proposition" and asks Robison, if he approves the "proposition," simply to write his O. K. on Doheny's letter. It is as plain as anything can be that Fall expected Robison to do this and that he proposed then to go ahead with the transaction himself.

The correspondence between the Lacey Manufacturing Company and the purchasing agent of the Appellant, Petroleum Company, in November, 1921 (Pl. Exs. 267-70; R. III-1169-70) and Gano Dunn's letter of June 19, 1922 (Pl. Ex. 271; R. III-1171) are further evidence that Mr. Doheny's letter of November 28, 1921, was more than an "estimate."

On page 35 of their brief in the Circuit Court of Appeals, Appellants admitted that "there is no question but that this plan was under consideration by Secretary Fall and Mr. Doheny * * *." They say this after commenting on the letter of November 28, 1921 (Pl. Ex. 33; R. I-162); and after referring to the language therein used concerning "lands within the naval reserve and to be leased to us," they then add that there is no evidence of any impropriety in such consideration or discussion as there may have been between these

two men. We shall hereafter call attention to the fact that this letter was written and being considered at the very time of the \$100,000 transaction between Fall and Doheny.

But there is more than this to the situation. The construction of Pearl Harbor storage involved only the taking of royalty oil from leases on lands within the naval reserves and in consideration of the receipt of that royalty oil turning over to the Government fuel oil and building the structures for its storage. When it suits their purposes Appellants' counsel make this matter very clear. **It was not a project which, in itself, involved any leasing at all.** The royalty oil running to the United States came from a large number of existing leases in Reserve No. 2 and from such leases as had been granted to Pan American and others for offset drilling in Reserve No. 1. Why then should Fall have said to Admiral Robison in his letter of November 29th (Pl. Ex. 34; R. I-163) that in order to get Mr. Doheny's company to take this royalty oil and give the United States some value in return for it, "of course it would be necessary, in my judgment, to turn over to Col. Doheny, if we can do so, leases upon further wells or area in the naval reserve in which he is now drilling. If this is done it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan American."

Does not this clearly indicate conferences between Fall and Doheny and that Doheny and Fall in these conferences had discussed this very matter of further leases which, as above pointed out, in fact had no necessary connection whatever with the so called exchange contract for the royalty oil?

As we shall hereafter demonstrate, when the formal contract with Doheny came to be made some months later, it did involve the making of additional leases in the naval reserve and did contain a covenant for the making of still further leases at lower royalties than the Pan American was then paying,—exactly what Fall was predicting in his letter of November 23.

Robison also looked upon Doheny's letter of November 28, 1921, as a definite proposition, for a few minutes after receiving it with Fall's covering letter on November 29th he carried it into a meeting of the Navy Council (R. II-972-73); and when questioned in that meeting about the fuel oil storage facilities of the Navy said: "I have here a definite proposition to supply that; a proposition for the completion of the entire Pearl Harbor project during the next calendar year. The other steps in the matter of the provision of fuel oil reserves along the Pacific Coast, in accordance with this plan, could be completed within less than five years, that is from the Panama Canal to Puget Sound. That is what I hope to accomplish. I think that is the Secretary's idea."

Up to that moment the understood policy of the Navy had been to use royalty oil in exchange for current use fuel oil. At that meeting Robison advocated the policy of not using the royalty oil for exchange for current use fuel oil at all, but on the contrary using it for the building of tankage and filling the same with reserve fuel oil (R. II-972-75). He had previously consulted with the Judge Advocate General of the Navy and obtained his oral opinion that the fuel oil storage project was legal (R. II-981).

The minutes of this same meeting make it quite clear that the important thing in Mr. Denby's mind was the fear of drainage of the reserves by outsiders and that he had no thought of leasing for any purpose but protection. Secretary Fall had previously told Secretary Denby that if the latter didn't tackle the Naval Petroleum Reserves at once, there would be no oil to get in three months (R. II-973). This representation was corroborated by the statement of Robison at the meeting that "a message from the Interior Department within five minutes says the gas pressure is lessening and decreasing; it is very disappointing. They will experience a loss in the payment of royalty to the Government."

Secretary Denby evidently intended that any protective leas-

ing should not be done without the approval of the President and Congress. When Robison pressed Secretary Denby for an answer to the Doheny proposition, the latter replied, "I will have to go into that further * * * that is a matter of national policy I do not want to decide until I have seen the President and probably will take it up again with Congress." Later in the meeting, Robison again said, "Shall I go ahead with those tanks?" and Denby replied, "Not until I have seen that committee." (R. II-972-73).

As we shall hereafter demonstrate there was no excuse whatever for such statements by Fall and Robison to Denby at that time and it is agreed on all hands that there was no necessity for leasing up the whole reserve on December 11, 1922, about a year later, to prevent drainage.

It is further clear that Admiral Robison assured the Council that all he had to do was to O. K. Doheny's letter, as Fall suggested, in order to get the tanks. Robison said to the Council: "All I have got to do is to say on this letter is we can get the tanks built. I cannot say, of course, as to these tanks until I have seen the plans and make sure these plans correspond with our specifications" (R. II-974). Then occurs this very significant sentence, which shows that Robison was entirely familiar with the plan to get a bid from Doheny: "I sent a memorandum to the Chief of the Bureau of Yards and Docks some three weeks ago, but Bakenhus has not seen it" (R. II-974). (Bakenhus was then connected with the Bureau of Yards and Docks and was at the Council meeting.) The Bureau of Yards and Docks prepared the specifications for the Pearl Harbor job.

It is quite evident that while the existing program in November, 1921, was to use the royalty oil to procure a supply of current use fuel oil, Robison fought to reverse this policy (*i. e.*, not to use the royalty oil for current use at all, but to use it for the purchasing of reserve fuel oil and the construction of tanks at Pearl Harbor) and Robison won his fight and

Robison's earlier policy of fuel oil storage was restored (R. II-964, 965, 972-75, 981, 991, 995; III-1081, 1094).

At the October, 1921, conference with Robison, Secretary Fall expressed grave doubts about the legality of Robison's plan (R. III-1079, 1080), and it was evidently determined between him and Robison to arrive at some conclusion concerning the legality of the plan, and if possible, to use the oil for construction rather than for exchange for current use. This was done as soon as could be done, and the temporary policy of exchange for fuel oil was reversed, as Fall undoubtedly expected it to be reversed. We say he expected it to be reversed because it will be remembered that he sent Doheny's proposition contained in the letter of November 28, 1921 (Pl. Ex. 33; R. I-162) to Robison with a covering letter (Pl. Ex. 34; R. I-163), in which he showed every expectation that Robison would O. K. the proposition and it would go forward.

More than this, before leaving Washington on December 1st, when counsel for Appellants would have us believe that the sole policy was the exchange of crude oil for fuel oil, Fall handed Doheny's proposition to Bain and told Bain to try his hand at evolving a plan along these lines (R. II-719, 833). The Appellants sedulously avoid any reference to this testimony, when they trace the course of this letter (Appellants' brief, pp. 241-42); and by the half-statement "where it came into the possession of Dr. Bain of the Bureau of Mines along about the 1st of December, 1921, without any instructions," counsel seek to create the impression that the letter in some unexplained manner fell into Bain's hands.

Moreover, that the original intention of both Fall and Robison was to use the oil for storage and to make a construction contract, is shown by the telegram of Finney of December 6, 1921, to Fall (Pl. Ex. 237; R. I-329), in which Finney says:

"Navy Department requests that we proceed **as originally planned** with reference to exchange of oil and securing storage."

Many statements are made in Appellants' brief (pp. 32-34) to the effect that the storage plan was acquiesced in by the Interior Department without Fall's concurrence or without his being informed about the matter at all. It is sought to give the impression that Fall knew nothing about the Navy's desire to have this plan followed out at or about the beginning of December. We think the above quoted telegram effectually disposes of this suggestion.

Any fair reading of the Record will, we think, convince that the "original" plan is the one that was carried out, and that it was only because of doubt as to the ability to carry it out, and as to Denby's consent, that it was temporarily laid aside in November.

How Doheny's letter of November 28th got back to Fall the Record does not disclose, but certain it is that between November 29th and December 1st, Fall again had it, because before he left for the West on December 1st he handed that letter to Dr. Bain, Director of the Bureau of Mines (R. II-719; 833). Bain says that Fall had the matter up "actively with him between November 29th and December 1st," the date Fall left for the West, because Bain's bureau was to be charged with whatever duties there were in connection with it in Fall's absence (R. II-833). Before Fall went away, and at the same time he handed Bain Doheny's letter, Fall gave Bain instructions that when the Admiral and the Navy Department sent over the plans he should "proceed to develop a method of carrying out the Navy's wishes in this matter" (R. II-833).

The statement in the Appellants' brief (pp. 31, 201 and 218) that the Doheny letter of November 28, 1921, came into the possession of Dr. Bain "without comment or instructions" is unwarranted. The Appellants can gain but little solace from Finney's repetition to Bain of the instructions which the latter had previously received from Fall before the latter's departure for the West (Appellants' brief, p. 192), since such instruc-

tions were not original with Finney, as counsel would have the Court believe.

These unquestioned facts seem to us to demonstrate that counsel for the Appellants are in error when they say in their brief (pp. 31, 32, 34, and 35) in effect, that Fall had nothing to do with the formulation of the fuel oil storage plan and that the steps taken in early December, 1921, by Director Bain to effect that plan were without the prior knowledge and consent of Secretary Fall. The alleged countermand of Fall's orders by Finney on November 30th (Appellants' brief, p. 213) has no reference to Fall's orders to Bain that the latter should draft a plan with reference to the November 28th letter; but deals with the disposal of the royalty crude oil from the government leases on the naval reserves.

That Bain understood he was to proceed **with Doheny's company** is quite clear from the fact that on or about December 16th Bain went to Finney, then Acting Secretary in Fall's absence, and asked Finney to write Cotter the following letter (Pl. Ex. 67; R. I-342):

"Mr. J. J. Cotter, Pan American Petroleum and Transport Co., 120 Broadway, New York, N. Y.

"DEAR COTTER:—Will you be in Washington any time between now and December 27? If so, please call on Director Bain of the Bureau of Mines who wishes some information from you with respect to the matter discussed in Mr. Doheny's letter of November 28, 1921.

"Please let me know when you will be here.

"Sincerely,

"E. C. FINNEY,
"Acting Secretary."

On the retained file copy of this letter in the Interior Department, there is this notation in Bain's handwriting (R. I-343):

"I asked Mr. Finney to send this since Doheny's bid will be considered through the New York office and I

thought we might get it outlined before we go west. Bain."

When Finney was requested to write the above letter by Bain, Bain had Doheny's letter of November 28th in his hand (R. I-342; II-719). That letter did not go into the regular files, but went into Bain's safe, where it remained until it was found during the course of the Senate investigation (R. II-832, 833). The statement on page 243 of the Appellants' brief that the letter was filed "in the Bureau's safe with and kept in the same manner as other 'papers relating to this case'" is partially true but very misleading. At page 720 of the Record, to which counsel refer, Bain testified on direct examination that it was "kept in the files of the Bureau of Mines, where the original remains until the present date." But, when pressed upon cross examination upon this point, Bain was forced to admit (R. II-832-33) that the letter was placed by him "in the safe in his office, and was not in the general files of the Department, and when the general files were certified to the Senate Committee, this letter was not certified over with them, and was subsequently found." The witness refrains from telling by whom it was found.

Thus it appears that in addition to the relief measures a second business matter of importance, *i. e.*, Doheny's written proposition of November 28, 1921, was pending between Doheny's company and Fall on November 30, 1921, when the \$100,000 transaction, hereafter to be referred to, occurred. Counsel for the Appellants are in error when they state at page 278 of their brief that there was but one matter under negotiation on November 28, 1921, and that was the question of relief from the excessive royalties payable under the July 1921 leases.

Cotter did go to Washington to see Bain about the matter and discussed it with him (R. I-345; II-720, 835, 836, 837) and told Bain that Pan American would bid on the tankage proposition (R. II-834).

Prior to this time Judge Finney, Acting Secretary, had insisted on the taking of competitive bids (R. II-862). There is no justification for the statement on page 191 of the Appellants' brief that Robison and Bain decided upon competition. As a result it was agreed Dr. Bain should go to the California coast and see certain of the oil companies on the question of whether they would be interested in bidding on the proposition. We believe that if Finney had not insisted on this method of procedure, matters would probably shortly have been closed with Cotter and the J. G. White Engineering Corporation teamed up together.

Meantime Robison had asked on November 30, 1921, and received on December 2, 1921, the written opinion of the Judge Advocate General to the effect that it would be legal to exchange royalty oil for tankage, in which it is stated that **"the authority granted 'to exchange' is unrestricted; i. e., the Act does not specify nor limit what may be taken in exchange for the oil and its products."** (Def. Ex. M-4, PP; R. II-697, 701, 981.) This confirmed an earlier oral opinion to the same effect (R. II-981). On the footing of this opinion the Navy had advised the Interior Department that it desired the Interior Department to proceed along the line of using all of the royalty oil not for current use fuel oil, but for oil to be stored in tanks to be built by the contractor (Pl. Ex. 66, R. I-339).

At page 35 of their brief, Appellants' counsel refer to the Navy Council meeting of December 8th, but they fail to tell the whole story of what occurred at that Council meeting. On December 2nd the Judge Advocate General rendered his opinion in favor of the legality of the so-called exchange procedure, and on December 5th, Secretary Denby upon the urgent recommendation of Robison O. K'd the use of royalty oil for this purpose (Def. Ex. PP; R. II-697, 983). At the December 8th Council meeting a form of letter was presented to be sent to the Interior Department, which letter

had been prepared in the Bureau of Yards and Docks, and which called attention to the serious questions as to legality, not so much in any attempt to reverse the Judge Advocate General's opinion, but because of the fact that the legal doubts then existing were so great that probably there would be no bidders for the work. It is significant that this reference in the letter was taken out (R. II-988).

On December 23, 1921, Dr. Bain reported to Secretary Fall what had occurred and what was planned, in a letter (Pl. Ex. 70; R. I-345) as follows:

"DECEMBER 23, 1921.

"The Honorable, The Secretary of the Interior.

"DEAR MR. SECRETARY:—Confirming my telegraphic correspondence with you, I am planning to stop off at Three Rivers the morning of the thirty-first, arriving from Chicago, on the Rock Island, and will leave the next morning for Los Angeles.

"I am going West primarily to consult with the Standard and such other companies as we may determine in conference between us should be taken into account with regard to the tankage plant of the Navy. I have seen Mr. Cotter, and he is getting for us additional data now. I have also had a preliminary conference with the J. G. White Company, which has done a large amount of construction work for the Navy and is also dealing in oil. By the time I reach you I will be able to give you some idea of the character of the contract which should be made in this case. Mr. Finney has, I believe, already told you that the Navy has given the Department a free hand to go ahead."

This letter seems to us to dispose effectually of Appellants' assertion (pp. 38-40, Appellants' brief) that Bain was working independently and not in close conjunction with Fall in December, 1921, on the matter which eventuated in the contract of April 25, 1922.

Bain and Cotter, of the Pan American, went West together, leaving Washington December 28th, 1921 (R. II-837). At Three Rivers Bain reported to Fall what he had done and what he proposed to do on the Pacific Coast and received Fall's approval (R. II-725, 726); Mr. Cotter merely greeted Fall on the station platform at Three Rivers and went on to Los Angeles (R. II-837).

On pages 31, 37, 213 and 238 of the Appellants' brief, counsel say that no action was ever taken by the Government along the lines referred to in the letter of November 28th. They also state that Doheny's letter was not treated as either a bid or a proposition and never entered the realm of negotiation for the contracts here attacked (Appellants' brief, p. 278). That such statements are inaccurate will readily appear from the facts above narrated. The action taken was that Robison was given the letter with the statement that if he O. K.'d it the Government would proceed on the basis of it (Pl. Ex. 34; R. I-163). Bain was given the letter and told to try his hand at drafting a plan (R. II-719, 833). The contract of April 25, 1922 ultimately eventuated, with the preferential right to Doheny's company to leases in Naval Reserve No. 1, and that preferential right eventuated into the lease of December 11, 1922. The contention of counsel that the November 28th letter can not be considered a bid or proposition because of the five months' delay in the execution of the April 25, 1922 contract (Appellants' brief, p. 239) is readily answered by the fact that Judge Finney in early December, 1921 insisted upon competitive bidding (R. II-862) and to comply with such insistence, a semblance of competitive bidding was thereafter pursued.

Another matter which is significant is that Robison testifies that Fall, in October or November, indicated doubt as to the legality of exchanging crude royalty oil for the construction of tankage, dredging and docking facilities at Pearl Harbor (R. III-1076, 1080). Robison fixes as at approximately that

time a statement by Fall to the effect that he was afraid the doubt as to the legality of the procedure would prevent the Government getting bidders to make proposals (R. III-1078, 1079, 1080). As we have above shown, Doheny did make a proposal on November 28th (Pl. Ex. 33; R. I-162). As we have above shown, this was a fulfilment of a statement on Doheny's part to Fall. Admiral Robison attempts to fix by a certain exchange of letters which occurred between himself and E. L. Doheny, Jr., in December, 1921 (Pl. Exs. 68, 69; R. I-343, 344) the date of an interview which he says he had with Doheny, at which Doheny stated that his organization was opposed to his company undertaking the work and that he had decided not to go into it (R. II-996). Robison testifies that he persuaded Doheny that for patriotic reasons his companies ought to undertake the work, and obtained a promise from Doheny that his company would submit a bid at cost (R. II-996; III-1087).

Robison's testimony on this point is made doubtful by the fact that he claims to have reported his interview with Doheny to Fall (R. II-997; III-1087). Of course, Fall was at that time in the West. Director Bain, however, knew of the interview (R. II-834, 835).

Of course, if Robison wanted competition he would have sent for the other prominent men of the oil industry and gotten them to agree at least to do as well as Doheny. The record is bare of any evidence that he ever took the matter up with any other person in the United States on the basis of patriotism and public need. This being the case, he must have known, and Bain must have known, that if the matter was put as a business proposition to any other person or corporation the bid of such person or corporation would be a bid which involved the usual and ordinary profit in a business transaction. They must all have known, therefore, that if Doheny was to be taken at his word, no one could or would underbid him in what appeared on the surface to be

a business competition. The real inducement to Doheny to do the construction work at cost, was, of course his getting enormously valuable leases in Reserve No. 1. That feature of the matter was, as we shall show, a matter of personal negotiations.

It is to be noted that Doheny's bid of November 28th (Pl. Ex. 33; R. I-162) was at cost and was unquestionably submitted before the alleged interview. It is also to be noted that Robison claims he had convinced Fall of the legality of the transaction before November 28th (R. III-1076, 1079, 1080). It is further to be noted that following the Doheny proposition of November 28th negotiations and conferences went on without interruption between Bain and Cotter, who represented the Doheny company (Pl. Exs. 67 and 70; R. I-342, 345; R. II-720, 835, 836, 837), and that in connection with the transaction Cotter left for the West with Bain on December 28th (R. II-837). We suggest that Robison has misplaced the date of the interview, and that it in fact occurred, as Mr. Doheny's recollection would indicate, sometime after January, 1922, when Bain had returned from the West with information that a number of the oil companies thought the proposition illegal and did not care to bid.

3. The money transaction between Fall and Doheny.

This recital brings us, so far as the making of the proposed contract is concerned, down to the end of the year 1921. We must stop here and go back to cover another transaction occurring in the autumn of 1921.

During the autumn of 1921 Secretary Fall discussed with Mr. Doheny his need for certain money to make a purchase of a ranch adjoining his ranch at Three Rivers, New Mexico. This discussion was certainly three or four weeks prior to November 28, 1921 (R. I-210, 211, 267, 268). As a result of the conference Doheny agreed to advance Fall \$100,000 (R. I-210, 268). It was agreed that Fall should let Doheny

know when he needed the money. It is to be borne in mind that the petition for relief of the Petroleum Company was filed on November 22nd (R. I-156), and that the Doheny proposition regarding tankage and further leases to his company was submitted November 28th (R. I-162), and received by Fall presumably on November 29th (R. I-163). On November 29th Fall called Doheny in New York from Washington over the telephone and advised Doheny that he now needed the \$100,000 (R. I-268).

Doheny caused his son to draw this amount in currency out of the bank account of the son at Blair and Company, New York, caused the money, which was in large bills, to be placed in a satchel, and had his son take it and deliver it to Fall in Washington. Fall executed a demand note dated November 30, 1921, and delivered it to young Doheny who returned the note to his father (R. I-211, 212, 268, 269). Fall left on December 1st, went to El Paso, Texas, where he disbursed practically all the money so received in cash, using said cash for the purchase of the very ranch he had mentioned to Mr. Doheny, and to purchase which he told Mr. Doheny he needed the money (R. I-177).

This is the transaction which Appellants in their brief (page 274) characterize as a "*bona fide* loan." On the surface and on the face of the transaction, it was a loan. In fact it was a gift. What was the exact purpose of giving and taking a note covering the transaction will probably never be accurately known. Some motive actuated it. It was not a proper motive and it was not the intent that the note should evidence an obligation of repayment on the part of Fall.

No person of ordinary sense can read the Record made by Mr. Doheny himself and reach the conclusion that this transaction was in good faith a loan and that it was intended the money should be repaid. If it had in fact been a loan about which there was nothing wrong, why carry out the transaction in the extraordinary manner in which it was done?

First, can anyone doubt that Edward L. Doheny had at his command \$100,000? (R. I-266-7.) Why then did he have his son supply the money? (R. I-268.) Obviously so that there should be no record of Mr. Doheny's procuring the cash at the time it was procured.

Second, if as Doheny alleges, he knew that Fall needed the funds to make settlement for a ranch in New Mexico (R. I-210, 268), why did he send the funds to Washington in cash? That he did know Fall was leaving Washington immediately is evidenced by his letter of November 28, 1921, in which he says in the last paragraph: "I suppose you will turn this matter over to First Assistant Secretary Finney, who, with Rear Admiral Robison, may arrange the details of it during your absence, * * *" (R. I-163). How very odd to give a man \$100,000 in cash to carry all the way across the United States, when a bank check or a cashier's check would have been equally available for making a real estate settlement and in every way the equivalent of cash, and would have been wholly safe.

Thirdly, why send the money by a confidential messenger in cash to Washington to reach Fall by the most careful timing exactly on the eve of his departure from Washington?

Fourthly, why was the note torn within a few weeks of the time it was given? (R. I-182, 259, 260, 262, 269.)

Fifthly, why has Fall paid neither interest nor principal upon the note to this day? For, be it remarked, there is no word of testimony in this case to show that Fall has acknowledged the debt since the note was torn, thus making it collectible, or has ever paid either any interest on the note or any portion of the principal (R. I-244, 245, 249).

Sixthly, does not Doheny's own testimony show beyond peradventure that the matter was a gift and not a loan, and that it was never intended that Fall should repay it?

Seventhly, why did Doheny plan to employ Fall at such a large salary that he could apply half of his salary to the

repayment of the note if he did not realize it could never otherwise be repaid by Fall, and if he did not realize that it was in fact a gift and not a loan?

Eighthly, why did Doheny after urging Fall (R. I-237) to make a clean breast of the whole affair change his testimony before the Senate Committee from day to day, first saying that "I" obtained the money upon a check and a few days later saying his son obtained it upon his son's check; first saying nothing about the note being torn and a few days later producing a torn note; and why did he have so much difficulty remembering why he sent cash instead of a draft, and otherwise hesitate and hedge in answering questions, if the entire transaction was *bona fide*?

We need only turn to the language of Edward L. Doheny to be convinced that there is no reasonable explanation of this transaction except that it was made with the full knowledge that it was an improper transaction because his company was then in business relations with the Government which Fall represented, and that the transaction must therefore be concealed; and that the transaction was nothing but a bribe with no intent that it should ever be returned. We quote from the Senate Record, giving the page numbers before each quotation, as follows:

(R. I-237) "THE CHAIRMAN:—At the time you made this loan, Mr. Doheny, you had had relations with the Interior Department with reference to this very naval reserve and had a certain lease?

"MR. DOHENY:—Our company had, Mr. Chairman.

* * * * *

(R. I-222) "SENATOR WALSH, of Montana:—Mr. Doheny, you knew at the time, of course, that Senator Fall was charged with the administration of all of the oil lands of this country in the public domain?

"MR. DOHENY:—Yes."

* * * * *

(R. I-211-12) "MR. DOHENY:—I sent it to him right away I think the next day, or within a couple of days.

"SENATOR WALSH, of Montana:—From New York to Washington?

"MR. DOHENY:—Yes, sir.

"SENATOR WALSH, of Montana:—And the note then went back to you?

"MR. DOHENY:—Yes, sir; the note was brought back to me.

"SENATOR WALSH, of Montana:—How did you transmit the money to him?

"MR. DOHENY:—In cash.

"SENATOR WALSH, of Montana:—How did you transport the cash?

"MR. DOHENY:—In a satchel. The cash was put up in a regular bank bundle and taken over and delivered to him.

"SENATOR WALSH, of Montana:—Who acted as your messenger in the matter?

"MR. DOHENY:—My son.

"SENATOR WALSH, of Montana:—Where did you get the cash?

"MR. DOHENY:—I got the cash from the bank, from Blair & Co.'s bank in New York.

"SENATOR WALSH, of Montana:—And how did you get it from the bank?

"MR. DOHENY:—I cashed a check.

"SENATOR WALSH, of Montana:—Have you got the check?

"MR. DOHENY:—The check I can also send you. I saw the check just before I left."

It might be here remarked that this statement was not truthful and not frank. The Appellants completely overlook this misstatement by Mr. Doheny, as to the source of the \$100,000 in cash, when they state on page 275 of their brief that his testimony before the Senate Committee was a full statement

of the situation, except for his evasion as to the note. The true facts subsequently developed on a second hearing, when Mr. Doheny again appeared before the committee. He there testified as follows:

(R. I-266-7) "THE CHAIRMAN:—Why, Mr. Doheny, you came here to tell this committee that you had loaned Mr. Fall \$100,000 two years ago last November?

"MR. DOHENY:—Yes, sir; a year ago—two years ago last November.

"THE CHAIRMAN:—And you knew at that time that you had the check evidencing the loan or evidencing your drawing the money with which you made it in your possession in California before you started East?

"MR. DOHENY:—No, I didn't have it in my possession, Mr. Lenroot. Before we get any further misunderstanding on this let me tell you. First I borrowed that money from my son. It was his check that was in California.

"THE CHAIRMAN:—You borrowed the money from your son?

"MR. DOHENY:—I borrowed the money from my son and I repaid the money to him with two checks. My account wasn't large enough to produce the money that I was going to loan him, so I repaid him with two checks.

"THE CHAIRMAN:—Did you tell us that the other day?

"MR. DOHENY:—No, sir.

"THE CHAIRMAN:—Why not?

"MR. DOHENY:—Well, I wasn't asked about it.

"THE CHAIRMAN:—Wasn't asked about it?

"MR. DOHENY:—No."

To resume the story let us quote as follows:

(R. I-212) "SENATOR WALSH, of Montana:—How did you come to make this remittance to Senator Fall in cash?

"MR. DOHENY:—That is just what I said a moment ago. I do not remember whether it was the result of his request, or whether it was my own idea of sending it to him in cash to pay for the property. But he was going to use it down in New Mexico, and I thought

perhaps,—well, I do not know exactly how that was as my memory is not good on that point."

Several weeks after it was given, the note was torn. At the first hearing at which Doheny appeared, on January 24, 1924, he stated that he could not produce the note, as it was lost and he could not find it. It subsequently appeared that the note was in his pocket at the time he was testifying and that he was seeking to avoid the story as to the tearing of the note, hoping that he might produce the torn-off signature at a later date. At this first meeting he testified on this subject as follows (R. I-208):

"MR. DOHENY:—Well, I have the note at home, the note that former Senator Fall gave me for the money, and I remember it by the note.

"SENATOR WALSH, of Montana:—Where is the note now?

"MR. DOHENY:—It is at home. I looked for it the day I started over here. But it was impossible to locate it on that date and there was a question between my wife and myself whether it was in New York in my private box or in Los Angeles. We came to the conclusion that it was in New York, so we gave up looking for it at home, and I decided to look for it in New York when I get there tomorrow or next day."

When he appeared the second time Mr. Doheny testified as follows (R. I-259):

"MR. DOHENY:—Yes, sir; I came today prepared to make a statement with regard to the note which I got from Mr. Fall when I loaned him the \$100,000. I brought with me all of that note that is in my possession at the present time. I had the entire note in my possession in December, 1921, and my wife and I on the eve of our departure for California were going through some papers, and I found this note in my pocketbook, and I remarked to her that inasmuch as I had made this loan to Mr. Fall to help him out of a difficulty, it would not

much help him out of a difficulty if anything happened to us and the note became the property of executors; it would mean that he would be pressed upon for the payment of it, and that the note instead of being a service to him would be an injury, so I divided the note into two parts. I gave her one part to keep, and I have the other part here to present to the committee (handing paper to Senator Walsh)."

(R. I-262):

"MR. DOHENY:—With the entire note in the possession of my family, whenever we wanted to collect the note we had the note to show that the money was due on the note, but if it should happen to go into the hands of our executors, in case something happened to us, they would not be able to press Mr. Fall and make the loan an injury instead of a help to him.

"SENATOR WALSH, of Montana:—Yes. And where was it that this conversation took place between you and your wife?

"MR. DOHENY:—This transaction took place in the Plaza Hotel, in our rooms at the Plaza Hotel, just prior to our departure for the Pacific Coast.

"SENATOR WALSH, of Montana:—And when was that with reference to the date of the note?

"MR. DOHENY:—That was about two weeks or three weeks after the note was made, after I received the note."

(R. I-264-5):

"THE CHAIRMAN:—Now, Mr. Doheny, your purpose then was if anything happened to you and Mrs. Doheny that this \$100,000 should be a gift to Mr. Fall?

"MR. DOHENY:—No; my purpose was that he should not be pressed for the payment until he was able to pay it.

"THE CHAIRMAN:—Well, if anything happened to you or Mrs. Doheny how could he ever be pressed for payment after what you had done to the note?

"MR. DOHENY:—If anything happened to us the two fragments of the note would still remain in our posses-

sion, wherever we were with our bodies, if we were in a railroad wreck, and our heirs, my son would have gotten hold of the pieces and he would have known what they meant, but executors wouldn't; they would force the payment of the note upon him. My son knew that the note was given for the money, and he knew it was Mr. Fall's intention to pay the note, and we believed that he could get a new note from Mr. Fall by asking for it. That is what is in my mind, that he could have gotten a new note by saying to Mr. Fall, 'The note that you gave to my father was lost when they were in that wreck, and we want a new note for it,' and we believed that Fall would give him a new note, and in case we were all killed in a wreck, why of course it would have been a legacy to him."

On the question of any entry of this as an indebtedness on his books he testified as follows (R. I-272):

"SENATOR ADAMS:—So there was no entry made on your personal accounts at that time in reference to this note or the money that you sent to Secretary Fall?

"MR. DOHENY:—No, sir."

On the question of repayment of the note Mr. Doheny stated as follows (R. I-244-5):

"THE CHAIRMAN:—Mr. Doheny, what are your expectations with reference to the repayment of this loan?

"MR. DOHENY:—Well, I will tell you frankly now—I don't know whether this has any connection whatever with the investigation—but I expected that if the Senator did not sell or turn over that land that later on I might employ him in connection with our affairs in Mexico, with which he is very conversant, and I would pay him a salary large enough of which he could pay about one-half to apply on the note, and pay it off in five or six years. And that was my expectation.

"THE CHAIRMAN:—You had that in mind at that time?

"MR. DOHENY:—Yes, sir.

"THE CHAIRMAN:—If Mr. Fall does not enter your employ, do you ever expect to press him for payment of the note?"

"MR. DOHENY:—Well, I don't know. If Mr. Fall is well enough and in good health, I expect he will enter my employ.

"THE CHAIRMAN:—You do expect that?"

"MR. DOHENY:—Yes, sir."

(R. I-247):

"SENATOR PITTMAN:—Mr. Doheny, at the time you discussed the making of this loan to Senator Fall, was there any discussion with regard to repaying you the money?"

"MR. DOHENY:—No, sir.

"SENATOR PITTMAN:—He did not say he thought he could ever repay it?"

"MR. DOHENY:—No, sir."

(R. I-249-50):

"MR. DOHENY:—I do not know that I had that particularly in mind. I cannot say just what came into my mind at that time.

"SENATOR PITTMAN:—Well, you had in mind employing him and his repaying this note out of his employment?"

"MR. DOHENY:—Yes, sir.

"SENATOR PITTMAN:—And he had talked to you about resigning from the job of Secretary of the Interior?"

"MR. DOHENY:—Yes, sir; but I did not know how soon he would retire, whether he would stay his term out or not. We never discussed the length of time that he would remain in the Interior Department."

On the question of Mr. Doheny's own knowledge of the probable effect of such a transaction on Secretary Fall's official action, Mr. Doheny stated the following (R. I-214):

"SENATOR WALSH, of Montana:—I can appreciate that on your side, but looking at it from Senator Fall's side it was quite a loan.

"MR. DOHENY:—It was, indeed; there is no question about that. And I am perfectly willing to admit that it probably caused him to have such a feeling that he would have been willing to favor me, but under the circumstances he did not have a chance to favor me. He did not carry on these negotiations. That is the point I would like for you to understand; that Senator Fall, in my opinion, was not influenced in any way by this loan, because the negotiations were carried on by men who were not under his control."

(R. I-232):

"THE CHAIRMAN:—I am not asking you about the question of collusion; I am examining you concerning your own statement, that by reason of your accommodation to Mr. Fall you think that had he a discretion to exercise he might have been more likely to exercise it in your favor.

"MR. DOHENY:—Why, I admit that.

"THE CHAIRMAN:—Very well.

"MR. DOHENY:—I don't think he is more than human."

It should be added that in a number of places Mr. Doheny stated that he had no personal relations with Secretary Fall concerning the contracts and leases (R. I-214; I-230; I-232). We have above shown certain personal negotiations and shall below elaborate on others which show that he was in touch with Secretary Fall throughout the transaction.

There is another matter which must not be overlooked in the transactions of these two men. It is perfectly evident from Mr. Doheny's statement to the Senate Committee that there was an understanding that the Pan American Company should employ Mr. Fall upon his leaving his office of Secretary of the Interior (R. I-245):

"MR. DOHENY:—Well, I will tell you frankly now—I don't know whether this has any connection whatever with the investigation—but I expected that if the Senator did not sell or turn over that land that later on I might

employ him in connection with our affairs in Mexico, with which he is very conversant, and I would pay him a salary large enough of which he could pay about one-half to apply on the note, and pay it off in five or six years. And that was my expectation.

"THE CHAIRMAN:—You had that in mind at that time?

"MR. DOHENY:—Yes, sir.

"THE CHAIRMAN:—If Mr. Fall does not enter your employ do you ever expect to press him for payment of the note?

"MR. DOHENY:—Well, I don't know. If Mr. Fall is well enough and in good health I expect he will enter my employ.

"THE CHAIRMAN:—You do expect that?

"MR. DOHENY:—Yes, sir."

(R. I-248-49):

"SENATOR PITTMAN:—And you have testified that you expected it would be paid probably by your employing Senator Fall and taking it out of his salary?

"MR. DOHENY:—In case he did not find it possible to pay it out of the profits of the property; in case he was not able to repay it any other way.

"SENATOR PITTMAN:—You did not expect him to go into your employ while he was Secretary of the Interior, did you?

"MR. DOHENY:—No, sir.

"SENATOR PITTMAN:—**You were to employ him after he ceased to be Secretary?**

"MR. DOHENY:—**After he ceased to be Secretary of the Interior.**

"SENATOR PITTMAN:—Was there anything said with regard to him resigning as Secretary of the Interior before his term was up?

"MR. DOHENY:—Yes, sir; he often spoke of that. He often said he was not going to remain very long."

(R. I-249-50):

"SENATOR PITTMAN:—Well, you had in mind employing him and his repaying this note out of his employment?"

"MR. DOHENY:—Yes, sir.

"SENATOR PITTMAN:—And he had talked to you about resigning from the job of Secretary of the Interior?"

"MR. DOHENY:—Yes, sir; but I did not know how soon he would retire, whether he would stay his term out or not. We never discussed the length of time that he would remain in the Interior Department."

It is perfectly clear from the above that there was an understanding that Fall would enter the employ of the Appellant Company and might liquidate his indebtedness out of the salary he would then receive if he could not do it in any other way. In support of their unwarranted contention that there was no such agreement or understanding between Doheny and Fall (Appellants' Brief, pp. 276, 292), counsel refer to the testimony adduced by the Chairman (R. I-245) but ignore Doheny's admission to Senator Pittman that Fall was to be employed "after he ceased to be Secretary of the Interior" (R. I-248-49).

The cases which are cited under a subsequent heading of this brief show clearly that such an agreement and arrangement is fraudulent, against public policy, and vitiates any contract made. It not only vitiates the contract for repayment by the taker of the money, but vitiates any dealings had on the footing of that arrangement or understanding, or following it, between the United States and the giver of the money. If there were no other thing in this case except the understanding that Fall was to enter the employ of Doheny's company in gainful occupation, that thing, in and of itself, would vitiate every subsequent transaction between Doheny or the company which he represented and for which he was speaking, with Fall, representing the United States of America, made or intended to be made through the actual

or potential influence of Fall or which he was supposed in any way to forward. And this would be equally true whether Fall were actually an employee of the United States or merely to use his influence with other employees of the United States in the premises. The authorities cited later in this brief so hold.

Counsel attach great significance to the fact that Fall's note was carefully preserved by Doheny after its mutilation and to the further fact that Fall was not informed of its mutilated condition (Appellants' Brief, pp. 276-77). Such facts evidence an intention on Doheny's part to retain control over Fall through the medium of his outstanding \$100,000 obligation; and cannot be urged as proof of the *bona fides* of the transaction. Counsel also state that public officials who are bribed do not draw up notes in their own personal handwriting and give them to the briber (Appellants' Brief, p. 277). That would seem to depend largely upon whether the subject matter of the bribe, as here, lay *in futuro* and upon whether the briber wished some tangible means of control over the future conduct of the bribed. Finally, counsel contend that a note constitutes as much evidence of the transaction as a check (Appellants' Brief, p. 278). With this statement we strongly disagree. Had a check been given, there would have been a record of the transaction in Doheny's checkbook, in his bank statement and in the records of the bank. The testimony is uncontradicted that Mr. and Mrs. Doheny took great care that the note should not appear in their personal accounts and papers; and inasmuch as the cash was drawn from the bank account of their son, obtaining the evidence was made most difficult.

Mr. Doheny, in his statement to the Senate Committee, several times said that he had never discussed the leases or contracts with Fall; that all of the transactions were had between Fall's subordinates and the subordinates of Doheny in the Pan American Company, and that therefore while the

transaction might naturally influence Fall it could not in fact have had that effect, as he had nothing to do with these matters (R. I-214, 230-2). We have above referred to Fall's great activity in behalf of the Pan American Company at or about December 1, 1921.

It remains to show his close personal touch with the transactions thereafter and that in every case he kept his hand upon the lever, and that no matter could go through or was allowed in fact to go through without his personal participation and control.

4. The making of the contract of April 25, 1922.

(a) Competitive Bidding.

Early in January, 1922, Bain arrived at Los Angeles and took up the Pearl Harbor proposition with Doheny, Cotter, and various directors of the Pan American Company (R. II-727, 837-8).

The Standard Oil Company was approached. Why? If a contract were ultimately to be awarded to Pan American and it appeared that Standard had not been approached on the subject, there would have been some pretty difficult explaining to do. The answer came promptly that Standard would not be interested in the construction end of the contract (R. II-729).

And yet from January to the middle of April, when the bids were submitted, a sort of pretense was kept up that Standard would probably bid. Robison states that when Bain got back to Washington in January, 1922, he told Robison that Standard's objections were of such a character that they could be met and that he, Bain, expected Standard to submit a bid on construction (R. III-1083). Of course this is wholly contrary to the fact, because Standard's objections were fundamental and Bain knew it (R. II-844-45).

On March 3 Black sent Bain a copy of the adverse opinion of Mr. Sutro, counsel for Standard (Pl. Ex. 95; R. I-386).

It did not take a lawyer to see that Mr. Sutro's objections were fundamental and were to the method of contracting because it would constitute, in his judgment, a violation and evasion of the Act of June 4, 1920. (See opinion, Pl. Ex. 51; R. I-296.) And yet on March 4, 1922, Bain writes Black (Pl. Ex. 96; R. I-387) advising that he is having Sutro's opinion studied and that he expects to be able to devise a form of bidding which will meet the objections raised by Sutro. Dr. Bain says the study he had in mind was a study by Secretary Fall and Assistant Secretary Finney (R. II-842-3). But they had already studied the matter and given opinions, if the testimony is to be believed.

It is furthermore clear that Bain's statement that he expected to be able to devise a form of bidding which would meet the objections was untrue, because on March 7th an invitation for bids was issued on exactly the same theory of a bid in barrels of oil, which had been the form of bid required by the earlier invitations.

Why this pretense that Standard was to be a real competitor with Pan American when it was entirely clear that it would not be? Again, at the end of March, Standard wired the Interior Department (Pl. Ex. 93; R. I-384) indicating a desire to bid on a different sort of proposition. It was promptly advised that it was too late to change the proposition and it would have to bid on the project according to the invitation of March 7th (Pl. Ex. 94; R. I-384).

What is the story with regard to General Petroleum? The matter was laid before it. The answer came promptly from its attorney that the plan was illegal in his judgment and that his company would not bid. Bain met this attorney, Mr. Weil, in California (R. II-740). He reported his objections and his position to Fall (R. II-743, 842), and we think it clear he reported them to Robison (R. II-743), although the Admiral's testimony is very unsatisfactory on this point (R. III-1083, 1084). In his deposition in the Mammoth

oil case, he said he knew, there were two attorneys who objected. At this trial he insisted that he only knew of one,—Sutro (R. III-1083). At all events, it was or ought to have been clear that General Petroleum would make no bid.

The matter was taken up with Pacific and Associated (they are affiliated companies). Why? They constitute one of the large oil groups in California. If a contract had been made without going through the form of submitting it to them it is entirely clear that the most severe censure would have been passed upon the transaction. These companies, as the record here shows, have always been good neighbors to the United States in the Naval Reserves and have sought in every way to cooperate with the Government in the conservation of its naval oil (Pl. Exs. 15, 16, 17, 18, 19, 20, 21, 22, 76, 77, 78, 144, 146, 148, 149, 150, 152, 153; R. I-138-45, 353-56; II-587-593). As was to be expected, therefore, their attitude was that if they could be of service in the matter they would like to do so. They were very much at a disadvantage, however, in getting data and knowing what was going on, as shown by Mr. McLaughlin's letter of March 9, 1922 (Def. Ex. XX, R. II-754), wherein he says:

"I have your very interesting letter of March 1st and am very much obliged to you for it. Not being familiar with the details of how this matter is being worked out in Washington, we are naturally more or less perplexed at this end."

They came to the conclusion that the transaction was unauthorized by the Act of June 4, 1920, and that they could not bid except upon condition that Congress would pass legislation approving the form of contract. This they advised Fall and Bain (R. II-844). It was therefore known first, that if they made any bid they would make it on a basis which involved a profit and that their bid would undoubtedly be higher than the Pan American's bid, even though the Pan American did make a profit, because as the Record shows

Pan American and J. G. White Company, its agent, had gotten data and been in touch with officials of the Government concerning its bid so frequently and in such wise that it had a clear inside track in any bidding; secondly, because the Associated bid would be conditioned, as above set forth (R. II-844), and could be of course discarded on that ground if made.

Dr. Bain in the letter of March 30, 1922 (Pl. Ex. 247; R. II-846), writes Mr. McLaughlin of the Associated Company to come to Washington and be present at the time the bids are received. In this letter he makes this interesting suggestion:

"It also occurs to me that it is entirely possible that even if some other company is the successful bidder on the project as a whole you might be able to make a private arrangement to get control of the crude oil from Reserve No. 2, which I gathered from our conversations is the thing you are most interested in." (R. II-846.)

It is further interesting to note that exactly what Bain suggested as above did happen, because as soon as the Pan American Company became the taker of the royalty oil of the Government under the contract of April 25, 1922, it resold this royalty oil at a premium or advance in price to the Associated Company (R. II-845, 859; III-1132).

The only other company with whom the matter was taken up in California by Bain in January was the Union Oil Company. The record with regard to this is indeed peculiar. Bain says that he got the "impression" that this company would not be interested (R. II-742). He stated that plans were not left with the officials of this company for the reason that it seemed to him improbable that they would be sufficiently interested to warrant it (R. II-742).

He states that this was the reason that when invitations were issued none was sent to the Union Oil Company. Robison testifies that Bain reported to him that the Union Oil Com-

pany was anxious to bid and that the Government could undoubtedly get a bid from that company if it wanted one, but that Bain advised against asking that company to bid on account of its being foreign-owned (R. III-1084). Robison's testimony on this point is that Bain said that a bid could be gotten from the Union, but it was not wanted because they were British owned in a large measure (R. III-1084). He did not tell Robison that the Union had given him the impression that they did not want to bid; Robison got quite a different impression (R. III-1084).

The fact as proved is that the Union Oil Company was not foreign owned at all (R. III-1167, 1168). It is further in evidence, that when it became known that the contract of April 25th had been made the Union Oil Company protested at not having been given an opportunity to bid (Pl. Ex. 213; R. II-653). How does this comport with Bain's statement above quoted that he had the impression that they were not anxious to bid (R. II-742), and how does Bain's statement comport with Robison's testimony that Bain told him Union was anxious to bid (R. III-1084)? This is the story of the exclusion of Union from the bidding.

J. G. White Engineering Corporation was consulted in December by Bain, apparently because of the engineering and construction work involved in the project (R. II-722-3, 839). Gano Dunn, its president, expressed interest, and thought that perhaps his company could handle the royalty oil (R. II-724, 840). He soon found out that he could not dispose of it (R. II-724). This meant that he was out of the transaction unless his company could be teamed up with some oil company. His company was Bain's first choice as an engineering company. It is interesting to note that Bain immediately went about forming a coalition between the favored oil company, Pan American, and the favored engineering concern, J. G. White Company (Pl. Ex. 72; R. I-347; R. II-746-7). He was successful in this, thus again giving Pan American the

edge on all others in the supposed bidding. He went to Colonel Black, of Ford, Bacon & Davis, in San Francisco, not because he was anxious to get into touch with Black, but because Mr. Storey of the Standard Oil Company, to whom Bain submitted the plan, suggested that as the matter involved a construction feature it would probably be wise for Bain to take the matter up with Black (R. II-729, 730, 841). Bain could not, without showing bad faith, refuse to do so, and he did so.

Black's company, however, was associated with two companies, the Standard and the Associated, neither of which made a bid in accordance with the invitations.

Two engineering concerns late in the proceedings heard of the project. As shown by the letter of Dunn to Cotter of April 3, 1922 (Pl. Ex. 257; R. II-931), Pittsburgh-Des Moines Company heard of the proposition, because J. G. White Engineering Company was asking Pittsburgh-Des Moines to become subcontractor for tanks. Late in the proceedings Pittsburgh-Des Moines asked for plans and specifications and got them (R. II-770-71, 855).

In some way Foundation Company heard of the proposition, and late in March got plans and specifications (Def. Ex. YYY; R. II-881; R. II-770, 855). It is quite obvious that neither of these engineering concerns was able to make any arrangement to dispose of the royalty oil and therefore neither of them was ever heard from again in the matter. Other engineering concerns would have been interested and would have attempted to arrange for the sale of the royalty oil and to make a bid, as is shown by telegrams of Chicago Bridge & Iron Company and Graver Corporation (Pl. Exs. 106 and 112; R. I-399, 402).

It results from the above that it was known that but one concern would bid—the Pan American (R. II-844, 845).

It was Judge Finney, Assistant Secretary of the Interior, who insisted upon a form of competition for the Pearl

Harbor contract (R. II-862, 863). When Bain arrived home from the West in January, 1922, he set about preparing invitations for proposals (R. II-512, 744). These invitations in effect called for a cost-plus bid. (Pl. Exs. 73, 74 R. I-349, 350-53.) Admiral Gregory of the Navy objected to cost-plus contracts (Pl. Ex. 79, R. I-356, 513), and as a result the invitations which had been sent on February 15th to the Standard, Pan American, Associated, Ford, Bacon & Davis, and J. G. White Engineering Company, were withdrawn, and a modification of them made (Pl. Exs. 80, 81, R. I-358). This modification was found to be unworkable, and new invitations were sent on March 7th to the three oil companies, Standard, Associated and Pan American, and to two engineering concerns, J. G. White Engineering Company and Ford, Bacon & Davis (Pl. Exs. 91, 92, R. I-373, 374, 375-83), it being then understood that J. G. White Engineering Company was definitely teamed up with the Pan American Company and that Ford, Bacon & Davis would be teamed up with Standard or Associated.

(b) *The Alternative Proposal.*

The two propositions on which alternative bids were permitted were these: the bidder was permitted to submit on the **construction feature** of the proposed contract either a lump sum bid for the whole, or a bid based on firm lump sum sub-contracts for at least two-thirds of the work and some other sort of supplementary bid (*e. g.*, a yard or foot price per unit of work) for the remainder. (Pl. Ex. 92, R. I-375; II-857, 858.) The other alternative arrangement permitted the bidder to submit on the **fuel oil feature** of the proposed contract either a bid stated in ratio of barrels of fuel oil to barrels of royalty oil, or to state the relation in other terms [*e. g.*, one dollar's worth of fuel oil at market, for one dollar's worth of crude oil at posted field price (Pl. Ex. 92, R. I-379, 380)]. **These permitted alternatives had nothing whatever to**

do with proposed leases or preferential rights to lease (R. II-857-858). They had merely to do with construction items or exchanges of oil (R. II-857-59).

Although informed just prior to the time bids were opened that the Pan American would submit a complete bid and an alternative bid, Bain had not expected an alternative bid involving a preferential right to further leasing in the Reserve (R. II-856, 858). Cotter of the Pan American had discussed alternative bids with Bain and told him that he wanted an opportunity to put in such a bid and said he would do so (R. II-856). Mr. Dunn requested that "the alternative be made as wide open as possible in the sense of giving the bidder as much latitude as possible" (R. II-856).

(c) The Award of the Contract.

Under the invitations bids were to be submitted April 15, 1922 (R. I-381). Fall intended leaving for Three Rivers on April 13, 1922. Before he left he asked Judge Finney and Dr. Bain why the transactions could not be closed, and when they told him that the bids were not to be opened until April 15th he expressed dissatisfaction with the delay, and suggested that it would be possible to close the contract by private negotiation (R. II-772, 847). This suggestion is overlooked by the Appellants, when they state at page 45 of their brief that Fall had nothing to suggest to hasten the consummation of the contract. Finney and Bain explained to him that this could not be done in view of the invitation for bids (R. I-392; II-772, 773, 847).

We find, further, that there is every presumption Fall knew all that Bain knew on the subject of the bids which were to be expected (R. II-743, 744, 842). Bain knew that Doheny would bid (R. II-743, 744; III-1087-88). He knew that Associated would not bid except conditionally (R. II-844); that General Petroleum would not bid (R. II-842); that Standard Oil would not bid (R. II-842, 844); and that

Union Oil had not been asked to bid (R. III-1087). But lest there might be any chance that the contract would get away from the Pan American Company Fall left explicit word that he was to be consulted before a contract was closed (R. II-849), and it was his final O. K. given by telegram (Pl. Ex. 123; R. I-424) that permitted the contract to be closed. The Appellants are inaccurate in their statements (pages 46, 49-50) that the only instructions given by Fall were that the bids were to be opened and examined.

The bids were opened April 15th, and they disclosed what might have been expected. Standard, as was to be expected, submitted only a bid for the exchange of royalty oil for fuel oil, not being willing, on account of illegality, to bid on the construction work (Pl. Ex. 116; R. I-408). Associated made a bid for the exchange of fuel oil and for the construction work, **but expressly conditioned it upon the prior approval by Congress of the plan** (Pl. Ex. 117; R. I-410).

Pan American submitted two proposals, designated Proposal A (Pl. Ex. 118; R. I-411-412) and Proposal B (Pl. Ex. 118b and Exhibit B of Amended Bill; R. I-36, 411, 412), respectively. These proposals contained certain formulae for the calculation of the exchange values of oil and construction, which confessedly had been worked out and submitted prior to the bidding, to the Bureau of Mines of the Department of the Interior (R. II-769, 770, 861, 862). The Record indicates that there were many conferences and much discussion between representatives of the Pan American and its associate, J. G. White Engineering Corporation, and officials of the Bureau of Mines and of the Bureau of Yards and Docks of the Navy before the bid was actually put in (R. II-860). We think the record does not support the statements found in Appellants' brief (pp. 45, 285) that other engineering concerns had similar conferences with Bain and had the same chances as the Pan American Company had.

Proposal A of Pan American named a lump sum in barrels

of royalty oil for the fuel oil and the construction of the tankage, wharfage, etc. covered by the specifications (Pl. Ex. 118a; R. I-411). Proposal B of the same company was also a lump sum proposal covering the same matters and was some \$235,000 less in amount than Proposal A, and also stipulated that if the Company could do the construction work for less than a given figure, which was the figure used in making up this lump sum proposal, it would credit the Government the amount of any such saving in the construction work. (Pl. Ex. 118b and Ex. B of Amended Bill R. I-36, 411-12.) **The other and vital difference between Proposal A and Proposal B was that Proposal B was conditioned on the Government's granting to the bidder a preferential right to any leases for oil and gas thereafter granted by the Government in Naval Reserve No. 1 (R. I-40).**

The bids as scheduled were referred to Mr. Ambrose, of the Bureau of Mines, for report (R. I-412, II-515, 775), and he reported (Pl. Ex. 119; R. I-412) what was perfectly obvious, that Proposal A was lower than the Associated's bid; that Proposal B was still lower than Proposal A, but that Proposal B was conditioned upon the grant of a preferential right. Fall being absent, conferences were had between Finney, Bain, Robison and Ambrose, and it was reported by telegram to Fall that the Pan American's Proposal B was the lowest bid, and that it was recommended that the contract be awarded to Pan American (Pl. Ex. 120; R. I-419, 420). This telegram requested Fall to authorize the closing of the contract with the Pan American Company. Secretary Fall, before he left for the West, gave instructions to Bain that no contract was to be closed without his prior approval (R. II-849).

Upon receiving Fall's authorization, Judge Finney wrote a letter on April 18th advising Pan American that its Proposal B was accepted (Pl. Ex. 122; R. I-421, 422). Said letter accepted Proposal B as it stood and was signed by Judge Finney alone.

(d) The Preferential Right.

It is interesting to note what the attitude of the Government officials was towards the proposed preferential right. Robison testified that the consideration given to the terms of the proposed contract may have lasted a few hours (R. III-1097-8). Bain testifies that when Cotter claimed that the preferential right was not of much value he, Bain, "joshed Cotter" (R. II-864). Bain says he considered the preferential right of very substantial value (R. II-864). As we shall hereafter point out, Robison apparently thought the preferential right of little consequence, but learned to his sorrow in December that it was vital and important (R. III-1097, 1132, 1135-36).

In Ambrose's report of April 17th he recommends that the preferential right shall be limited to what may be roughly designated as the eastern half of Reserve No. 1, and further recommends that certain language shall be used in the contract with regard to the preferential right (R. I-418-19). The preferential right was so limited in the contract, although there is a strange lack of evidence of what negotiation took place after Judge Finney's unconditional acceptance on April 18, 1922, of Proposal B, and before the execution of the formal contract whereby this change was effected. On the other hand, we submit that Mr. Ambrose's careful suggestions as to the wording of the preferential right were not carried out in the language of clause XI of the contract (R. I-34, 35).

Several matters are to be noted in connection with the granting of this preferential right:

(1) It put the entire power to agree to the terms of any leases in this large portion of the Reserve in Secretary Fall alone. It took from the Navy Department and Secretary Denby any power whatsoever with regard to the leasing or the terms upon which leasing should be done in that portion of the Reserve.

(2) It gave the Pan American Company the exclusive right, if it were willing to agree with Secretary Fall alone as to royalties, to any such leases; but if it did not so agree, it left the Pan American open to have equal advantage with the best bidder in competition for such leases. It thus effectually destroyed the possibility of any competition for such leases.

There was no competition between the bidders as to this preferential right. There was no advice to bidders that such a preferential right, or any right to oil leases, would be considered in the opening of the bids. In all of the invitations sent out there had been a provision that if royalty oil from existing leases did not accrue at a certain rate the Secretary of the Interior would consider the advisability of granting further leases in order to produce royalty oil at a more rapid rate (Pl. Ex. 92; R. I-375, 379). Be it noted, however, that this was left as a matter of discretion with the Secretary, was intended to be an assurance to the contractors that they would not be too long delayed in receiving payment, did not indicate that such leases would be granted to the bidders for the storage construction, and had no element of preference of one bidder over another.

It is to be noted further, as we have above shown (pp. 56, 57 this brief) that the invitation of March 7th did provide for certain alternative proposals, which had not the faintest relation to any leasing or any preferential right to leases.

The damage was practically and in effect done when Proposal B was accepted. Naval Reserve No. 1 was in effect pledged to the Appellant Petroleum Company. Mr. Doheny's prophetic letter of November 28, 1921, concerning lands "to be leased to us" was in the way of fulfillment. It only remained for Secretary Fall to see that it was actually carried to fruition.

(c) *The Execution of the Contract.*

The proposal having been firmly accepted, Mr. Cotter, as above stated, protesting that the preferential right was not of great value to his company, stated that he desired a definite commitment by the Government to lease certain areas to his company within one year from the execution of the contract (R. II-529, 530, 779, 780-82, 864). This matter was discussed by Finney, Bain, Robison and Ambrose, and as a result on April 18, 1922, a letter was prepared committing the Government to make these leases. This letter was dated April 25, 1922, the day on which the contract was actually executed (Pl. Ex. 125 and Ex. E of Amended Bill; R. I-65).

Cotter also raised a question as to the validity of the transfer of power under the Executive Order from Secretary Denby to Secretary Fall and stated that his company would not take the contract unless it were executed by both Secretaries (R. II-529, 778, 779, 780, 1006). This matter was referred by telegram to Fall (Def. Ex. FF; R. II-525) and he replied by telegram to the effect that it would be well to have Secretary Denby made a party (Def. Ex. GG; R. II-526). This was accordingly done.

On April 20, Ambrose was sent with the papers and data to Three Rivers, New Mexico, to submit the same to Secretary Fall and procure his consent to the execution of the agreement as then proposed (R. II-780, 867). He arrived at Three Rivers April 23d and on that date Fall wired that he had arrived and that as to both contracts Finney should go ahead and execute them (Def. Ex. II; R. II-526, 527). The statement in the Appellants' brief (p. 287) that Ambrose's change in the language of the preferential right was not even reported to Fall does not agree with Bain's testimony that Ambrose was sent to Fall at Three Rivers to explain, *inter alia*, the definition of the preferential right to lease (R. II-780).

Thus, without competitive bidding, a construction contract involving millions of dollars was made by the United States Government, the administration of a large portion of the Naval Reserves was by covenant irrevocably surrendered by the Secretary of the Navy to the Secretary of the Interior and the United States was committed to lease at the behest of the Secretary of the Interior about one-half of Naval Reserve No. 1.

So far as appears from the record, at the time the contract of April 25, 1922, was under negotiation, and at the time it was executed, neither Robison, Bain, Ambrose nor Finney had any information that it was intended by Fall or any one else, at any near date to execute leases on the remaining unleased portions of Naval Reserve No. 1, except for two comparatively small leases stipulated in the covering letter of April 25, 1922 (Ex. E of the Bill of Complaint; R. I-65). What Fall and Doheny knew and thought on that, they, of course, have not disclosed by testimony.

The record does not disclose what all the parties had in mind so far as concerned the control of the contract of April 25, 1922. By letter of May 5, 1922, Finney to Denby (Pl. Ex. 129; R. I-433) it is disclosed that the Interior Department was to be responsible for the entire control of the contract and that the Navy Department was merely to supply assistance to the Interior Department in that matter. The letter discloses that the entire responsibility was understood to rest with the Interior Department. This letter, to which no reference is made by the Appellants, effectually answers the statements appearing on pages 82, 83, 84 and 249 of Appellants' brief, and shows that Naval officials who supervised the performance of the contract acted merely as delegates of the Secretary of the Interior. This letter also refutes the contention of counsel (Appellants' brief, p. 289) that the mere joinder of Denby as a party signatory to the contract of

April 25, 1922, concededly placed him in control of the situation.

Late in May, 1922, application (Pl. Ex. 127; R. I-432) was made for a lease under the letter of April 25, 1922 (Exhibit E of the Bill; R. I-65), and said lease was granted and is the lease of June 5, 1922 (Exhibit F of the Bill; R. I-68).

5. The making of the contract and lease of December 11, 1922.

(a) *Doheny's Plan.*

Admiral Robison, soon after the execution of the April 25th contract, busied himself with increasing the plans for naval fuel reserve storage at Pearl Harbor and put in train in the Navy Department a study of the needs of the Navy for additional fuel oil storage on the Pacific (R. II-1012).

Meantime the price of oil was steadily declining. There was a flood of crude oil coming on to the market and a great over-production thereof (R. II-582, 599). This gave occasion to the Pan American Company to communicate with Secretary Fall requesting that they be permitted to curtail production under such leases as they then held in Government lands in the California reserves. Cotter wrote to this effect to Fall on July 28, 1922 (Pl. Ex. 140; R. II-582). Fall immediately granted the request to curtail production and not only permitted such curtailment by the Pan American Company as lessee, but by other lessees of the Government in the Naval Reserves (Pl. Exs. 141, 142, 143; R. II-584-6).

In his letter to Fall, Cotter makes these significant statements: "We are seriously contemplating the adoption of a plan which should bring better prices for this oil, if and when the plan can be consummated." * * * "We believe that if this oil **can be safely stored underground**, that better prices which the future should develop will result and bring

out the liquidation of contract prices in approximately the same length of time with a much smaller quantity of oil.

We hope that you will see your way clear to authorize us to suspend operations both of drilling or production, or either, to such extent as we may find it necessary in connection with the study of our proposed plan, until such time as said plan can be fully developed and submitted to you for your study and approval. **We hope to be able to submit this plan within ninety days.**" (R. II-583-84.)

It is a curious fact that Fall's reply to the above letter was sent to Doheny and not to Cotter (R. II-585). On September 6, 1922, Doheny wrote to Fall again about this plan (Pl. Ex. G-5; R. III-1155).

The "plan" was submitted within ninety days. As to just when it was submitted there is some discrepancy in the testimony. Prior to the trial, Bain stated that he had seen it as early as August, 1922 (R. II-868); but at the trial he testified that he did not see it until October, 1922 (R. II-868).

As to how the plan was submitted, there seems to be no doubt. Doheny submitted the plan to Fall. How long it remained in the possession of Fall is not known; but Fall handed the plan to Bain and told him to take it up with the Admiral, meaning Robison (R. II-789, 868). Fall expressed his approval of the plan to Robison. The latter testifies "That when 'this proposition was originally brought to' his attention 'by Secretary Fall,' as stated in the foregoing memorandum, Secretary Fall told the witness that Mr. Doheny was much concerned over the state of the oil market in California, and had some sort of a proposition to advance looking toward the stabilization of prices that might be made to the Government's advantage, as well as to his own; witness told Secretary Fall that anything that came 'to our advantage' was of interest to witness and that is about all there is to it, because the witness was not furnished with any details" (R. II-1021).

Robison further testified that "the plan for increased storage facilities was purely a naval matter, but Secretary Fall did say to witness when he discussed Mr. Doheny's plan with regard to Naval Reserves that he thought that plan was valuable both to the Navy and to Mr. Doheny, or would prove valuable to both of them" (R. III-1137). Fall's approval of Doheny's plan is ignored by counsel, although his instructions to Bain are stated at length. (Appellants' brief, pp. 66-67, 201, 289).

Cotter called on Bain and asked what had become of the memorandum (R. II-790). In late October, 1922 Doheny called upon Robison and discussed the proposed plan (Def. Ex. R-4; R. II-1015). As a result of that discussion, the memorandum originally submitted by Doheny was enlarged and resubmitted to Robison under date of November 6, 1922 (Pl. Ex. 158; R. II-598; R. III-1022).

Counsel are certainly wrong in their statements on pages 63 and 64 of their brief that Fall had said nothing which resulted in the adoption of the plan of November 29, 1922, and the lease of December 11, 1922. The only testimony which we have on the subject is that Fall approved Doheny's plan and so stated to Robison (R. II-1021; III-1137).

An inspection of Doheny's enlarged memorandum (Pl. Ex. 159; R. II-598) will show that his plan contemplated the leasing to his company of large unleased portions of Naval Reserve No. 1 (in his memorandum he calls it Naval Reserve No. 2, but it is obvious that he means Reserve No. 1; R. II-602, 603). Robison so understood it (R. III-1127). In consideration of this leasing he proposed to do certain things for the Navy in the way of arranging fuel reserve storage for naval oil. The plan also contemplated that the Pan American Company should not only become lessee of this additional territory, but would continue to receive as vendee the Navy's royalty crude oil for a considerable period after the construction program at Pearl Harbor should be

completed. Such a provision is to be found in Article II A of the contract of December 11, 1922 (R. I-48). The statement by counsel that the entire project embraced in the December 11th contract and lease originated exclusively in the Navy Department and that no claim or contention to the contrary is made (Appellants' Brief, pp. 193-94 and 280) is clearly erroneous. Many important features and proposals contained in the enlarged Doheny memorandum appear in the December 11th contract and lease.

(b) *Preliminary Negotiations.*

At about this time we note increased activity in the various bureaus of the Navy touching the extension of the plan for fuel oil storage at Pearl Harbor (Pl. Exs. 161-165; R. II-608-15). Robison evidently anxious to get further fuel oil storage apparently did all he could to expedite the revision of the Navy's program for Pearl Harbor and also took up with the Interior the question of a contract and lease such as were finally executed on December 11, 1922. The result was negotiations between the Pan American officials and officials of the Department of the Interior and Admiral Robison representing the Navy. At the first conference, attended by Mr. Doheny, the preferential right was discussed (R. II-792). The tentative proposition was to lease to the Transport Company or its nominee, the Petroleum Company, all of the unleased portions of Naval Reserve No. 1; that which was covered by the preferential right to be drilled at the pleasure of the Petroleum Company; and that which was not covered by the preferential right to be drilled only if and when the Government consented thereto.

(c) *Determination of the Royalties.*

The negotiations seem to have gone on smoothly enough and everything was agreed upon except the royalties (R. III-1030). But the conferees could not agree upon the royal-

ties to be paid by the proposed lessee. We submit that the picture presented by the Appellants of this situation is wholly different from the facts. Mr. Anderson, Vice-President of the Pan American Company stated that it desired a flat rate of $12\frac{1}{2}$ per cent. (R. II-792, 793, 872; III-1030, 1031, 1127, 1128); while Robison insisted that the Government should have "high royalties" and held out for a royalty, which began at $14\frac{2}{7}$ per cent. (R. II-792, 793, 872; III-1030, 1031, 1127, 1128).

Subsequently Pan American came up to what are known as the Interior Department's regulation royalties under the Leasing Act of February 25, 1920, which consist of a sliding scale of royalties beginning at $12\frac{1}{2}$ per cent. and running up depending upon the average production per well per day per calendar month. The parties came to a complete *impasse*, Robison insisting on a minimum royalty of $14\frac{2}{7}$ per cent. and Anderson absolutely refusing to pay such a royalty and insisting upon the lower royalty (R. II-794; III-1031, 1132-33).

When this situation arose, Bain made some figures with regard to royalties and took them up to the office of Fall and talked them over with him (R. II-794). Fall and Bain then worked out an intermediate or compromise set of royalties. These were worked out in pencil and typewritten copies were made in the Secretary's office. Bain was then instructed by Fall to take them up with Robison (R. II-794). Fall took up these compromise royalties with Doheny personally and got the latter to agree to them (R. III-1131-32). The statements appearing on pages 77-78 and 227 of the Appellants' brief are misleading in that they create the erroneous impression that the compromise royalties were indirectly submitted by Fall to Doheny through Bain and Cotter.

Admiral Robison was not satisfied and told Fall that he wanted bigger royalties (R. III-1131). Fall answered, "That is the best I can get out of the old man; if you can do

better, go do it," or words to that effect (R. III-1132). Robison accordingly saw Doheny and tried to get better royalties but did not succeed because Doheny stood firm on the figures that he and Fall had discussed and agreed upon (R. III-1132). The contract was closed on the basis of the figures agreed upon between Fall and Doheny.

The assertion by the Appellants that Secretary Fall did not influence the making of the December 11th contract and lease or the negotiations leading up to them; that he took part only with Dr. Bain in the preparation of a suggested royalty schedule but in effect "washed his hands" of that matter; and that he turned it over entirely to Admiral Robison for direct negotiation (Appellants' Brief, pp. 280-81), cannot be sustained in view of the testimony above set forth.

Nor will it do to gloss over Robison's surrender to and acceptance of the royalties theretofore fixed by Fall and Doheny by stating that Robison and Doheny "reached an agreement to enter into a lease providing for royalties according to the schedule included in the lease of December 11, 1922" (Appellants' Brief, p. 79). The statements on pages 204-5, 228 and 290 of the Appellants' Brief that Fall's one connection with these negotiations "was in preparing with Bain a tentative schedule of royalties as 'affording ground for discussion' which was submitted to the Navy Department and to Mr. Doheny and was left entirely to the decision of the Navy without the slightest attempt by Fall to direct or even influence that deciding-department's action" is likewise contradicted by the above testimony. Counsel overlooked the fact that Fall took up these royalties personally with Doheny and obtained the latter's consent thereto; and that the efforts of Robison to go beyond what had already been fixed by Fall and Doheny were unavailing.

The Appellants attack the statement of counsel for the Government that the schedule of royalties was fixed by Fall and Doheny dealing directly; and quote at length from Bain's

testimony to disprove that contention (Appellants' Brief, pp. 230-31). But they do not refer to Robison's testimony (R. III-1131-32) that Fall told Robison that "he (Fall) and Mr. Doheny had been in personal contact on the subject and in discussion, and Mr. Fall said to witness he had gotten Mr. Doheny to agree that he would agree to a certain set of royalties which Mr. Fall handed to witness * * *." And that testimony was cited by us to sustain our statement. Fall's letter of December 8, 1922 (R. II-796-797) shows it was Fall and Doheny that fixed the royalties.

(d) *The Preferential Right.*

The difficulty in the way of the Government in these negotiations was obviously the preferential right. By virtue of that preferential right Doheny's companies had the Government in their power, for, if Fall exercised his prerogative under the contract of April 25, 1922, he could lease the whole eastern half of Reserve No. 1 to Doheny at royalties he thought proper. Admiral Robison's testimony with regard to the effect of the preferential right is most significant. Robison realized when it came to fixing the royalties to be paid under the December 11, 1922 lease, that he was in Fall's hands; that Fall had the sole and absolute power to fix the royalty scale; and that he could not stand out against Fall and Doheny. If Robison should break with Fall on the subject he could get nowhere with his pet storage scheme. Certainly Fall knew the same thing. Robison therefore surrendered.

He says this, with regard to the circumstances: **"The preferential right had a great deal more value than witness (Robison) suspected at the time"** (R. III-1097). In explaining that he did not tell Fall that they could say to Doheny that Fall would lay down to him certain royalties under his preferential rights and if Doheny refused to accept them, then the Government could turn around and advertise, he says, **"because that is the time when the preferential right**

got its value to the Pan American." (R. III-1132.) Robison admitted that there was no hurry about leasing Reserve No. 1, and that he could have waited long enough to take the matter up with some other oil companies or to advertise (R. III-1133).

Robison further stated that he knew of the high royalties obtained under the leases on Reserve No. 2 which had been let on competitive bidding. (R. III-1135.) As part of the direct examination of Assistant Secretary Finney certain leases let upon competitive bidding in June and July, 1922, were read into the record (R. I-437-48). These leases show that the Government fixed the royalty to be paid up to 100 barrels per day per well and let the prospective lessees bid upon production in excess of 100 barrels per day. The royalty bid on such excess production ranged as high as 72% (R. I-442), and averaged over 60% (R. I-437-48). Admiral Robison also stated that while these royalties were not quoted at the time the December 11, 1922, contract was being determined, yet the question of the Government's ability to get larger royalties was actively discussed and **it was determined that advertising should not be done** (R. III-1135-36). He adds, "That is where the value came to the Pan American Company in bid B. **Witness thinks at that time** (meaning April, 1922), **he made a mistake in the value to them of that preferential right. It was of real value to them then**" (meaning December, 1922). (R. III-1136.)

For obvious reasons, Appellants do not refer to the part played by the preferential right in the negotiation of the contract and lease of December 11, 1922. The foregoing story of the preferential right clearly demonstrates how unwarranted is the contention of counsel that said right was emasculated and was a preferential right in name only (Appellants' Brief, pp. 286-87). We are at a loss to understand the statement that the powers purporting to be granted by the preferential right were never exercised by Fall or

purported to be exercised (Appellants' brief, pp. 250-51, 288). The only power conferred upon him under that right was to advertise, if the defendant Transport Company did not accept Fall's terms. That power was never exercised because Fall and Doheny fixed the royalties, which Robison was forced to accept because the preferential right had come into full play.

As a result of these negotiations the contract of December 11, 1922, whereby Transport Company agreed to erect and fill storage for 2,700,000 barrels of additional reserve petroleum products at Pearl Harbor at cost was made, said contract providing as one of the considerations that a lease should be made to Transport Company's nominee, Petroleum Company, for all the unleased portions of Reserve No. 1, at certain royalties. This lease Mr. Doheny has stated he expected would bring to his companies ultimately a profit of \$100,000,000 (R. I-234, 240-42). In view of the estimates of the oil contents of Reserve No. 1, that expectation seems justified (R. II-864; III-1034). The significance of such anticipated profits is not lessened by the lengthy statement on page 282 of Appellants' brief to the effect that it involved further expenditures by Doheny over a period of years. No one expected and no one has argued that the lease was to yield forthwith \$100,000,000 in profits, without any capital expenditures.

When the final act in the drama was to be played Secretary Fall acted as *deus ex machina*. He came from the clouds at the psychological moment and delivered to the last jot and tittle the matters and things to which he had been committed to Mr. Doheny since the autumn of 1921. Can anyone contend that the corrupt bargains made between Fall and Doheny in the autumn of 1921 which we have above set forth did not poison and vitiate every contract and every lease made thereafter? We need hardly point out that the two leases, that of June 5, 1922, and that of December 11, 1922, were merely incidental to and in pursuance of the contracts of April 25, 1922, and December 11, 1922, respectively; and were osten-

sibly, and by the terms of those contracts, given as part consideration for Transport Company's entering into those contracts.

How can we better characterize these negotiations than by referring to the observation made by Admiral Robison upon cross examination when discussing the advertisement of naval construction work (R. III-1074).

"This whole thing was an extraordinary performance taken all together—it was entirely out of the ordinary."

6. The leases under attack were not required to be made to prevent drainage of the reserves by neighboring drillers.

The Trial Court specifically found that it was not necessary to make the leases of June 5 and December 11, 1922, in order to prevent drainage of the naval reserves (Findings Nos. 69 and 82; R. III-1415, 1419). These findings are not now attacked by the Appellants. Save for fugitive hints here and there in the Appellants' brief (pp. 16, 23, 24, 37, 55, 73 and 105) intended to suggest that Naval Reserve No. 1 was in some danger from drainage, no argument on the subject is made by their counsel.

These findings and their accuracy have, nevertheless, an important bearing upon the badges of fraud in the present case. In the first place, Secretary Denby was unquestionably led to do whatever he did in the way of signing the contracts and leases by the false belief that they were necessary for protection against drainage, which belief was induced by Fall and Robison. This will be demonstrated under a subsequent heading of this brief.

In the second place, certain Government officials concerned in the negotiation and execution of the leases have sought to justify them upon the ground that they were necessary to prevent drainage.

Lastly, although those Government officials advanced drainage as an excuse for the making of the leases under attack, yet they did not hesitate to advise applicants for leases on the naval reserves and others that no leases were being granted except for such offset wells as were necessary and to leave such persons under the misapprehension that there was no present need of such offset drilling. The voluminous correspondence with lease applicants is referred to in a subsequent portion of this brief dealing with secrecy.

The oral and documentary proofs in the present case warrant the findings by the Trial Judge. Director Bain testified without contradiction that the December 11th lease could have waited if the Navy had not been anxious for the storage facilities and admitted that the Appellant, Petroleum Company, had not developed Reserve No. 1 with any speed (R. II-874). Admiral Robison admitted that there was no need to hurry and stated that the most important function of the lease of December 11, 1922, in his mind was the accomplishing of the national security, *i. e.*, the storage of oil (R. III-1106-7, 1108, 1125-6 and 1133). In February, 1922, the Government had entered into a friendly agreement with the Pacific Oil Company to create a temporary reserve covering a large portion of territory in Reserve No. 1; and that temporary reserve agreement remains in force to this day and is recognized in the lease of December 11, 1922 (Pl. Exs. 76, 77, 78; R. I-353-56; Pl. Ex. 169 and Ex. D of Amended Bill; R. I-50, 58; II-619). Pursuant to the request of the Appellant, Petroleum Company, Secretary Fall entered into an agreement with the Standard Oil and other companies cutting down production to the very minimum and thus securing protection from possible drainage (Pl. Exs. 144-156; R. II-587-96). That agreement went into effect in late September, 1922, only a few weeks prior to the execution of the lease of December 11, 1922.

Mr. Cotter in his letter of July 28, 1922, expressed the belief that the oil in Reserve Number 1 could be safely stored under ground (Pl. Ex. 140; R. II-583-84); and Doheny's proposition of November 6, 1922, contains the statement that only a portion of Section 35 and possibly a small portion of Section 26 of Reserve No. 1 should be drilled (R. I-607). The lease of December 11, 1922, shows on its face that it was not made necessary by danger of drainage because the right of the Appellants to drill is restricted to certain specified areas and is subject to the existing non-drilling agreement with the Pacific Oil Company (R. I-57-8). The over-production of oil and the resultant flooding of the California oil market, which gave rise to the non-drilling agreement of late September, 1922, has deterred the Appellant, Petroleum Company, from pushing the development of the land in Reserve No. 1 with any speed, because, as Bain testifies, it was not good business to drill under such conditions (R. II-874). Although Robison testified that the lease of June 5, 1922, was granted upon the advice of Bain that a lease in the northeast quarter of Section 3 would have to be granted in order to protect against drainage, yet the witness admitted that but two wells had been drilled to date under that lease (R. III-1100-01).

The foregoing oral and documentary proofs forced the Appellants to abandon in the Trial Court the defense of drainage; and there would have been no occasion for the 69th and 82nd Findings of that Court, had it not been (1) for the attempt of certain Government officials to justify the leases upon the ground of threatened drainage and (2) the deliberate misleading of applicants for leases on the reserve.

7. Secrecy.

The Appellants have not specified among the errors intended to be urged before this Court the findings of the Trial Court (Nos. 19-21; R. III-1400) and the Court of Appeals (R. III-1505-6) that Fall, Robison, and other officials, concealed

and kept secret the contract of April 25, 1922, through fear of trouble from Congress, and not for military reasons. Counsel have now abandoned in this Court their contention, made both in the Trial Court and in the Court of Appeals, that there was no secrecy; and in lieu thereof say that such measure of secrecy as was observed was enjoined by the Navy Department because (1) the military plans of our Government concerning the establishment of a thing important to the naval defenses of the Pacific at a strategic point were involved and (2) the Navy feared legislative interference.

We shall demonstrate in a subsection immediately following hereafter that the observance of secrecy cannot be justified upon military grounds. The findings of the two lower Courts as to secrecy are conclusively indicated by the evidence and constitute one of the outstanding badges of fraud and proofs of conspiracy.

From the very beginning of Fall's interest in the naval petroleum reserves, all of his negotiations with Doheny and all of the negotiations between Robison, Fall and Doheny were clothed with the utmost secrecy. Other officials of the Interior and Navy Departments were kept in the dark and were instructed not to give out any information concerning the plans and negotiations. Therefore, in answering inquiries, if any answer was given, misinformation was given. Officials of the Navy Department referred inquirers to the Interior Department for information and officials of the Interior Department referred inquirers to the Navy Department for information. Where the inquirer was persistent and inquired of both departments, he was told that the information was confidential because of its military nature, and that the information would have to be obtained from the President.

Admiral Robison first claimed that his secrecy pact with Fall was not made until late January, 1922; but on cross examination he was compelled to admit that his earlier statement in a deposition taken in the case of *United States vs.*

Mammoth Oil Company, wherein he testified that the pact was entered into in late October, 1921, was more accurate. This admission was brought about by again directing the witness's attention to the letter of Admiral C. S. Williams, Director of War Plans of the Navy Department, dated November 4, 1921, to the Chief of Naval Operations, which reads in part (Pl. Ex. 259; R. III-1058):

"There may be a certain amount of danger in giving too much publicity, because as soon as it is known what the character of the arrangements are, Congress will undoubtedly use these arrangements as a reason for cutting down appropriation for fuel and transportation. If this is done, of course the reserves which we so badly need, and which we seek to establish, will not be established. **Furthermore, it is conceivable that the whole project might be met with open hostility in certain quarters because it operates to some extent to increase appropriations under fuel and transportation beyond what is set down in the bill; and in another way it operates to create reserve fuel storage, the construction of which has not been specifically authorized by Congress. In view of the foregoing it would seem advisable to close the arrangements as soon as possible without undue publicity.**"

Counsel for the Appellants refer to Admiral Robison's testimony concerning a conference with Fall, Ambrose and Bain, in late January, 1922, in order to show that the secrecy agreement was not arrived at until that time (Appellants' Brief, p. 272). They make no reference whatever to that part of his cross examination, wherein the witness was compelled to admit that his testimony in the Mammoth case was the more accurate and that Secretary Fall and Admiral Robison intended that "the public and Congress should not get knowledge of what was being done until it had been in fact done" (R. III-1054-58). The significance of such testimony lies in the fact that such intention was explicitly carried out. Fall

Robison, and other officials, gave out no information concerning the contract of April 25th until the formal award had been actually made; and thereafter they gave out no more information than was necessary under the circumstances.

When negotiations reached the point that the assistance of subordinate officers was necessary, it became necessary for such officers to be cautioned not to give out any information. This was done. A memorandum prepared on April 12, 1922 and issued on April 13, 1922 by Fall (Pl. Ex. 114; R. I-405) reads:

"Referring to constant requests for information concerning rumors or statements as to disposition of naval reserve oil lands:

"The general policy in these matters has been given publicity. In carrying out this general policy as it is being carried out through the cooperation of the Navy Department and of the Interior Department, it is being handled by the Secretary of the Interior and the Secretary of the Navy **but not in a routine manner by either department. The consequence is that the officials of the bureaus of either department are not able to give out any information whatsoever as to the detail of any plans of any kind or character."**

This memorandum was forwarded by Secretary Fall to Secretary Denby in his letter of April 12, 1922 in which he said (Pl. Ex. 113; R. I-403):

"I am also handing you a copy of memorandum which I have made for the government of my staff in giving out any information concerning these contracts.

"I have instructed my office force to give out nothing of the details of any of these contracts and to retain in a secure place the original contract with the deeds, etc. attached. This for the reason that it has been customary to file all contracts with the general files, where by inadvertence they might be subject to examination by parties not entitled to see them.

"I am particularly anxious that no details should be given out pending the final agreement upon the contracts for the construction of reservoir facilities in Hawaii."

The Finney and Safford telegram of April 17, 1922 to Secretary Fall (Pl. Ex. 120; R. I-419-420) and Fall's reply of April 18, 1922 (Pl. Ex. 121; R. I-420-421) show that the utmost secrecy had been observed in all the negotiations because Finney and Safford asked permission to "immediately make public the entire disposition of all naval reserve contracts, with reasons therefor," and Fall authorized them to make the disposition public after the contract with Pan American had been closed. The injunction not to make anything public until the contract had been closed was followed. (Def. Ex. DD; R. II-523-524.) In the statement given to the press (Def. Ex. CC; R. II-519-523) no mention is made of the fact that the Pan American contract called for the exchange of the royalty oil for tanks, or of the fact that it was given a preference right to such further leases as might be made in the California reserves. The public would understand from the information released that the royalty oil was being exchanged solely for fuel oil.

Soon after the closing of the contract of April 25, 1922, negotiations were commenced for leases under the preferential right granted in that contract, and for the enlargement of the Pearl Harbor program, so that it would justify the granting of a lease upon the entire unleased portion of the California reserves. Again these negotiations were carried on by Fall and Doheny in a non-routine manner, and those few departmental officers who had anything to do with the negotiations were following the injunction of secrecy, but Fall feared that in making the annual departmental report, Judge Finney might forget that secrecy was desired, and on November 6 he wired Finney from Three Rivers, New Mexico that in the preparation of the report (Pl. Ex. 243; R. II-695)

it was "unnecessary go into details naval oils as we merely co-operating with Navy."

After the lease and contract of December 11, 1922, had been executed, Fall had the lease removed from the public file of the General Land Office of the Interior Department to the Bureau of Mines, where a confidential file of papers pertaining to the naval oil reserves had been established. This file was not considered a part of the files of the department and access to it was limited. In this regard Fall wrote a letter to Commissioner Spry on January 22, 1923 which reads in part (Pl. Ex. 172; R. II-621):

"At the request of the Navy Department, and in pursuance of the war plans of the General Board, I have made certain exchange arrangements and agreements under which contractors are charged with the responsibility of drilling offset wells and performing other development as ordered by the Government, upon lands within the Reserves but outside the leased areas mentioned above. **These contracts form part of the confidential records of the Navy Department and are not for public inspection. Copies have been deposited with the Bureau of Mines for guidance of the officers of that Bureau in enforcing the contracts and may be inspected by you as occasion arises, but are not considered to be part of the files of this department.**

"No portion of the Naval Petroleum Reserves are now subjected to entry in any form or to leasing through this department."

In accordance with Fall's plan of placing the December 11, 1922, lease in a separate and distinct file which would not constitute a part of the departmental files and would not be open to public inspection, A. W. Ambrose, of the Bureau of Mines got in touch with the Bureau of Mines office at Bakersfield, California, and instructed it not to permit the public to inspect this lease. His letter containing such instructions reads (Pl. Ex. 255; R. II-877):

"You have a copy of the lease which practically gives them a lease on the eastern half of the reserve and requires that they drill necessary offset wells on the western half of the reserve in case the Government feels that drainage is taking place from wells on the bordering territory. Obviously, the Navy is not anxious for any more to be said about this than is absolutely necessary, and the Secretary has directed the representatives of the Bureau in Washington to maintain the whole matter confidential as this was requested by the Navy. As a result we have referred all inquiries to the Navy Department and are letting them make whatever announcements or give whatever information they desire, and I suggest that in so far as possible your office should take the same attitude. I appreciate that this puts you in a somewhat difficult position, but inasmuch as the Naval reserves are considered a part of the National Defense, and as long as the Navy requests us to keep this information confidential, I think that is the best way for us to keep in the clear in the matter."

After considerable correspondence in which the embarrassment of the officials of the Bureau of Mines was expressed (Pl. Exs. 275, 276, 277; R. III-1180-83; Def. Exs. ZZZ, A-4; II-885-887), the Navy Department finally expressed the view, on July 23, 1923, that there was no reason why the terms of the lease should be any longer kept secret.

Even after the investigation of the transaction was commenced by the Senate Committee on Public Lands the confidential file containing the contracts and leases and vital correspondence, such as the November 28, 1921 letter from Doheny, was not turned over to the Committee, although the Committee had requested all papers pertaining to the transaction. (R. II-833.)

When Admiral Robison took charge of the Bureau of

Engineering, Commander Stuart was in charge of the Fuel Oil Office and responsible directly to the Secretary of the Navy. Shortly he was made subordinate to and responsible to Admiral Robison. Thereafter, he was ordered to have no official communications with the Interior Department and because he opposed the lease to the United Midway, believing its claim invalid, and because of the secrecy desired, he was never consulted concerning the negotiations, contracts, or leases (R. I-112, 114, 116, 118, 315). Commander Landis, Inspector of Naval Petroleum Reserves, stationed at San Francisco was never consulted. (R. I-133). Dr. Mendenhall, who, upon the recommendation of Assistant Secretary Finney had made an investigation for Secretary Fall in June, 1921, opposed the United Midway lease and saw no danger of drainage warranting anything more than offset leases. His recommendations were disregarded by Fall, and he was never thereafter consulted in connection with the negotiations, contracts, or leases (R. I-313, 315). Assistant Secretary Finney himself, who was in charge of the sub-department generally handling leases of lands in the public domain, was given only scraps of information concerning the negotiations and permitted to take but a minor part in the drafting of the contracts and leases. He did not see Mr. Doheny's proposal of November 28, 1921 from that date until December 16, 1921 (R. I-342). He had no part in arranging the contract and lease of December 11, 1922, and did not know of it until after it had been executed. (R. I-436.)

During 1921 and 1922 many individuals and corporations inquired for leases of lands in the California reserves, but in every case they were either refused information and told to consult a different department of the Government, or were told that no leasing was contemplated, or were given other misinformation. In almost every case they were told their application would be filed and if any further leasing was

to be done, they would be given an opportunity to bid. The following excerpts are typical:

"The department instituted the policy of drilling necessary offset wells in Naval Reserve No. 1 to prevent undue drainage from wells located on surrounding land. * * * The most urgent offset wells have been provided for and to my knowledge the Secretary is not planning to throw open any of Naval Reserve No. 1 in the near future."

(Pl. Ex. 209; R. II-650.)

"Your application has been placed on file and, also, has been called to the attention of the Bureau of Mines. I feel sure that the Secretary will be pleased to consider a bid from your company when, in the best interests of the Government, it is decided to lease additional tracts in this reserve."

(Pl. Ex. 231; R. II-670.)

More than a score of such inquiries and applications by prospective lessees may be found beginning with plaintiff's exhibit 182 (R. II-627) and ending with plaintiff's exhibit 236 (R. II-676), and the reply in every instance is couched in similar language.

While such replies were being sent to lease applicants Secretary Fall and Mr. Doheny were formulating the plan for preferential rights and later the plan for the execution of leases consummating the original understanding that Mr. Doheny should have a lease upon the entire California reserves. Did drainage require leases to Doheny's companies but not to others? This deception is important, not only because it shows that there was no real competition for the leases, but also because it shows that there was a very conscious effort to keep the whole matter secret. Evidently there was a consciousness of wrongdoing.

The applicants for leases were not the only ones who were deceived. Senators and Congressmen entitled to know

the facts were given misinformation and the opposition which Admiral Williams suggested on November 4, 1921 was thus avoided.

Shortly before March 24, 1922, Congressman French of the House Appropriations Committee called Admiral Robison by telephone and requested certain data relative to the operation of the reserves. In answer thereto Admiral Robison, on March 24, 1922, sent the following letter to Congressman Kelley, Chairman of the Sub-Committee of the House Committee on Naval Affairs (Pl. Ex. 260; R. III-1063):

"On Monday morning Congressman French of the House Appropriations Committee called me on the telephone and requested me to furnish certain information relative to the operation of the Naval Petroleum Reserves.

* * * * *

"In accordance with the general agreement arrived at between the two Departments the Department of the Interior is taking steps to have Naval Petroleum Reserves Nos. 1 and 2 drilled with *offset wells* in every case where adjacent property is drilled. It has been further agreed

"(a) That the amount of drilling with consequent exhaustion of the Reserves shall be kept as low as practicable without risking the depletion of the Reserves by other parties.

"(b) That the equivalent of all royalty oil shall be delivered to the Navy in the form of fuel oil at such points on the Pacific Coast as may be found necessary for Naval use, and that this exchange of crude oil for fuel oil will be effected on as favorable terms as it is possible to obtain. It is presumed that under favorable circumstances and terms arrangements may be made for including points on the Atlantic Coast for the delivery of an equivalent supply of fuel oil to the Navy.

"(c) That the equivalent of the royalty oil will be placed in storage at such points as the navy may designate.

"(d) That the Interior Department will exercise its best efforts to obtain for the Navy as large royalties and as favorable terms as practicable by public competition or otherwise.

"(e) That the development of Naval Petroleum Reserve No. 3 is to be undertaken only to protect the Government against depletion of the Reserve by other parties.

"In connection with this program it has been estimated that the Navy will obtain by 30 June, 1923, royalty oil amounting to 592,200 barrels, which will give an equivalent in fuel oil of 567,400 barrels. For the fiscal year ending 1 July, 1923, the royalty oil to be obtained is estimated at 1,350,000 which will give an equivalent in fuel oil of 1,286,460 barrels. Under the terms of the agreement this oil will become a reserve—above ground instead of under ground as now.

"The following data with reference to the Naval Petroleum Reserves are submitted for your information:

* * * * *

"As to No. 2 Reserve it is generally admitted that no Reserve as a Reserve now exists and it will be necessary to drill up within a short (time) the entire Reserve. In order to meet this situation the Department of the Interior is granting leases from time to time to various operators to drill these lands on a royalty basis varying from 12½ to 25 per cent. depending upon the production of the individual lease.

"Trusting that the above information is that which you desire and assuring you that if there is any further information which I can furnish I shall be glad to do so."

Admiral Robison admits the evasion in his letter but justifies it upon the ground that he included therein "all the information that should become a part of the printed public records at that time in order to accord with the agreed policy as to secrecy." (R. III-1067.)

Frequently, instead of giving evasive and misleading information to inquirers, Robison affected ignorance and would

refer the inquirer to the Interior Department. This cross-referring of inquiries is well illustrated by his letter to Congressman N. J. Sinnott, dated April 19, 1922 (Pl. Ex. 261; R. III-1069). Congressman Sinnott asked, among other things (R. III-1068):

"What if any disposition has the Department in contemplation with reference to any of the three Reserves in the immediate future?"

and (R. III-1069):

"What lands if any are yet subject to leasing or development contracts in Naval Reserve No. 1, California?"

Admiral Robison's reply was (R. III-1069-70):

"* * * I am very sorry to say that I am unable to give satisfactory answers to several of your questions. As you know, the President, on 31 May, 1921 signed an executive order transferring the care, operation and preservation of these reserves to the Department of the Interior. Since that date I am not able to give all details of what has transpired. * * *

"Referring to question (3) *et seq.* of your letter, I am not able to give this information but it can probably be obtained from the Department of the Interior."

At that very time Robison knew that an award had been made to Pan American, in accordance with the contract subsequently executed on April 25, 1922.

On December 11 Senator Harreld wrote Fall that he had heard on good authority that the Interior Department contemplated leasing a part of Naval Reserves 1 and 2, and requested information because he had some very reputable, capable, and responsible parties who desired to submit bids to the department for oil leases covering all or any part of these reserves (Pl. Ex. 241; R. II-693). Fall refused all information (Pl. Ex. 242; R. II-694) saying:

"The Navy Department is a military arm of this Government and information concerning their plans, the details of same, etc., must be secured from the Navy Department itself.

"I think you can readily see that this is the case and I have no doubt that an application to the Commander-in-Chief of the Army and Navy from yourself will receive favorable attention if it is deemed to be in accord with the best interests of the Government."

(a) *Secrecy was not Justified by Military Expediency.*

Appellants emphasize on pp. 266-72 the alleged military reasons that lay behind the injunction and observance of secrecy. It is argued that the Pearl Harbor project was part of the military plans of the United States and that these plans ought not to be disclosed. If such reasoning were sound, it would inevitably follow that these plans should still be kept secret and that the Navy and Interior Departments should have refused to comply with the Kendrick resolution upon the ground that it sought information upon a matter which the best interests of the United States required to be kept secret. The testimony of Admiral Robison and Admiral Gregory incontrovertibly shows that the observance of secrecy was not justified by military expediency. We have previously demonstrated that the fear of Congressional opposition was in the minds of all by early November, 1921, and was the real reason for keeping the negotiations secret.

Both Admiral Robison and Admiral Gregory admitted on the stand that so far as the leasing of lands in the reserves is concerned there was no military secrecy necessary (R. II-578; III-1074). We do not understand that counsel for the Appellants gainsay this admission. These two witnesses testified that war plans are kept secret until determined upon and that then the usual course is to advertise for bids. At that moment the project necessarily becomes known. War plans are tentative plans of the Navy Department, indicating what

the Navy thinks should be the program for the national defence. They are subject to change from time to time and are not revealed to Congress until a definite sum is asked of Congress in an appropriation (R. II-545, 546, 560; III-1073, 1074).

In support of their contention that the Navy Department enjoined secrecy for military reasons, counsel refer to Assistant Secretary Roosevelt's letter of December 9, 1921, in which, referring to the Pearl Harbor plans and specifications, the request was made that "all matters in connection therewith be regarded in as confidential a manner as possible." Assistant Secretary Roosevelt testified that the naval authorities regarded the information concerning oil storage as confidential and that there was no reason other than this for observing secrecy (R. II-949). The same witness in authorizing the Interior Department to make public the lease of December 11, 1922, wrote under date of July 23, 1923 (Def. Ex. A-4; R. II-887-88):

"Since the military features of the national defense enter largely into considerations of this nature, it is believed that a degree of secrecy has surrounded the whole undertaking that is probably not necessary. There has been no disposition on the part of this Department, to treat these leases in their entirety so confidential, it being desired to retain as confidential only the amounts and location of the resulting petroleum products when placed in storage. It is realized that, being physically of some size, these cannot be really kept secret, yet it is not desired to spread the information that these reserves of petroleum products are in existence or are planned."

Counsel also invoke in their aid the deleted plats of the Pearl Harbor Naval Station and the inhibition against photographs. Such precautionary measures are always observed about military fortifications and would doubtless have been

observed even if the customary publicity had been given to the contract of April 25, 1922.

As Admiral Robison and Admiral Gregory reluctantly admitted, secrecy as to oil storage could only be observed up to the moment that public bids thereon were asked. Besides, storage tanks of the kind called for under the contracts of April 25, and December 11, 1922, tower into the air and cannot be concealed or kept secret once the construction thereof has gotten well under way (R. III-1074).

The oral and documentary proof make it letter-clear that the reason and purpose of the secrecy pact between Fall, Robison and other officials was in order that Congress and the public should not know what was being done and was not for military reasons. In so finding (Finding No. 20; R. III-1400), District Judge McCormick had clearly in mind the alleged military necessity and the testimony thereon, as is shown by the concluding words of his opinion upon that subject (R. III-1292-3):

"The evidence in this case shows that by October 25, 1921, both Secretary Fall and Admiral Robison had agreed upon the adoption of a policy whereby royalty oil should be bargained for tankage and its contents of fuel oil at Pearl Harbor, and that they had further agreed at that time that any negotiations relative to the carrying into effect of such policy were to be kept secret, so that their intentions could not be thwarted by Congressional interference, or become generally known to the public. The contention of defendants that the secrecy which attended all of the negotiations leading up to the contract of April 25, 1922 and of December 11, 1922 were because of Navy war plans is, in my opinion, not sustained. Even if the Pearl Harbor construction was such as to require secrecy, the oil leases in the naval reserves demanded no such safeguard. The secretive manner in which these leases were made cannot be justified by any war emergency plan."

8. Wilful disregard of legal advice.

Unless Secretary Fall had some ulterior motive spurring him on to complete the contracts and leases, he would not have disregarded the opinions of attorneys for several of the oil companies consulted by Bain, that the proposed plan was illegal. It is customary for Cabinet officers to request the opinion of the Attorney General of the United States upon any plan, the legality of which has been questioned. Theoretically, Government officers have no possible motive for proceeding hastily when such doubts have been raised. Theoretically, they derive no personal profit from taking a chance. The danger of drainage was not pressing, and the opinion of the Attorney General could have been obtained; and, if adverse, additional legislation obtained, if the plan was harmonious with the policy of Congress.

Bain testified (II-842) that in October or November, 1921, he suggested to Fall that it would be well to get the opinion of the Department of Justice.

While Bain was on the Pacific Coast in January, 1922, to interest selected oil companies in bidding, he had a conference with Standard Oil Company officials, during which its counsel, Oscar Sutro, expressed an offhand opinion that the plan was illegal. Mr. Sutro followed this up with a formal written opinion on January 27, 1922, definitely advising his company that the plan was illegal (Pl. Ex. 51; R. I-296-300). While on the same mission, on January 3, 1922, A. L. Weil, Attorney for the General Petroleum Company, told Bain that in his opinion the plan was illegal and he would not permit his company to bid. (R. II-540, 740.) Mr. Weil suggested that if the Attorney General of the United States approved of the plan, he would reconsider the matter. Bain refused to promise that the Attorney General would be requested to render an opinion.

Upon Bain's return to Washington, and about January 25, 1922, he told Fall and Robison of the legal doubts which had

been expressed by the attorneys for the concerns he had consulted. (R. II-743). At the same time, Bain suggested to Assistant Secretary Finney that the opinion of the Solicitor for the Interior Department be obtained. (R. I-346; II-842.)

In February or March, 1922, the attorney for the Associated Oil Company and the New York City attorneys for Ford, Bacon and Davis gave opinions to the effect that the plan was illegal (R. I-304; II-843-44). Early in the transactions, Dr. Bain told Fall that Mr. Weil, Attorney for the General Petroleum Company, had disapproved of the plan and that Mr. Sutro, Attorney for Standard Oil, believed the plan illegal (R. II-743, 842).

By a letter dated April 12, 1922 (Pl. Ex. 102; R. I-393-394) Fall suggested to Secretary Denby that it would be advisable to obtain further legislation from Congress, in order to be certain of the legality of the plan. This request was not in good faith because at that very time, Fall was criticising Finney and Bain for not already having closed a contract with Doheny. Secretary Denby did not follow out the suggestion because Robison told him the Government was certain of a bid from Doheny, and that it was, therefore, unnecessary to have such legislation in order to get a bidder.

On March 3, 1922, Bain wrote Colonel Black of Ford, Bacon and Davis, acknowledging a copy of Mr. Sutro's opinion and stating (Pl. Ex. 96; R. I-387):

"* * * I am sure we can back our plan with good legal opinion, since the matter happens to have been examined by attorneys outside, as well as inside the Service. I will give you the results later."

Such results were never given to Colonel Black, and Bain testified on cross examination that the attorneys to whom he referred as having approved the plan were the Judge Advocate General of the Navy Department and the attorneys for the White Engineering Company (R. II-843), but by May 12,

1922, Bain was again becoming apprehensive that the consequence of the almost unanimous opinion of disinterested attorneys against the plan would be a serious disadvantage. At that time, he was endeavoring to get the lessees of lands leased in settlement of placer mining claims to turn over the Government's royalty oil to the Pan American Company, in accordance with the contract of April 25, 1922. The attorneys for the lessees did not think the receipt of the Pan American Company would be a valid discharge of their obligation to the Government, and so Bain dictated a letter to Fall, in which he said: (Def. Ex. EEE; R. II-784-786).

"I have been surprised to find that the Standard and General Petroleum in particular are adopting a very technical attitude toward this transfer, going so far as to raise a question as to whether either company would be safe in making such a transfer or in later handling any of the oil in case the Pan American desired to have them do so. As you will recall, Mr. Sutro and Mr. Wyle have been doubtful as to the right of the department to make the exchange contract. They now seem to have become positive that no such right exists and Mr. Storey is even interpreting the law so far as to question the right of the Standard to deliver oil to the Pan American on our order. * * *

"There is, however, another phase to it. None of us want Mr. Doheny to get into trouble, and I take it we will want to do anything we can to make it easy for him. * * *

"Out of all this has come the suggestion repeatedly that the opinion of the Attorney General be obtained as to the legality of the contract. I realize the objections to asking such an opinion, but I have thought it proper to let you know the difficulties that are being raised here so that you might reconsider the matter and decide as to whether you might not properly ask the Attorney General to put in writing what I have understood was his informal and verbal expression of opinion favorable to the action the department has taken.

I am not certain that Mr. Doheny cares, but Mr. Cotter will see him tomorrow, and if it does seem to them important, I am giving Mr. Cotter this letter to show you, so that you may know what I have found out here."

Doheny did not care. The letter was never delivered to Fall. (R. II-786-87.) Neither the Attorney General nor the Solicitor for the Interior Department ever was requested to give or gave any opinion, verbal or written, approving the exchange plan or any of the contracts or leases (R. I-346, II-842, III-1193). The reason no opinion was requested from the most qualified attorneys for the Government and those who would normally be asked for opinions in such matters is expressed by Bain in his testimony (R. II-787-88) as follows:

"* * * First, 'the fact that the Department, having gone ahead and made the contract, to then ask for a legal opinion to fortify its action, would throw doubt on its own confidence in its judgment in making such a contract, and, second, was the fact that whenever you ask a lawyer for an opinion, you may get into the hands of a lawyer who is thinking only of strictly technical legal matters, and who gives you a highly technical opinion, and he has no responsibility whatever for carrying out a thing or getting anything done, and in the Government service there are a great many men whose business it is to pass the buck and to pass the responsibility on to somebody else; and when we ask for an opinion from another department, we never know what kind of a lawyer is going to pass on it. They have some very excellent lawyers in the Department of Justice, but when you ask for an opinion over there, you don't know whether it will get to one of them or somebody who is merely interested in building up a good record for himself, and never letting anything be done which might come back on him.'

"The witness was familiar with the custom in the executive departments at Washington as to when opinions of the Attorney General were asked; they are asked when the department itself is in doubt."

Counsel for the Appellants set great store by the written opinion of the Judge Advocate General of the Navy Department, of December 2, 1921 (Appellants' brief, pp. 32-34). In thus pointing out that the legal advice of the Judge Advocate General was sought and received, no mention is made of the fact that this advice was taken by Robison at a time when no doubts had been expressed by eminent counsel representing large oil companies. The Judge Advocate General was of the opinion that the power of exchange was unrestricted (R. II-701), and that the Act of June 4, 1920, did not specify or limit what might be taken in exchange for the oil and its products. This broad construction of the Act of June 4, 1920, is now repudiated by counsel for the Appellants on pp. 111-112 of their brief. They were forced to admit in the Court of Appeals, and now concede, that some reasonable limitation must be placed upon the word "exchange." The Judge Advocate General of the Navy was never consulted, and his opinion was never asked, upon the validity of the Executive order of May 31, 1921, or upon the validity, legality or form of the contract of April 25, 1922.

The positive opinions of the many outside attorneys who, in spite of the opinion of the Judge Advocate General, thought that the plan was illegal, should have induced the responsible officials to consult the Attorney General. The only explanation for the failure to obtain such an opinion is that Fall and Doheny believed it would be disapproved by the Attorney General and/or that the contemplated action would become public and be stopped by Congress as contrary to the policy of the Act of June 4, 1920. That this is the real reason is made clear by the disclosure of the evidence discussed in this brief under the heading of "Secrecy."

The early determination of Fall to avoid any consultation with the Attorney General's Department in the matter of the handling of the petroleum reserves is illustrated by the most peculiar conduct of Fall following a request made by Secretary

Denby of the Attorney General in early May, 1921, for an opinion as to the legality of the claim of United Midway. On May 5 Secretary Denby addressed the Attorney General and gave the history of the United Midway application, and requested his opinion as to the right of the claimants to any further consideration. He sent a copy of his letter to Fall, and on May 11 Fall addressed a personal letter to the Attorney General, stating that the Attorney General's opinion was not desired. At this early date Fall had a program in mind which made it worth his while to appeal to the Attorney General personally to head off any possible rulings that might tend to limit his discretion in the administration of the petroleum reserves.

The significance of the wilful disregard of the adverse opinions of eminent lawyers is well summarized in the opinion of Judge McCormick as follows (R. III-1334):—

"If there had been a sincere and real attempt to interest the leading commercial oil companies in the project to the end that they would on common ground compete with one another in bidding on the contract so that the Government would obtain the most advantageous and best bid, there would have been a desire and an eagerness to obtain an opinion from the Attorney General as to the legal right of the Government to make the contracts."

Again Judge McCormick says (R. III-1336):—

"This was a peculiar position for him (Secretary Fall) to take if he was not trying to thwart competition and to favor his friend and benefactor Mr. Doheny. * * *

"The failure to adopt such a course is another badge of fraud and another of the many suspicious circumstances concerning Secretary Fall's activities in the matter of the contracts in controversy in this case."

9. Fall's activity and dominance in the negotiation of the contracts and leases.

We postpone for argument under a later head of this brief the proposition that whether Secretary Fall acted *de*

facto or *de jure* in connection with the contracts and leases, if he acted fraudulently or was corrupted by or conspired with Doheny in connection with them, this fact avoids them. We address ourselves here only to a citation of the facts which justify the findings of the Trial Court (R. III-1397-8; 1414-15; Findings Nos. 12 and 67), that Secretary Fall was active and in constant touch with the negotiations throughout and that he dominated them and that no decision was made without his consent and concurrence.

During all the negotiations and dealings up to the contract of April 25, 1922, and thereafter by virtue of the very terms of the contract of April 25, 1922, Doheny and the officials of his company, Secretary Denby, Admiral Robison, and all the officials of the Interior Department believed and acted upon the belief that Fall had the power, and that the power to act rested in him alone. Robison said that Fall thought that the Executive order made the Naval Petroleum Reserves an Interior Department matter and that to advance the Navy business best he yielded to the Secretary's views in that matter on all unimportant matters. (R. III-1062.) As early as September, 1921, Fall had the same belief (Def. Ex. P.; R. II-482).

The statement of Secretary Denby in the Navy Council meeting of October 18th, above quoted (Pl. Ex. 293; R. III-1176) shows that it was Denby's intention to turn the matter of leasing and administering the oil reserves absolutely over to Fall and to have nothing to do with them himself. There is no evidence in the case anywhere that he ever changed his mind on this subject. It was Fall who about this time was arranging for a proposition from Doheny's company (this brief, *ante*, pp. 18, 20).

The policy letter (Pl. Ex. 24; R. I-146) which Robison in collaboration with Fall prepared and which Denby signed on October 25, 1921 (R. II-960, 965; III-1111), as we have above demonstrated, clearly shows that the Interior Depart-

ment was to follow a policy which the Navy Department expressed as satisfactory to it, one of the items of which policy was that it would merely turn over to the Navy copies of such leases as were made, as matter of information to the Navy Department only.

The invitations for all proposals were issued by the Interior Department (this brief pp. 55, 56, *ante*). The Navy Department's officers merely represented to the Interior Department what it was that the Navy desired in the nature of specifications and these specifications were included in the Interior Department's request for bids. These specifications for the contract of April 25, 1922, provided that the contracting party for the Government was the Interior Department (R. I-426).

Every negotiation with an oil concern or an engineering concern was conducted by Dr. Bain, Chief of the Bureau of Mines of the Interior Department, in close touch and under the supervision and with full information to Fall (this brief pp. 50-56, *ante*).

The legal objections which had been raised against the plan were reported by Bain to Fall upon his return in January, 1922, from the West; and Fall thought that the opinion of the Judge Advocate General was sound (R. II-744). Fall issued definite instructions that no contract should be closed without his prior knowledge and consent (R. II-849). The matter appearing in Appellants' brief, bottom page 46 and bottom of page 49, would give the impression that Fall did not retain final veto power and control over the awarding of the contract of April 25, 1922, and that he went away to Three Rivers and left this matter wholly in charge of others and in their unrestricted discretion. This is incorrect as Bain's testimony (R. II-849) will demonstrate.

In fact, all of the results of the so called bidding and the intent to award a contract to Pan American, and the kind of a contract to be awarded to Pan American, were

carefully submitted to Fall before the papers were executed, and these papers were not executed until he had given his consent to go ahead (Pl. Ex. 123; R. I-424). Even the matter of joining Secretary Denby as a party to the contract of April 25, 1922, was submitted to Fall for his consent before the thing was done (Def. Ex. FF.; R. II-525).

As we have above set forth, the contract of April 25, 1922, vested in Fall absolute and final power with regard not only to the administration of the contract itself considered as a construction contract, but it gave Fall the sole and unrestricted power to fix the terms of any leases which should thereafter be granted on what may be roughly designated as the eastern half of Naval Reserve No. 1. (Ex. B of Amended Bill; R. I-26, 34.) When it came to a cessation of drilling under the leases granted the Pan American Company, permission to cease drilling and cut down production was applied for to Fall (Pl. Ex. 140; R. II-582), and by Fall the permission was granted. (Pl. Exs. 141, 142; R. II-584.) There is no evidence that Fall even consulted the Navy with regard to this matter.

When Doheny evolved his so called "plan" in the summer of 1922, that plan was submitted to Fall. It was Fall who discussed that plan with Doheny and who afterwards handed it to Bain and Robison with his approval (this brief, pp. 65, 66, *ante*). And when finally the vital question of the royalties to be paid under the lease of December 11, 1922, was to be decided, it was decided in conference between Fall and Doheny. We have not the benefit of the testimony of either Fall or Doheny as to what went on at that conference. We only know that Fall, realizing the great desire of Robison to get a supplemental storage contract even at the expense of leasing up the whole of Reserve No. 1, told Robison that the schedule of royalties he had discussed with Doheny was the best he could get out of him and that if Robison thought he could do any better he should try (this

brief, pp. 68, 69, *ante*). It resulted that the schedule so suggested was adopted.

At pages 31 and 32; 34 and 35; and 213-214 of their brief Appellants call attention to the fact that Fall had gone West on December 1st, to show that he had nothing to do with the alleged change of policy of the Navy Department from the use of royalty oil for current use fuel oil to the use of it exclusively for reserve storage. But this will not do. We shall not again advert to the correspondence of November 28th and 29th (this brief, pp. 20-24, *ante*). We think we need not again advert to the fact that Fall handed Bain Doheny's letter with instructions as to working out a plan (this brief, pp. 28, 29, *ante*), and that on December 6th Assistant Secretary Finney, who did nothing in this matter without advising Fall, wired Fall that the Navy had decided to go back to the original plan (Pl. Ex. 237; R. I-329).

Again it is argued (pp. 32-37) that the Secretary of the Navy settled and defined the policy in December, in Secretary Fall's absence, of using royalty oil for storage purposes. If this is so, what becomes of the policy letter of October 25, 1921 (Pl. Ex. 24; R. I-146), in paragraph 4 of which this policy is set forth; and what becomes of Robison's successful fight for the fuel oil storage plan of October, 1921 (R. II-964, 965, 991, 959; III-1081, 1094)? See this brief, *supra*, pp. 26, 27, 28.

Counsel for Appellants indicate (pp. 36-7) that after the receipt of the letter of December 9th, 1921, the Interior Department proceeded as a routine matter with the Pearl Harbor proposition, and add that Fall, who was absent from Washington, had nothing whatever to do with it. It is to be noted in this connection that on December 6th, 1921, Assistant Secretary Finney wired Fall apprising him of the situation (R. I-329), and that on December 23rd, 1921, Bain wrote Fall a full report of the situation preparatory to his going to interview Fall at Three Rivers about it (Pl. Ex. 70;

R. I-345). Besides, Bain stopped off at Three Rivers, New Mexico, on his trip west, reported to Fall in person and obtained his approval of the plan and of the oil companies on the Pacific Coast to be approached as prospective bidders (R. II-725, 726).

Appellants contend that Fall withdrew from the matter of the Pearl Harbor project and left it to Bain and Finney. As we have above pointed out, Fall never let go his hold on the proposition. At every stage and every step what was to be done was subject to his approval. Moreover, as Fall had knowledge of the situation that other oil concerns would not bid and had the assurance that Doheny's concern would bid, what more clever course could he take than apparently to leave the matter of the invitations for proposals and the preliminary preparation of a contract to his subordinates while he, in fact, retained ultimate control of the situation.

On pages 214 and 215 of their brief Appellants say something to the effect that Fall had not been in personal touch with the details of the Pearl Harbor matter during the spring of 1922. The evidence does not so indicate, but indicates just the contrary. The questions that were arising with regard to legality were all reported to Fall and discussed with him (this brief, pp. 57, 58, 90, 91, *ante*). The question of the probability of various companies on the Pacific Coast bidding was discussed with Fall (this brief, pp. 57, 58, *ante*).

We might as well here and in this connection discuss another matter referred to on pages 216-7 of Appellants' brief, which is Fall's letter of April 12, 1922, to Denby. Bearing in mind that the legality of the proposed exchange was still a matter of discussion and doubt, Fall, on the day before he left for Three Rivers, and three days before the Pearl Harbor bids were opened, and five days after he had actually executed and signed the lease on Reserve No. 3 to the Mammoth Oil Company, writes Denby a letter which is anything but frank. The letter will be found as Plaintiff's

Exhibit 102; R. I-393. In the first place, Fall, with apparent frankness, states that the difficulty of exchanging royalty oil for storage is that oil companies are not competent to do construction work, and that this therefore is a costly method of procedure. He knew that the Pan American company was going to make a bid at cost because he had been told so. Moreover, he had had Pan American's proposition of November 28, 1921, showing that the Pan American's bid was at cost. He states that on account of the existing difficulty he suggests an amendment to existing law. This appears at the bottom of page 393 and top of page 394 of the Record. It will be noted that the amendment suggested, if adopted by Congress, would absolutely justify and make lawful the exchange, the legality of which had so often been called in question, and Fall calls attention to these facts in his letter. This was the construction that Robison placed upon the letter, when he first read it (R. III-1088).

He then goes on to say that he is holding up the proposed contracts indirectly by taking abundant time for the consideration of bids, etc., in the hope that meantime the amendment may be adopted, and that he can thus deal with one concern for the royalty oil and a different concern for the construction and so save the Government money. Of course this statement is wholly untrue. The evidence shows that he was at this very time pressing Bain and wanting him to hurry through the Pearl Harbor matter, and even suggesting that they close it by negotiation rather than by competition (this brief, p. 57, *ante*).

Fall winds up his letter by the suggestion that he thinks Secretary Denby will have no difficulty in getting the amendment, and adds this significant phrase:

"It may or may not be necessary to go fully into the details of what we are trying to do at Pearl Harbor; of course impressing Congress with the view that too great publicity should not be given to the subject."

Whatever may have been the real motive for this letter, it is certainly not one from which the Appellants can gain much comfort, when the sinister character of it certainly indicates anything but open dealing and good faith. Of course no action was taken on the strength of the letter, because Admiral Robison knew that there was to be a bid from Doheny, and that bid at cost (R. II-1001-02; III-1089, 1090).

10. Doheny's active participation in the negotiation of the contracts and leases.

The Trial Judge found not only that Edward L. Doheny directly or indirectly controlled over 50 per cent. of the voting stock of the Appellant, Transport Company, which in turn owned and absolutely controlled the Appellant, Petroleum Company; but also that Edward L. Doheny purported to be and was in fact in effective control of the policies and actions of both companies during the negotiation and execution of the contracts and leases now under attack (Findings Nos. 1, 2, 3, 4 and 5; R. III-1393-94). These findings are not included in the Specifications of Error intended to be urged by the Appellants in this Court and are not the subject of attack in their brief.

In his testimony before the Senate Committee, Mr. Doheny said (R. I-214, 232) that Secretary Fall would be likely to be influenced in his companies' favor by reason of the financial transaction between them, but he added that Fall had not had anything to do with the negotiations. In this, he was obviously wrong since Fall and he were frequently in touch with each other during the negotiations. The dealings with Fall over the July 8, 1921, lease were personal between him and Fall (Pl. Ex. 12, R. I-133; Def. Ex. L; R. 1-471); he complained in person to Fall in Washington, in July, 1921, about the high royalties being paid under that

lease (R. I-130); the first discussion of the fuel oil storage plan, of the Pearl Harbor project and of further leases to be granted to his company was had personally between him and Fall prior to October 25, 1921 (R. II-831). He personally signed the letter of November 28, 1921, to Fall (Pl. Ex. 33; R. I-162). It was Doheny that Robison visited and obtained the former's promise to bid at cost (R. II-996; III-1086-87).

The conferences with Bain at Los Angeles were participated in by him and he there again repeated the statement he had made to Fall and Robison that his company would submit a bid (R. II-727, 742, 838). He was in touch with Cotter by telegram when Cotter was submitting the proposals for the April 25th, 1922, contract (R. I-239).

Doheny himself decided it was unimportant to procure the opinion of the Attorney General upon the legality of the contract of April 25, 1922; and hence Bain's letter of May 12, 1922, to Fall was never sent (R. II-784-87).

In the summer of 1922 it was to him that Fall wrote about granting permission to suspend drilling on the Pan American leases (Pl. Exs. 141, 142; R. II-584, 585).

It was he who took up the new plan which involved the lease of December 11, 1922, with Fall personally (R. II-789, 868; Def. Ex. R-4; R. II-1015, 1021; R. III-1137; Def. Ex. G-5; R. III-1155).

He attended the first preliminary meeting in the negotiations leading up to the contract and lease of December 11, 1922, and having heard the preferential right being discussed, he left and took no further part until the impasse about royalties (R. II-791-92).

It was he who with Fall personally later settled the royalties which were to go into the lease of December 11, 1922 (R. II-794; III-1132, 1135, 1136). He executed the contract of December 11, 1922 (Ex. C; R. I-41).

Wherever anything of vital importance arose both Fall and Doheny were personally engaged in it, and this applies to the whole course of the transactions.

11. Denby's inactivity and misapprehensions as to contracts and leases.

Much fault is found by Appellants with the conclusion of the Trial Court that Secretary Denby was not an active participant in the making of the leases and contracts and that he signed the same under a misapprehension (Finding No. 13; R. III-1398).

We have already had occasion to refer to the fact that Fall was of the opinion that the Executive Order of May 31, 1921, made all matters pertaining to the naval petroleum reserves an Interior Department matter (R. III-1062). We shall here call attention to those facts which we think fully justify the conclusion of the Court that Secretary Denby was passive throughout the negotiations and signed the leases under a misapprehension.

That Denby was entirely complacent in the surrender of the administration of the naval petroleum reserves to the Interior Department by the Executive order of May 31, 1921, appears from the letter of May 11, 1921 (Pl. Ex. 53; R. I-311), in which Fall refers to a conversation of the day before and **"to your suggestion to the President that the Secretary of the Interior be placed in charge of administration of the laws relating to Naval Reserves."** Secretary Fall's draft of the Executive order, as enclosed in the letter of May 11, 1921, transferred every vestige of authority with regard to the naval reserves to the Secretary of the Interior.

It was not Secretary Denby, but Admiral Griffin, Commander Stuart, and Assistant Secretary Roosevelt who revised that draft in an effort to safeguard the Navy's interests. (R. II-944-46.) Counsel now con-

cede that in May, 1921, Secretary Denby intended to leave to the Interior Department the handling of leases on the Naval Reserves (Appellants' Brief, p. 176).

Fall thoroughly understood that Denby did not intend to have anything to do with the naval petroleum reserves except on matters of general policy, and then only when Fall should consult him. He so definitely states his understanding of the matter in his letter of July 8, 1921, to Doheny (Pl. Ex. 12, R. I-133), wherein he says that he will confer with Secretary Denby only and that **"such consultation will be confined strictly and entirely to matters of general policy."**

So little attention had Secretary Denby paid personally to the administration of the naval petroleum reserves from the time of his taking of office on March 4, 1921, that he did not know until October 8, 1921, that there was a Fuel Oil Office reporting directly to the Secretary of the Navy and of which Commander Stuart was in charge. On that date he suddenly discovered the existence of this fuel office by noticing a letter which Commander Stuart had just written for his signature and which had been placed in his correspondence. (R. II-954-55.) Secretary Denby forthwith abolished this office. He appointed Admiral Robison, the then Chief of the Bureau of Engineering, as his personal representative and charged him with the handling of oil matters (Pl. Ex. 66, R. I-339; II-955).

On October 18, 1921, the very day on which he formally transferred fuel oil matters to the Bureau of Engineering, there was a meeting of the Navy Council at which Secretary Denby said (R. III-1176), "I want the Interior Department when a tract is to be opened in part or full, I want them to do it for the best interest of the Navy. That matter of leasing is most difficult and dangerous thing to be done. **It is full of dynamite. I don't want to have anything to do with it.**"

In this regard it is interesting to note that this significant statement which Secretary Denby made with regard to the "dynamite" that was in the oil leasing business is not referred to in the Appellants' brief, although their counsel repeatedly refer to Secretary Denby's so called activity in the matter of the naval petroleum reserves.

When Robison and Fall had conferred in late October, 1921, and Robison in collaboration with Fall had drafted the so called policy letter of October 25, 1921 (Pl. Ex. 24, R. I-146) for the signature of Secretary Denby, the latter wanted the seventh paragraph, which reads: **"That all leases and contracts * * * will be arranged and consummated by the Interior Department, copies of same being furnished to the Navy Department as a matter of information and record only,"** inserted therein (R. II-965).

Secretary Denby did not attend the conference of late October, 1921, nor did he attend any other conference in the Interior Department, dealing with naval petroleum reserve matters.

It was Secretary Fall and the Bureau of Mines that sent out the telegrams in November, 1921, to lessees in Naval Reserve No. 2 in order to increase production and thereby build up a substantial oil credit.

There is nothing in the record to show that Secretary Denby had knowledge of or participated in the proceedings which resulted in the granting of relief leases in Section 1 to the Petroleum Company, unless full faith and credit be given to Admiral Robison's general statement that there was nothing that he did not talk over with Secretary Denby.

It should be noted that Admiral Robison seldom, if ever, states in his testimony what he told to Secretary Denby on a particular occasion or what was

said between them, or what effect anything he said had upon the Secretary. This bit of his testimony on direct examination is typical. He was asked whether or not he had discussed with Secretary Denby the letter of December 14, 1921, before it was sent to the Interior Department and he replied, "Witness had talks with the Secretary so frequently that he cannot state definitely that he talked this particular thing—yes, he can; **there was nothing that he did not talk over, so he must have talked over this.**" (R. II-989.) We shall later show that Admiral Robison could not distinguish between the various persons in the Interior Department, viz., Fall, Finney, Ambrose and Bain, and could not accurately relate what had been said at the various conferences which he attended. For this reason we do not feel that much weight should be given to his sweeping statement that he consulted with Secretary Denby as to all matters pertaining to the naval petroleum reserves.

That Secretary Denby was not kept fully informed and was from an early date under a misapprehension as to drainage of the naval petroleum reserves appears from his statement in the meeting of the Navy Council on November 29, 1921, at which meeting Admiral Robison was strongly advocating the reserve fuel storage plan and had directed the attention of that meeting to Mr. Doheny's proposition of November 28, 1921. On that occasion Secretary Denby referred to a statement made to him by Secretary Fall that **if they didn't tackle it now they would not get any oil three months hence** (R. II-973). There is nothing in the record to justify such a statement by Fall, since it stands admitted that there was not at that time or later a serious threat of drainage to Naval Reserve No. 1. Secretary Denby never knew the true status as to the possibility of drainage.

In November, 1921, Fall instructed Bain to work out

the fuel oil storage plan and, pursuant to said instructions, Bain got in touch with Cotter and Dunn in December, 1921, before his trip West. The results of these conferences were reported directly to Secretary Fall. There is nothing in the evidence to show that Secretary Denby had any knowledge of them.

Secretary Denby did not take part in any of the negotiations in the Interior Department with the prospective bidders, and the specifications of March 7th expressly provided that the Interior Department should be the contracting party on behalf of the United States (Pl. Ex. 136; R. II-577).

On December 14, 1921, there was prepared for the signature of Secretary Denby a letter to the Interior Department requesting the latter to proceed with the fuel oil storage plan. That letter was prepared by Admiral Robison for the signature of Secretary Denby in accordance with the established practice of the Department. (R. II-960, 989, 1023; R. III-1136.) Admiral Robison testified that Secretary Denby knew what was in every letter prepared for his signature before it was permitted to go out from the Department (R. II-989-90). An excellent evidence that Secretary Denby did not know everything that went into a letter is his letter to Senator Harreld of April 20, 1922 (Pl. Ex. 274; R. III-1177). It is sufficiently important to quote it. It is as follows:

“THE SECRETARY OF THE NAVY

“*Washington*

“APRIL 20, 1922.

“*Hon. J. W. Harreld,*
“*United States Senate.*

“MY DEAR SENATOR:

“Replying to your inquiry of April 14, wherein you request information concerning the oil leases

executed with regard to the naval reserve lands belonging to the Government since March 4, 1921, the following data are submitted:

"The Executive order transferring the care, custody, and operation of the naval reserves to the Department of the Interior, was signed May 31, 1921, and since that date the Navy Department is not in a position to give the details of leases that may have been executed. However, between the dates of March 4, 1921, and May 31, 1921, it appears that two leases became effective, as shown below:

Lease No. Visalia 09312.
 Delivered: April 19, 1921.
 To: Consolidated Mutual Oil Co.
 Date of Lease: February 16, 1921.
 Located at: S $\frac{1}{2}$ NE $\frac{1}{4}$ and S $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$, sec
 28, T. 31 S., R. 23 E., M. D. M.
 120 acres.

Back royalty paid to Government.... \$171,664.34.

Lease No. Visalia 09305.
 Delivered: March 31, 1921.
 To: Buena Vista Oil Co.
 Date of Lease: August 23, 1920.
 Located at: Two wells in N $\frac{1}{2}$, SE $\frac{1}{4}$, Sec. 32,
 T. 31 S., R. 24 E.

Back royalty paid to the Government \$294,606.71.

"I trust that this information will serve your purpose. It is quite incomplete, of course, but accurate details as to the leases that have been entered into since May 31, 1921, can only be obtained from the Department of the Interior.

Sincerely yours,

EDWIN DENBY."

That letter was confessedly written after the Mammoth lease of April 7, 1922, leasing Reserve No. 3 in Wyoming, had been executed by Denby. It was confessedly written at a time when Robison says Denby knew all about the Pan American transaction. Either Denby did not read this letter before he signed it, in

which case it is a fair inference that he did not read other letters prepared for him by Robison, or else he read it and assumed that it stated the situation correctly when in fact it was a total misrepresentation of the then status of leases in the naval reserves.

The letter written by Fall to Denby on April 12, 1922 (Pl. Ex. 113; R. I-403), leads us to believe that Denby had no knowledge of what was going on. In this letter Fall forwards to Denby a copy of the Mammoth lease, which Denby had signed on or before that date and with which lease Robison would have us believe Denby was fully familiar, and also encloses in the letter a brief setting forth what the Mammoth lease is all about (R. I-406). This letter is all the more remarkable because Fall takes the trouble therein to inform Denby that the latter has signed the Mammoth lease.

Robison testified that he reported to Denby the bids received on April 15, 1922, and that the latter instructed him to go ahead with Bid B of the Transport Company. He claims to have reported this decision to Assistant Secretary Finney and also to have been present when the telegram of April 17, 1922 (Pl. Ex. 120; R. I-419) was sent to Fall. That telegram reads, in part, "In opinion Ambrose, Robison and myself, Pan American alternative bid best offered and should be accepted" and "suggest you authorize closing contract with Pan American" (R. I-420). It is strange that Denby's name should have been omitted if Robison had in fact received and communicated to Assistant Secretary Finney the alleged instructions of Denby to go ahead on Bid B. Nor can it be said that by referring to Robison, Assistant Secretary Finney impliedly included Denby for the remainder of the telegram shows that when the sender meant Denby he had no hesitation about using the latter's name.

On April 18, 1922, Mr. Cotter first raised the point that Secretary Denby would have to be a party to the contract. The specifications accompanying the proposals provided that the contracting party would be the Secretary of the Interior. The formal award had been made by the Acting Secretary of the Interior pursuant to Fall's authorization. Accordingly, on April 20, 1922, Assistant Secretary Finney wired Fall asking whether they should comply with the wish of the Pan American Company in that regard or should follow the wording of the Wyoming contract (Def. Ex. FF; R. II-525). The consent of Fall to this request was given by wire on April 22, 1922 (Def. Ex. GG; R. II-526). About this time Ambrose had been sent West to consult Fall *inter alia* about the question raised by Cotter. Assistant Secretary Finney had no doubt that Fall had the power to approve or disapprove of the joinder of the Secretary of the Navy as a party. He testified that a single word to the contrary from Fall, who had left definite instructions that no contracts should be closed without his prior approval and consent, would have sufficed to put an end to that suggestion (R. II-528). Until the receipt of Fall's approval by wire it was not decided to make Secretary Denby a party.

The fact that Secretary Denby was made a party had no effect upon the manner in which the construction work under the contract was to be supervised. The letter of May 5 from Assistant Secretary Finney to the Secretary of the Navy (Pl. Ex. 129; R. I-433) expressly retains in the Department of the Interior "direct control of the oil business involved in this contract." It also expressly reserves to the Secretary of the Interior the right to recall the appointment of the Chief of the Bureau of Yards and Docks, who had been designated as the representative of the Secretary of the

Interior in handling the construction of the oil storage and the receiving of oil in the tanks at Pearl Harbor.

Just as Fall had apparently thought it necessary to call Denby's attention in his letter of April 12, 1922, to the fact that the latter had executed the Mammoth lease, so, apparently, Assistant Secretary Finney in his letter of May 5, 1922, likewise thought it necessary to call Denby's attention to the fact that on April 25, 1922, a contract had been entered into with the Transport Company (R. I-433).

Before leaving the letter of May 5, 1922, it should be further noted that Mr. Dunn insisted that the ultimate authority with reference to disputes which might arise under the contract of April 25, 1922, should lie with Fall and not with Denby. Assistant Secretary Finney testified that "one of the questions discussed was how disputes could be settled in case disputes arose between the contractor and the officers of the Navy or of any department; Mr. Dunn was very anxious and insisted that the umpire or final arbiter should be the Secretary of the Interior" (R. I-433). As a result of this insistence the above letter of May 5, 1922, was written by Finney as the Acting Secretary of the Interior and was approved by Secretary Denby on behalf of the Navy. Thus again we have a case where Denby surrendered to Fall any power that he might possess in regard to the performance of the contract.

Although Denby was made a party to the contract of April 25th, 1922, the lease of June 5th, 1922 (Exhibit F of Amended Bill; R. I-68), was executed by E. C. Finney, First Assistant Secretary of the Interior acting for and on behalf of the United States of America as lessor. The application for this lease was addressed solely to the Secretary of the Interior (Pl. Ex. 127; R. I-432) and there is nothing in the record to show that Denby took any part in the execution of this lease.

When in July 1922 it was to the interests of the Transport Company to suspend drilling operations under its leases on Naval Reserve No. 1, application for leave therefor was made directly to Fall by the Transport Company (Pl. Ex. 140; R. II-582). And permission to curtail production was forthwith granted by Fall (Pl. Exs. 141, 142; R. II-584, 585). Again there is nothing in the record to show that Denby was consulted before this decision was reached or approved the same. Furthermore, leave was generally granted to suspend drilling operations in Reserve No. 1 to other Government lessees by Fall without a scintilla of proof that Denby knew or approved of this course of action (Pl. Exs. 144-156; R. II-587-596).

We have had occasion to point out under an earlier heading in this brief that when Doheny was ready to submit the plan referred to in the letter of July 28, 1922 (Pl. Ex. 140; R. II-582), he first got into touch with Fall and the plan received the latter's approval before it came into the hands of Robison through Bain. Denby took no part in the negotiations which culminated in the contract and lease of December 11, 1922. Robison testifies that after he was forced to accept the compromise royalties previously agreed upon by Fall and Doheny, he reported to Denby and the latter, having been assured by Robison that that was the best Robison could do, told Robison to go ahead (R. III-1039); but Robison's letter of December 9, 1922, to Fall, in which the writer consents to the compromise royalties, does not refer to or mention Denby's consent in the matter and does not purport to have been written on the latter's behalf (Def. Ex. GGG; R. II-798).

Likewise, Robison testified that he took up with Denby the contract of December 11, 1922, and went

over it with him; but in his letter of December 9, 1922, to Secretary Fall (Def. Ex. GGG; R. II-799), he says that "I am going over the details of the proposed supplementary contract. This contract as now prepared appears satisfactory. I will give you definite information as soon as I have been advised by the legal authorities of the Department." Also, in his letter of approval of December 11, 1922 (Def. Ex. HHH; R. II-800), he writes that "The copy of the supplementary contract * * * has been carefully reviewed by me and by the Judge Advocate General of the Navy."

It is strange that the contemporaneous documentary record made by the witness himself should contain no reference whatever to Denby, if the latter, as the witness testified, not only was consulted about and approved of every step taken at this time, but had also gone over the contract with Robison.

It is quite evident from letters and statements made by Denby that his anxiety was that only such drilling should be done as was necessary to protect the Naval Petroleum Reserves from drainage and depletion. We have already referred to his statement before the Navy Council on November 29, 1921, which clearly revealed that Fall had alread misled him in that regard. We shall quote freely from the record in discussing hereafter the credibility of Robison's testimony in order to prove that Robison also misled Denby into believing that the lease of December 11, 1922, was for protective purposes. We refer to pages 1107, 1109, 1126-27, and 1141 of Volume III of the Record.

Finally, there is no evidence in this case whatsoever from beginning to end, that Denby ever attended any conference of any kind, character or description with any officer, agent or employee of either the Pan American companies or of the Interior Department or ever

spoke to any of them about any of the leases or contracts here in controversy. Robison testified that at the time of the execution of the lease of December 11, 1922, he introduced Doheny and Cotter to Denby in the Navy Department as the latter was affixing his signature (R. III-1041).

The foregoing facts and circumstances are sufficient to warrant the Trial Court in finding that Denby was passive and also was under a serious misapprehension when signing the lease of December 11, 1922, and the contracts of April 25 and December 11, 1922. In their attack upon that finding, counsel for the Appellants first invoke the presumption that official acts and duties have been properly performed (Appellants' Brief, p. 169); but this presumption is not conclusive and may be rebutted. The Ross case cited by the Appellants so holds. Counsel next invoke the testimony of Robison to show that Denby had knowledge of the contents and the purpose of the contracts and leases he signed (Appellants' Brief, pp. 170-74, 179-208). The value of such testimony depends upon the reliability of that witness; and accordingly we shall now consider the credibility of Robison's testimony and also of Bain's testimony.

In an obvious attempt to discredit the finding of the Trial Court that Denby was not an active participant in the making of the contracts and leases and that he signed the same under a misapprehension (Finding No. 13; R. III. 1398) and also in an obvious attempt to lend credence to the testimony of Robison that Denby acted with full knowledge in the matter, counsel quote at length from the opinion of District Judge Kennedy in the case of *United States vs. Mammoth Oil Company* (Appellants' Brief, pp. 174, 209). The answer to such an argument lies in the fact that the Wyoming District Court, which did not have the advantage of Robison's

testimony in open court but merely by depositions, gave full credence to his statements, whereas the California District Court, before whom Robison appeared in person as a witness, did not feel obligated to take his testimony at par upon this important and vital matter, *i. e.*, the participation of Denby in the negotiation of the contracts and leases and his knowledge of the contents thereof. It is not necessary to brand Denby as an "imbecile." His lack of knowledge and his misapprehension as to drainage did not arise from any lack of mental capacity, but were directly traceable to the misrepresentations and lack of disclosure of the true situation by Fall and Robison.

12. The testimony of Robison and Bain.

The validity of the defense on the facts is practically predicated upon the testimony of Robison and Bain, who were called as witnesses by the defendants.

Although J. J. Cotter, J. C. Anderson and E. L. Doheny, Sr., figured prominently in the conduct of the negotiations resulting in the contract of April 25, 1922, and the contract and lease of December 11, 1922, yet this Court, as were the Courts below, is denied the benefit and aid of their testimony. Their absence from the witness stand not only gives ground for unfavorable inferences, but is also fatal to the Appellants' case, because the Trial Court was justified in not accepting the testimony of Robison and Bain as to certain matters.

The findings of fact and the memorandum opinion establish that the Trial Court did not feel bound to accept the testimony of Robison and Bain on certain issues. How far their demeanor and manner of testifying affected the Court in its appraisal of their testimony is not known and is not within the province of a brief before an Appellate Court, which has not had the

opportunity of observing the witnesses on the stand. But we shall here call attention to many substantial contradictions, inconsistencies and inaccuracies in their testimony.

That a Court ought not to feel bound by Robison's testimony on crucial facts is, amongst other things, supported by his attitude, which was certainly that of an ardent advocate of the contentions of the defense and by the fact that he was deeply involved in all the transactions, and therefore, naturally inclined to defend them.

When questioned upon cross examination about his testimony on a prior occasion, he replies (R. III-1077):—

"I can answer that question as follows: I have made a large number of formal statements on oath or on honor concerning this matter. I have never made any attempt to make one statement agree with another and I don't intend to begin along that line. If you ask me a question as to my present recollection you will get an exactly correct answer for the moment. If you ask me what I testified at some other time, I don't know."

Later, in explaining his failure to remember a statement made in his direct testimony, the witness exclaims (R. III-1095):—

"I am afraid I am suffering from senility. I don't recall."

Not only did Admiral Robison not know what he had said on prior occasions, but he could not recall with whom he had spoken or conferred. He testified that shortly after his appointment as Chief of the Bureau of Engineering he conferred with Fall upon the question of building storage with royalty oil. He fixed with great circumstantiality October 9, as the date of the first meeting and added that he was in constant touch with

Fall from that time forward (R. III-1051, 1110); but this was impossible, because it is admitted that Fall did not return from the Pacific Coast until October 17, 1922 (R. III-1110). Likewise, he erroneously believed that Director Bain attended the October 22, 1925, conference (R. II-830; III-1051). This too, was physically impossible as Bain was not in Washington (R. II-830-31).

He also testified that he saw Fall during December, 1921, and told him about his conference with Doheny, Sr. He did not remember that Fall left Washington for the West on December 1, 1921, but thought that he had left at the end of the month—evidently believing that Fall went home for the holidays or something of that kind (R. III-1086). His naive explanation of this admitted error was that he did not and had never differentiated between Fall and Finney because the Interior Department was a person to him (R. III-1086). He confessed that he had no independent memory as to whom he had talked concerning Doheny's promise to bid in December, 1921, adding that the man who was important to witness was Denby (R. III-1086-87). He concluded that he had told this important fact to either Fall, Finney or Bain—his best recollection being that it was Fall (R. III-1087).

Having thus sought refuge in the statement that to him the Interior Department was a person, Robison described that person as the complete tool of the witness (R. III-1086, 1087). Although he strongly protested that Fall, Finney, Bain and all the rest of them were tools and were under the hand of witness, yet we shall have occasion later to show that the tool became for the nonce the master.

That Robison did not intend to begin making one statement agree with another is well illustrated by his

attempt to fix the date of his secrecy pact with Fall. In his deposition in the case of the United States *vs.* Mammoth Oil Company he stated that this agreement had been concluded with Fall in October, 1921, when they originally undertook the work (R. III-1055). At the trial, the witness testified that his present memory differed from what it was at the time of this deposition and that the secrecy pact was not agreed upon until some time in the spring of 1922, after the consummation of the contracts (Mammoth and Pan American) (R. III-1055). He recalled that counsel for the Government had during the taking of the Mammoth deposition called his attention to a memorandum by C. S. Williams, dated November 4, 1921; and although he refused to change his present testimony, he nevertheless admitted that this memorandum seemed to indicate that his previous recollection was more accurate (R. III-1055-58).

He was being cross-examined upon his contradictory statements in regard to the letter of April 12, 1922, in which Fall recommended certain proposed legislation to Denby (Pl. Ex. 102; R. I-393). In the Mammoth deposition he had testified that he had recommended to Denby that the letter be disregarded because witness was going to get a bid—he had it (R. III-1092-93). Robison confessed the obvious inaccuracy of that statement and then remarked (R. III-1093):

“As to the accuracy of his recollection about all these various matters, he would prefer to let the record speak for itself. It is as accurate as he can make it and **he has been prayerfully intent to make it correct.**”

In his direct examination Robison was shown a letter dated December 14, 1921, which he read and said it referred to a conversation with Doheny, Jr. He was thus enabled to fix Washington, D. C., as the place,

and December, 1921, as the month of his interview with Doheny, Sr., on which occasion the latter promised to submit a bid without profit upon the Pearl Harbor project (R. II-993-96). The witness stood firmly upon this recollection, but refused to say under cross-examination that Doheny was wrong in his testimony before the Senate Committee in stating that the conference took place in New York in the home of E. L. Doheny, Jr., and in the winter. Robison could not recall seeing either of the Dohenys in New York City at or about the latter part of January or February, 1922, but would not say that he did not do so. However, he knew that he didn't go to New York "especially for that purpose to see anybody" (R. III-1115-16). Under an earlier heading of this brief we have called attention to those facts and circumstances which in our opinion uphold the accuracy of Doheny's recollection and the inaccuracy of Robison's memory in this regard.

Director Bain was also closely connected with the making of the contracts. His natural attitude was one of hostility to the Appellee's case. He had, moreover, displayed throughout an extraordinary attitude towards the Government's interests as contrasted with those of Doheny.

In the letter he prepared to be sent to Fall on May 12, 1922, he said, "There is, however, another phase to it. **None of us want Mr. Doheny to get into trouble, and I take it we will want to do anything we can to make it easy for him.**" (R. II-785.) This letter shows great concern lest Doheny get into trouble, but no concern lest the Government get into trouble.

And again, "Out of all this has come the suggestion repeatedly that the opinion of the Attorney General be obtained as to the legality of the contract. **I realize the objections to asking such an opinion,** but I have

thought it proper to let you know the difficulties that are being raised here so that you might reconsider the matter and decide as to whether you might not properly ask the Attorney General to put in writing what I have understood was his informal and verbal expression of opinion favorable to the action the department has taken. I am not certain that Mr. Doheny cares, but Mr. Cotter will see him tomorrow, and if it does seem to them important I am giving Mr. Cotter this letter to show you, so that you may know what I have found out here" (R. II-786). Dr. Bain's explanation of the phrase "the objection to asking such an opinion," which he used in this letter (R. II-787) is, we submit, not satisfactory or convincing.

Director Bain is also inaccurate in his recollection of important matters. He testified during his direct examination, that some time in October, 1922, he received from Fall the memorandum submitted by Mr. Doheny, Sr., relating to the California oil situation (R. II-788-89). His attention was directed in cross examination to his letter to Senator Smoot of November 30, 1923 (Def. Ex. WWW), which contained the statement that this memorandum had first come into his possession in August, 1922 (R. II-868). The witness admitted that his letter to Senator Smoot took about three weeks to prepare (R. II-863). His explanation of this mistake in date is that he has since checked the date; but he does not explain what he found in said checking to change his memory or what was the occasion for so checking.

This same letter to Senator Smoot also contained the statement that certain leases had been granted upon the Naval Oil Reserve in order to increase the amount of Government royalty oil that would accrue and thereafter become applicable to the contract of April 25,

1922, thereby shortening the time "the contractor would need to wait to secure a return of the money he needed to construct immediate storage facilities" (R. II-863). The attention of the witness was called to this statement after he had testified on cross examination that the purpose of these leases was not only to supply more royalty oil to the contractor, but also "to anticipate the fact that the Government would have to take care of drainage on these particular pieces of land." The explanation of this inaccuracy is short but unconvincing. It is that in writing the letter he over-looked the other idea that was in his mind as to making these leases. He does not, however, suggest that he has checked his earlier recollection, recorded at a time when the event should have been more freshly in mind.

The recollection of Robison and Bain in regard to their conversations and conferences together is often flatly at variance. For example, Bain testified during his cross examination by Government counsel as follows (R. II-875):

"Admiral Robison said to witness words to this effect: 'Well, the matter is settled; we are going ahead with the additional storage. The Navy Department badly needs additional storage at Pearl Harbor. **It is not certain how long I may hold my present position. Administrations change, and if the matter is postponed, the acquirement of storage may never be accomplished.** It has been decided to go ahead at once with an additional project for 2,700,000 barrels at Pearl Harbor.'"

Admiral Robison commented upon this statement by Director Bain in the following manner (R. III-1125):

"Witness thinks that is what he said because that is what he felt at the time and undoubtedly he was speaking freely and frankly with those people, **but witness doesn't think he ever said to**

anybody it was uncertain witness might hold his present position—that administrations change and if the matter is postponed, the requirement of storage may never be accomplished."

Again, Director Bain on direct examination described his visit in January, 1922, at Los Angeles with the officers of the Union Oil Company, and then stated that plans for the Pearl Harbor project "were not left with the officials of this Company for the reason that **it seemed to the witness improbable that they would be sufficiently interested to warrant it.**" (R. II-741-42.) Shortly after his return to Washington in late January, 1922, Bain met Robison and Fall in the latter's office and told them the result of his conversations with the various oil companies on the Pacific Coast, enumerating Standard Oil, Associated and Pan American as the prospective bidders he had secured for the Pearl Harbor project (R. II-743). In speaking of this January conference, Robison testified under cross examination (R. III-1084):

"He did not tell witness that the Union had given him the impression that they did not want to bid—witness got quite a different impression. Witness' understanding was that the Standard Oil Company had made objections that Dr. Bain thought were but temporary, but that the General Petroleum Company and Associated would bid, and the Union would bid if they were given a chance, but it was not thought proper to have other than a completely American Company engaged in this project."

Director Bain testified in his direct examination for the defense that at this same January conference he told Fall and Robison of the objections of one kind and another which had been raised in his conferences with the various oil companies and made mention of the objection raised by Mr. Weil and Mr. Sutro against the

legality of his proposal (R. II-743). He further testified that Fall stated that the Judge Advocate's opinion was sound, that the power to exchange was broad enough for this purpose and that Mr. Weil was perhaps advising his client on the basis of a cautious lawyer who desired to keep his client from getting into any possible trouble (R. II-744). Such testimony does not accord with the following statement by Admiral Robison on his cross examination (R. III-1083):

“When Dr. Bain came back from California in January, the witness thinks ‘1922,’ he heard from him of a lawyer who had expressed doubts as to the legality of this project—only one—a man named Sutro. The witness does not think that he knows the name of Mr. Weil in that connection. At that time when Dr. Bain got back, he expressed the belief to witness that all of those concerned, with the possible exception of the Standard Oil Company on account of some objections that he thought were but temporary, of their Company—witness thinks he gave the name of Sutro—would furnish bids in accordance with these specifications. At that time in January, witness believed that the attorneys of the Associated Oil Company and the General Petroleum Company had approved the plans. That was witness’ understanding at that time—that the General Petroleum Company and the Associated Oil Company, both were supporters of the plan that witness and Dr. Bain were figuring on.”

But Bain well knew that the attorney for the General Petroleum Company had not approved the plans and that the Company was not a supporter of the plan. In his direct examination he testified that upon his return to Los Angeles from San Francisco he again met the officials of the General Petroleum Company and on this occasion (R. II-740):

"They did not get very far in discussing the Pearl Harbor matter, because Mr. Weil promptly announced his opinion that it was illegal, and that he would advise his Company to have nothing to do with it. He said that if the power to exchange went as far as the Judge Advocate's opinion indicated that it did, then it was an unlimited power to exchange, and that it would give the Navy authority to exchange oil for a battleship, if they desired to do so, and that he was satisfied that that was without the intent of Congress. He furthermore stated that if the Judge Advocate General was wrong, that there would be no statute of limitations to protect his Company."

Director Bain concluded his direct testimony upon his conferences with General Petroleum Company by saying (R. II-741):

"The conversation in Los Angeles closed the matter, so far as the General Petroleum Corporation was concerned, the upshot of that being that the officials of that company told Dr. Bain they would not be interested further."

During his cross examination, Director Bain described this second conference with officials of the Petroleum Company and then said (R. II-841):

"And Mr. Weil expressed very grave doubts, graver than Mr. Sutro; the latter apparently had not made up his mind; Mr. Weil asked why the opinion of the Attorney General was not obtained; witness does not remember Mr. Weil saying that his Company would not consider it unless the opinion of the Attorney General was obtained, but would consider it if the Department got that opinion; witness would not say Mr. Weil did not say that."

The testimony of Mr. Weil corroborates Bain's testimony that the General Petroleum Company had not

approved the plan and was not a supporter of it. Whether or not Bain told Robison of this fatal objection cannot be so easily determined.

Admiral Robison is positive in his assertion that Doheny, Sr., attended but one conference during the negotiations leading up to the contract and lease of December 11, 1922. He places that conference toward the end of the period between November 29th and December 11th, 1922. He testifies on direct examination that (R. III-1025):

“ * * * there was one conference at the Bureau of Mines, where Mr. Doheny was present; between November 29 or 30 and December 11, there were conferences on this subject about twice a day, at but one of which was Mr. Doheny present, and that was in the office of the Director of the Bureau of Mines, Dr. Bain; that conference was toward the end of the negotiations.”

He identifies this conference as the one at which he in vain endeavored to persuade Doheny to raise the royalties previously agreed upon by Fall and Doheny (R. III-1030-32). Bain agrees with the testimony of Robison insofar as the latter testifies that Doheny attended a conference where the compromise royalties were discussed. He disagrees as to the date of that conference—Bain stating that Fall had previously received Doheny's letter of December 8, 1922 (Pl. Ex. 167; R. II-619), and Robison stating that Fall was expecting such a letter (R. II-795; III-1031).

A more important inconsistency in their testimony is that Bain states that Doheny, Sr., also attended the first meeting in the series of negotiations culminating in the execution of the contract and lease of December 11, 1922. On this occasion (R. II-791-92):

" * * * there was a general discussion of what it was proposed to do, and how it should be done, and the preference right and its restriction to the eastern part of the reserve."

The witness then continues to say that following the general discussion, Doheny left and through a series of days there were discussions participated in mainly by Anderson, Cotter, Ambrose, Robison and himself. The significance of Doheny's attendance at these two meetings is apparent. Having ascertained in the first instance that his preference right under the contract of April 25, 1922, was before the negotiators, it was not necessary that he further attend the preliminary steps in the negotiations. After the parties had agreed upon everything except the royalties and an impasse had been reached in that regard, Doheny once more appeared on the scene and took a firm position as to the royalties which Fall and himself had fixed. This was the occasion when Robison for the first time realized the value of the preferential right (R. III-1097, 1132, 1135-36).

It would seem appropriate at this point again to advert to the statement by Admiral Robison that Fall thought that the Executive Order made the administration of the naval petroleum reserves an Interior Department affair. His exact language in this regard is (R. III-1062-63):

" * * * and Secretary Fall was of the opinion that the Executive Order made it an Interior Department affair. Witness found that he was able to advance the Navy business best by yielding entirely to the Secretary's view in that matter on all unimportant details. Whether the witness ever had any serious disagreement with Secretary Fall about an important detail depends on what one calls important, but the witness thought that he accom-

plished the Navy's desires to an extent that he had not originally contemplated."

Apparently, the witness did not consider royalties of prime importance or else he could not have boasted, as he did, that Fall, Finney, Bain and the rest of the people were tools—a complete tool of the witness (R. III-1087).

Admiral Robison constantly reiterated throughout his direct examination that he always discussed with Denby all matters pertaining to the naval petroleum reserves, that he kept the latter fully informed as to everything and took no action whatever without Denby's previous knowledge and consent. His own testimony shows that this could not have been true. He frankly confessed that Denby executed the contract and lease of December 11, 1922, under the mistaken notion that drainage rendered such a step imperative and also that he not only fostered this erroneous idea, but actually was responsible for it. The witness testified upon cross examination as follows (R. III-1107):

" * * * that to him that is the most important result in that lease, but that lease could not have been accomplished had witness been unable to say to the Secretary of the Navy that it involved the drilling of no lands that he did not consider it necessary to drill in order to protect government property from drainage to outside concerns."

(R. III-1109):

"Q. 'Now what was that you said to me, that you couldn't have gotten Secretary Denby's consent to this lease if you hadn't been able to represent to him that it was necessary to make it on account of drainage?'

" 'A. That there was no property leased that was not liable to drainage by outside concerns.' "

(N. B. Because the transcript in the Record has a line dropped out, counsel for the United States has taken the liberty of correctly setting forth the above question as it appears on page 1822 of the official stenographic transcript of the testimony.)

Admiral Robison attempts to put a semblance of truth upon his statement by adding (R. III-1109):

"Witness did not tell him it was liable to immediate drainage and did not think he used the term about this 300 year period before this moment. Witness did not tell Secretary Denby any period that it was likely to be drained out in, and the Secretary did not ask witness."

The following quotations from the testimony of Robison bear further upon Denby's mistaken notions about drainage:

(R. III-1126-27.) **"To the mind of the Secretary of the Navy witness believes the most important advantage was that permanent security against drainage would be secured. Witness is unable to state that, but to witness the most important advantage was the provision of security to the nation."**

(R. III-1141.) **"Mr. Denby had a fixed idea that the immediate necessity was the drilling of offset wells where they were required. Witness thinks that it was his idea to keep as much of the oil in the ground as long as he could, and the policy of his department was fixed by him."**

Apparently, Fall also preached to Denby the danger of immediate drainage. At the meeting of the Navy Council on November 29, 1921, Denby said (R. II-973):

"The Secretary of the Interior says if we didn't tackle it now, we would not get any three months from now."

In plain disregard of this testimony as to Robison's and Fall's misrepresentations to Secretary Denby upon the question of drainage, counsel boldly proclaim that the record in the present case is bare of any representations of any kind by Fall or officers of the Navy Department to Secretary Denby with reference to or for the purpose of bringing about the contracts and leases (Appellants' brief, p. 165).

Thus did the personal representative of Secretary Denby perform his duty of full disclosure to his superior. In this regard, it may be noted that Robison wrote for Denby's signature the important policy letters of October 25, 1921, December 14, 1921 and November 28, 1922 (R. II-960, 989, 1023; III-1136).

Bain testified upon cross examination that the lease of December 11, 1922, could have waited if the Navy had not been anxious for the storage facilities (R. II-874). In this regard he testified upon direct examination (R. II-791):

"As to what, if anything, Admiral Robison said to witness regarding a lease of the reserve, or any part of it, **Admiral Robison said that the Navy would lease the whole reserve if they got enough for it.**"

But Robison, when confronted during his cross examination with this testimony, branded it as inaccurate, saying (R. III-1108):

"Witness does not think that he ever said to anybody that if they had to lease up the whole reserve to get the storage project done, he was prepared to lease it all * * *."

This is but another instance of the contradictory statements made by Robison and Bain, upon most vital matters.

Bain did not always state a situation frankly. On or about March 4, 1922, the witness received a letter from Charles N. Black (Pl. Ex. 95; R. I-386) enclosing a copy of the opinion of Mr. Sutro upon the illegality of the Pearl Harbor project (Pl. Ex. 51; R. I-296). He acknowledged the receipt of this letter on March 4th in a letter (Pl. Ex. 96; R. I-387) in which he said:

"I am greatly obliged to you for the copy of Mr. Sutro's opinion which I am having studied here. **I think we will be able to arrange a form of bidding which will meet the principal objections he has in mind,** and I am sure we can back our plan with good legal opinion, since the matter happens to have been examined by attorneys outside as well as inside the service."

His statement that he expected to be able to arrange a form of bidding which would meet the objections was untrue because on March 7th an invitation for bids was issued on exactly the same theory of a lump sum bid in barrels of oil for construction and for storage, which had been the theory since February 21, 1922. He explains this apparent untruth by the statement that in his judgment the proposals of March 7th, 1922, "met the objection that the Navy could not legally exchange royalty oil for tankage" (R. II-843). He says that the attorneys outside the department who had approved of the matter were the attorneys of Mr. Dunn's company (R. II-843). The witness is silent upon the legal opinion of Mr. Weil in January, 1922. The attorneys inside of the service proved to be only the Judge Advocate General of the Navy Department. Bain had advocated since October or November, 1921, that the opinion of the Attorney General be secured, but his request had been in vain (R. II-842). As late as May 12, 1922, the witness again repeated this request, but to no avail (Ex. EEE; R. II-784).

A further vital factor in considering the credibility of Admiral Robison and Bain is their intimacy with the representatives of the Appellant, Transport Company. The testimony of Bain is replete with accounts of the frequent visits paid to him by J. J. Cotter and Gano Dunn between February, 1922, and April 15, 1922. Both were frequently in his office and freely discussed alternative bidding, which they heartily favored (R. II-746-50; 762, 768-69, 856-58, 860-61). Robison at the very outset of his direct testimony took advantage of the occasion to flaunt his past and present friendship with the Dohenys, Sr. and Jr.; and although immediately after his appointment on October 1, 1921, he wrote Doheny a self-congratulatory letter upon his appointment, yet he professes he did not seek their aid and assistance in obtaining this promotion (R. II-954). There not having been the slightest suggestion up to that time that Doheny was responsible for the appointment, we can conceive of no legitimate reason why Robison should make such a statement.

The foregoing contradictions, inconsistencies and inaccuracies in the testimony of Robison and Bain are even more striking, if their evidence be read as given in the form of question and answer. But the written word does not and cannot record the demeanor and manner of the witness, when testifying. The Trial Court only can take this into consideration, and the findings of fact and the adjudication in the present case leave no doubt but that the learned Chancellor did not feel bound to take the testimony of either Robison or Bain at par upon certain important and vital matters.

And yet, counsel for the Appellants at page 170 of their brief have the temerity to say, with respect to certain testimony of Robison, that it came "from a source unimpeached and unimpeachable" and "from a

source commended for good faith and honesty and honorableness and patriotism by both counsel for the United States and the District Court." We believe that the above analysis of the testimony of Robison does impeach its credibility; and it hardly seems necessary in view thereof to disclaim the unwarranted assumption of counsel that we have commended that witness in any manner.

C. THE FRAUDULENT CHARACTER OF THE CONTRACTS AND LEASES.

1. The findings of the Trial Court.

Briefly summarized, the Trial Court found with respect to the contracts and leases under attack as follows:

That they were consummated as a result of a conspiracy between Edward L. Doheny and Albert B. Fall to defraud the United States of its property and rights (R. III-1365-66, 1390, 1420, 1422).

That the payment by Edward L. Doheny to Albert B. Fall of \$100,000 was *contra bonos mores*, and against public policy, and avoided the contracts which ensued (R. III-1422).

That apart from the making of the payment above mentioned there was action and conduct on sundry occasions by Fall, by Doheny and by others connected with them in the transaction which was unusual, irregular and which demonstrated the existence of fraudulent and improper motives on the part of Fall and of Doheny. Among these matters were undue and improper secrecy, the attempt to prevent open competition, the refusal to take competent legal advice, the favoring of Doheny's company in the matter of information concerning the proposed projects, and the granting of preferential rights to Doheny's company unavailable to others (R. III-

1279-80, 1365-66, 1390, 1400, 1408, 1411, 1415, 1417, 1418, 1419, 1420).

That Fall was active in all the negotiations and dominated the same and that no important decision in connection with the negotiations was made by any one else than by Fall (R. III-1397-98).

That Denby was passive throughout said negotiations and signed the contracts under a misapprehension as to the true facts (R. III-1398).

The above summarization is by no means an attempt to itemize all the separate and independent facts which the Trial Judge found as subsidiary to what may be called his main conclusions which are attempted above to be briefly summarized. In a word, the Trial Judge proceeded with meticulous care to find a great array of subsidiary facts and from these he drew certain conclusions which may properly be termed fact conclusions (R. III-1393-1427).

In the Court of Appeals the Appellants may fairly be said to have attacked most of the subsidiary fact findings and all of the conclusions of fact drawn therefrom by the Trial Court. They have now abandoned their attack upon the subsidiary fact findings and attack only two of the fact conclusions by their assignments of error, Nos. 15 and 16 (Appellants' brief, p. 98). These are the conclusions that Fall was active and dominant and Denby passive and acting under mistaken belief in their respective parts in the negotiation (R. III-1397-98). The formulation of the assignment as to Fall does not, as framed, in our judgment attack the Court's finding that there was a conspiracy, although there is a reference in it to conspiracy. The argument on the facts for Appellants seems to us, however, to challenge the conclusions as to the respective parts played by Fall and Denby in the transactions, and that as to conspiracy.

2. The review of the fact findings by the Court of Appeals.

In its opinion the Court of Appeals first states the issues, as made by the pleadings (R. III-1478-81); next carefully reviews and summarizes the facts found by the Trial Court (R. III-1481-96), and then states the legal conclusions which the Trial Court drew from the facts so found (R. III-1496-98).

Having thus stated the case the Court opens its discussion of the questions involved as follows:

"The defendants assign error to certain of the findings of fact of the Trial Court, certain of the rulings of that court upon the admission of evidence, and certain of the Court's conclusions of law. We find no ground for disturbing the findings of fact **which we deem essential to the decision of the case,** and while the evidence may be insufficient to support certain contested findings, the disputed facts, in view of our conclusions upon the law applicable to the case, become of little importance." (R. III-1499.)

It is, therefore, not correct to say as Appellants do in their 14th Assignment of Error (p. 97 of Appellants' brief) that the Court of Appeals held "that the case could be disposed of on conclusions upon the law applicable to it **without regard to the facts.**" Nor, it seems to us, are Appellants justified in saying as they do on page 164 of their brief that "the appellate court not only held that the disputed facts were unimportant in view of its conclusions upon the law applicable to the case **but also clearly recognized that the evidence was insufficient to support contested findings of fact.**"

The Court of Appeals clearly showed that it approved and confirmed the fact conclusions essential to a recovery in this case. It said (R. III-1505-6):

"The evidence is that the Secretary of the Interior and the representatives of the Department of the Navy, who were most interested and active in furthering the Pearl Harbor scheme, were doubtful of their authority to engage in it and intentionally refrained from giving out information concerning the same and withheld from members of Congress knowledge of their action through fear that they would encounter trouble from Congress."

At pages 1506 and 1507 the Court in its opinion repeatedly calls attention to the fact that the Government had been deprived of its right to make more valuable contracts than those made with the defendants; had been deprived of the benefit of competition for leases; and calls attention to the fact that the Trial Court based its decree upon the right of the United States "to be restored to the use and possession of its naval oil reserves, **which through fraud, undue favoritism and misconduct of its officers** had been relinquished to private enterprises." And the Court of Appeals adds, "We think the ground so taken by the Trial Court was justified." (R. III-1507.) The Court is at pains then to cite cases showing that pecuniary damage need not be shown by the United States in cases based upon a fraud against the United States or a conspiracy to defraud the United States.

In holding that the defendant Petroleum Company was not entitled to be reimbursed for the value of its improvements upon the leased land the Court of Appeals correctly stated that credit for such expenditures could only be allowed on the theory that the trespass was innocent and that the expenditures had been made in good faith. It then concludes (R. III-1513), "The *mala fides* of the trespasses, however, follows from the findings of the court below," and then decides that no credit shall be allowed to said defendant because

of its *mala fides* in the transactions, and reverses that portion of the decree of the lower court which had made such allowance.

The entire testimony, with minor and wholly unimportant exceptions, was taken orally in open court. This was done by the expressed desire of the Trial Judge who, under his power so to do, issued subpoenas running out of the district in order that the witnesses might appear before him and he might the better be able to appraise their testimony. The *bona fides* of practically the entire defense rested upon the oral testimony of two witnesses—Robison and Bain—called by the Appellants. There were glaring contradictions and inconsistencies between their testimony and the written records; and between their direct and cross-examinations. Their bias, their demeanor, their accuracy, their manner of testifying, as well as that of all the other witnesses, were matters of the highest importance to a correct determination of the facts. The Chancellor heard them and appraised their testimony. No appellate court could so well do this even if the record were transcribed question and answer; for these matters do not get into cold type. Much less could an appellate court adequately do so when under the rules the testimony is transcribed into a narrative statement which to a large extent alters its significance as given in open court.

In refusing to set aside the findings of fact of the Trial Court the Court of Appeals followed the authorities.

Presidio Mining Co. vs. Overton, (1921), 270 Fed. 388, (9th C. C. A.).

wherein it is said:

"In *American Rotary Valve Co. v. Moorehead*, 226 Fed. 202, 141 C. C. A. 129, in the Circuit

Court of Appeals for the Seventh Circuit upon a petition for rehearing the appellant claimed that the court in affirming a decree of the District Court without filing a written opinion had either expressly or impliedly held that, under the new equity rules, the decree of the trial court upon a disputed question of fact was binding upon the appellate court. In answer to this objection, the court said:

“ ‘We had no intention of being so understood. Under the new equity rules, as well as under the old ones, the reviewing court has the right, and owes to itself and to the parties, the duty, of trying the question of fact *de novo*. Under the old rules, the findings of the trial court were entitled to be treated as very persuasive, and such findings were not to be disturbed, unless it appeared quite clearly that the trial court had either misapprehended the evidence or had gone against the clear weight thereof. We conceive that the new rules have made no change in those respects. Cases now are ordinarily to be heard by the trial judge in open court, while formerly they were ordinarily referred to a master. But under either set of rules, if the witnesses have been heard in open court, one element that rightly enters into the reviewing court’s consideration of the evidence *de novo* is the opportunity of the trial judge to estimate the credibility of the witnesses by their appearance and demeanor on the stand. *Espenschied v. Baum*, 115 Fed. 793, 53 C. C. A. 368.’

“Also *Westermann v. Dispatch Printing Co.*, 233 Fed. 609, 147 C. C. A. 417, where, in an equity case on appeal, Judge Denison for the Court of Appeals of the Sixth Circuit said:

“ ‘It follows that we must decide the questions of fact as well as * * * of law, * * * save that, under familiar rules, the conclusion of the trial court on questions of fact will not be lightly disturbed.’

"This is the established rule of this circuit. We believe this to be a correct statement of the equity rule. Where evidence is conflicting and the trial judge has had the opportunity of seeing the witnesses, observing their demeanor, while testifying, judge of their candor and intelligence, and thus be able to determine their credibility and the weight to be given to their testimony, the finding of the trial court is persuasive and presumptively correct, but not conclusive. U. S. v. Grass Creek Oil & Gas Co., 236 Fed. 481-484, 149 C. C. A. 533." (p. 390.)

The above language we think expresses the rule, as to which there is no contrary view either in Federal or State Courts, with regard to the review of the record in an equity case.

3. The doctrine of this Court as to the review of fact findings.

The cases cited by Appellants (p. 164, ff. of their brief), as well as a number of others in this Court, clearly demonstrate the rule to be as stated in

Norton vs. Larney, (1924), 266 U. S. 511.

(p. 518): "The well-settled rule of this Court is that where two courts have reached the same conclusion upon a question of fact it will be accepted here unless clearly erroneous."

Adamson vs. Gilliland, (1916), 242 U. S. 350.

(p. 353): " * * * the case is preeminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' Davis vs. Schwartz, 155 U. S. 631, 636."

Moreover, we submit that the facts appearing in this Record which we have above pointed out and summarized, clearly sustain the conclusion of Judge McCormick in the District Court, stated in his opinion as follows (R. III-1365-66):—

“To sustain these contracts and leases in view of the multitude of irregularities, favoritisms, discriminations, improprieties and wrongs shown by the record in this case is more than this court can do. Some of the specific means alleged to have been employed by Secretary Fall and Mr. Doheny to consummate the conspiracy have not been proven by the evidence in this case, but in general the allegations of fraud and conspiracy have been established. In my opinion it has been clearly proven that as early as November 28, 1921, there was a secret definite understanding, arrangement and agreement between Secretary Fall and Mr. Doheny that the companies controlled by Mr. Doheny would be given extensive and valuable oil leases in the naval petroleum reserves in the consideration of the building of the storage facilities at Pearl Harbor, Hawaii, and the filling of the same with fuel oil, and that all of the contracts and leases in controversy in this suit were and are the outgrowth, development and accomplishment of such secret plan.”

“My conclusion upon the issue of fraud and conspiracy is that the charge thereof alleged in the amended bill of complaint has been sustained and that the contracts and leases involved in this controversy must be cancelled, annulled and set aside.”

No one can read Judge McCormick's carefully phrased findings and conclusions of fact and his detailed discussion of the evidence without realizing that he gave to every element in the case the most careful and painstaking consideration, and weighed each element with care. The matter was argued before him on behalf of Appellants for days. The argument in the Court of

Appeals was full, ample and protracted. Certainly it would seem that Appellants ought not now to ask this Court to hold not merely that it would not have found as Judge McCormick did on the evidence before him, but that there was no evidence to support his findings.

We have above (p. 9 to p. 134, this brief) attempted with some care to point out the badges of fraud in this case and to demonstrate actions and conduct on the part of the parties most concerned in the transaction, constituting badges of fraud, and wholly inconsistent with innocence and fidelity to the interests of the United States. We do not propose here again to summarize and repeat them. We can only say that it was with these matters in mind that the fact findings were made.

4. The personal financial transactions between Fall and Doheny avoid the contracts and leases.

(*Points XII and XIII, Appellants' brief, pp. 273 and 300.*)

The Appellants, realizing the necessity, if they are to succeed in this cause, of eliminating the effect of the \$100,000 transaction between Fall and Doheny, attempt to eliminate it from the case in several ways. We have given the facts with regard to this transaction *supra*, pp. 36 to 50. We desire here only to deal with the legal argument addressed to the effect of these facts.

We shall attempt to deal with three positions taken by Appellants in treating of this transaction, although we shall not deal with them in the order stated in Appellants' brief. We desire in a word first to answer the fact argument made by the Appellants concerning this matter.

They first allege that the transaction was a *bona fide* loan and not a bribe. We do not propose here to rehearse the facts. We wish merely to say that it is simply inconceivable that this transaction was the innocent and upright transaction which Appellants seek to label it.

The second position,—that argued in Point XII of Appellants' brief,—is that Secretary Denby was not a party to this fraudulent money transaction, and if he was not a party to it, it can have no effect on his active and independent conduct in connection with the making of the leases and contracts, unless it brought about some misrepresentation which affected his final action. We have above attempted to show that Secretary Denby was not informed and active in what he did in this connection; but we assert that it matters not whether he was informed or ignorant, if a corrupt money transaction took place with a Government official, thought and believed to have influence or power in connection with the making of these contracts and leases. The innocence or ignorance of the official having final power, and the fact that he acted without knowledge or improper influence or misrepresentation due to the corrupt transaction cannot save the contract.

The third position, which is taken in Point XIII by Appellants, is that if the power to act was by law reposed in Denby and not in Fall, and Denby did in a formal way act, the Court must shut its eyes to all that went before and led up to Denby's action,—to all the impropriety in the conduct of Fall and Doheny, because, forsooth, it is not alleged that Denby was bribed or that he knew anything about the financial transaction between Fall and Doheny.

If fraud, corruption, or a transaction contrary to good morals was the genesis or the means intended to bring about a Government contract, or to affect any official connected with its making, that contract should not and cannot stand.

The Trial Court held that the financial transaction between Fall and Doheny vitiated the subsequent contracts in the making of which Fall participated, whether

it was a bribe, a gift or a loan (R. III-1303, 1316). We have already pointed out Mr. Doheny's statements to the Senate Committee to the effect that he realized that such a transaction would tend to make Fall favorable to him and to his companies in any transaction with the Government. It did not need Mr. Doheny's admission to develop this fact. We are all familiar with human nature. We know what human motives and purposes are and how they are influenced.

The Appellants certainly realize, and their whole brief on this point shows that they realize, that the transaction in and of itself is indefensible. They take refuge, as they must, in the proposition that however wrong the transaction was **it did not in fact affect the subsequent dealings between Doheny's company and the Government.** Thus they argue that the negotiations pending between Fall on behalf of the Government and Doheny on behalf of his company in November, 1921, came to naught (Appellants' brief, p. 278). They repeat over and over again that no action was taken under the letter of November 28, 1921. We have above sufficiently answered this contention (pp. 34-35 this brief).

Nobody can read the Record without being impressed with the constant activity of Fall in these matters, with the fact that whenever any critical situation arose Fall stepped in, and that it was his final say which made it possible for any of these papers to be placed before Secretary Denby for his signature; that always they went to Denby from Fall through Robison, and never direct, and that Robison, as the Trial Court has found, was so obsessed with getting storage facilities built with royalty oil rather than with appropriations by Congress that he was facile to do Fall's bidding and to bring about what he wanted by whatever means Fall suggested and approved.

It will not do for a company whose president, while negotiating a contract with the Government, had an improper financial transaction with a Government official, to say that upon the Government rests the burden of proof that that transaction was the **final and efficient** cause of the execution of the contract between the company and the Government. Nor will it do for it to assert that even if the burden remains upon it, it has carried the burden by proving **that the corrupt and improper bargain made between its president and the Government official was ineffectual because, forsooth, that improper financial transaction took place between the president of the corporation and the wrong official of the Government,—the one not in final control.**

The argument comes to this: That in Governmental transactions, if a contractor with the Government makes a gift or pays a bribe or makes a personal loan to an official of the Government, knowing that that official will be influenced thereby; if perchance it turns out that that particular official, albeit he was active in the matter, did not have the final say and the final decision as to the contract, **then the corporation is fortunate enough to have dealt with the wrong man and the Government is bound by the contract whether it will or no.**

It comes to this: The Appellants ask this Court to say first, that there was no impropriety in the transaction between Fall and Doheny on November 30, 1921. Second, that if there was such impropriety, it did not have any effect on what was ultimately done. Thirdly, that even if it did have some effect, that effect must be disregarded because the making of the contracts and leases was participated in by an innocent official of the Government, thus neutralizing the wrong which had been done by the improper financial transaction.

As we shall point out from the authorities, there is but one rule which should and can be applied by courts to such a situation. The moment a court is convinced by clear and indubitable proof that such a transaction occurred between a Governmental official and a contracting party, it will nullify and set aside the dealings between the Government and such contracting party, in which such official participated, on the ground that they are all infected by the improper transaction, and that no court, in ease of the contracting party, will stop to appraise the effect and the harm that has been done by such improper transaction.

Appellants must and do ask this Court to say to this Appellee and to the people of the United States that such a transaction as admittedly here took place either is not in itself unlawful or to be reprehended, is not offensive to good morals and proper dealing by Government officials, or, in the alternative, they ask this Court to say that while such a transaction is immoral, is wrong, and should be reprehended, yet the Court will make inquiry in ease of the wrongdoer to see if his wrong actually affected the conduct of some official who was not cognizant of it. We apprehend that no court ever has held such a proposition. Appellants cite no text-books and no case for any such proposition.

The authorities are clearly in favor of our contention.

Mechem, Public Officers, p. 246, Sec. 368.

"Contracts leading to violation of duty are void.
So any contract which has for its object or consideration, or which naturally and legitimately tends to induce a public officer to neglect, ignore, violate or exceed his official duty, or to make him less zealous, earnest or diligent in its discharge than the law requires, is contrary to public policy and void."

In reference to the confidential relationship existing between an agent and his principal and the duty of the agent to serve the interests of the principal free from outside inducement, the statement of **Kerr on Fraud and Mistake (5th Ed.) page 180**, may be cited:—

“Where a person in the employment of another is bribed with a view to inducing him to act otherwise than faithfully to his employer, the agreement is a corrupt one and unenforceable whatever the effect produced on the mind of the person bribed may be.

“* * * An agent cannot bargain for any benefit derived from the subject on which he is employed without disclosing the fact to his principal. Commission received by an agent without the knowledge of his principal is looked on as a bribe. It is a profit which the principal has a right to extract from the agent whenever it comes to his knowledge. The rule is the same whether the remuneration received by the agent formed part of the original bargain, or was a present for services rendered; or whatever the form which the secret profit may take.”

We need not stop to discuss whether the transaction was a “loan” or a “gift.” We have discussed that matter elsewhere. Whatever it may be called, it is still true that the money was paid with a full realization that it would tend to influence Fall in his official capacity. And it is clear that the transaction put Fall irrevocably in Doheny’s power. Such a transaction was certainly a “bargain for a benefit” and certainly **tended** to induce Fall to neglect, ignore, exceed or violate his public duty. Whatever Fall’s actual and legal relation to the contracts of April and December, he was then in fact an officer of the United States and active in the consummation of the contracts. Any duty he sustained in this

behalf was a public duty, whether he acted *de facto* or *de jure*.

In connection with Appellants' contention that if Fall had not the **legal power** to act Doheny's transaction with him can have no effect upon the validity of the contract, we cite:—

Crocker vs. United States (1915), 240 U. S. 74.

Here suit was brought on a contract for furnishing certain satchels to the Postmaster General. The facts were that by public advertisement the Postmaster General solicited bids for furnishing satchels for a period of four years. Shortly after the advertisement the company, here represented by its trustee in bankruptcy, and one Lorenz, entered into a written agreement whereby the company employed Lorenz to assist in securing the contract. The agreement was further that if the company got the contract Lorenz should receive a certain share of the profits. Lorenz and a confederate then entered into a secret agreement with one Machen, the superintendent of free delivery service, having important duties relating to the purchase of satchels, whereby in the event the company got the contract Lorenz's share of the profits was to be divided one-half with Machen. The company made its bid, which was accepted by the Postmaster General.

A contract was made in due course. A large number of satchels were furnished under the contract. They were accepted and retained by the Post Office authorities. When payment was requested it was refused because the Postmaster General had learned of the corrupt arrangement by which Machen was to share in the profits, and rescinded the contract. The company itself was innocent, except that it was chargeable with the knowledge of what was done by Lorenz and its vice-president,

Crawford, who had entered into the arrangement with Lorenz.

This Court affirmed a judgment of the Court of Claims denying a recovery on the contract, and said (p. 78):—

"We are of opinion that in the transactions out of which the claim arose there was an obvious departure from recognized legal and moral standards. It began when the company employed Lorenz, upon a compensation contingent upon success, to secure the contract for furnishing the satchels, and it persisted until its discovery by the Postmaster General led to the rescission of the contract. Because of their baneful tendency, as here illustrated, agreements like that under which Lorenz was employed are deemed inconsistent with sound morals and public policy and therefore invalid. Dealing with such an agreement this court said in *Tool Co. v. Norris*, 2 Wall. 45, 54-55: 'All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the Government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the Government. No other consideration can lawfully enter into the transaction, so far as the Government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds. * * * Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. **The law meets the suggestion of evil, and strikes down the contract from**

its inception. There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both is the direct and inevitable result of all such arrangements.' ”

Again this Court said (p. 80):—

“The secret arrangement whereby Machen was to share in the profits was most reprehensible. Its natural effect, as also its purpose, was to secure for the company an inadmissible advantage. The satchels were wanted for the free delivery service and Machen's relation to that service made it probable, if not certain, that his advice respecting the reasonableness of the bid, the number of satchels required from time to time, and the company's performance of the contract, would be sought and given consideration by his superiors in the Post Office Department. The advertisement for bids, the postal regulations (Ed. 1902, sections 17 and 70) and the findings leave no doubt that he was charged with important duties of that character. **Public policy and sound morals forbade that he should have any personal interest in the bid or contract lest he might be tempted to advance that interest at the expense of the Government.** Under the secret arrangement, which was made before the bid was submitted, he had such an interest and therefore was in a position where the hope of personal gain was likely to exercise a predominant influence and prevent a faithful discharge of his public duties, as in fact it did.

* * *

And again (p. 81):—

“Of course, the secret arrangement with Machen operated to vitiate the company's contract and

justified the Postmaster General in rescinding it on discovering the fraud. *Wardell v. Un. Pac. R. R.*, 103 U. S. 651, 658; *Thomas v. Brownville & Co. R. R.*, 109 U. S. 522, 524; *McGourkey v. Toledo & Ohio Central R. R.*, 146 U. S. 536, 552, 565; *Smith v. Sorby*, L. R. 3 Q. B. Div. 552; *Harrington v. Victoria Graving Dock Co.*, *ibid.* 549; 2 *Dillon Municipal Corporations*, 5th Ed., Sec. 773. **And this is so, even though the company was without actual knowledge of the corrupt arrangement.** It was made by Lorenz and Crawford while endeavoring to secure the contract for the company and was a means to that end. They were the company's agents and were securing the contract at its request. It accepted the fruits of their efforts and thereby sanctioned what they did and made their knowledge its own. *Krumm v. Beach*, 96 N. Y. 398, 404; *Fairchild v. McMahon*, 139 N. Y. 290; *White v. Sawyer*, 16 Gray, 586, 589; *First National Bank v. New Milford*, 36 Connecticut, 93, 101; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, 265; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5. P. C. 394, 410, *et seq.*; *Leake on Contracts*, 6th Ed., 255, 335-336; *Wald's Pollock on Contracts*, 3d Ed., 392."

Appellants' counsel seek to distinguish this case on its facts. It is perfectly clear that Machen, with whom an unlawful and secret arrangement was had, **was not the man who had the power to give out the contract.** It is equally certain that Machen did perform important functions in connection with the negotiations for the contract. So, in this case, Fall performed important functions in connection with the making of the contract, albeit he and Denby actually signed it. **The only way, therefore, that the Appellants can avoid the force of this authority is to say that the facts in the present case**

show that Fall had nothing to do with the making of the contract, and this is all they do say to distinguish it.

Garman vs. United States (1899), 34 Ct. Cls. 237.

Here suit was brought by a mail contractor for one month's extra pay for services "dispensed with." The suit was on a contract for carrying the mails. After the contract was made the Postmaster General ordered that the service be expedited, thus raising the compensation to be paid to the contractor by a very large amount. It appeared by evidence in the cause that while the plaintiff's application was pending in the Post Office Department for the expedition of the services he offered \$20,000 to a certain person to secure the proposed expedition on both routes, and that on the expedition being ordered he paid the money, partly in cash and partly in drafts and notes, which were subsequently paid. The Court of Claims dismissed the suit, holding that the payment of the money tainted the transaction and that the plaintiff was not entitled to recover for that reason. The Court further held that it was immaterial whether the payment actually reached any official of the Post Office Department in fact. The Court said (p. 242):—

"As regards the contractor, Price, the court is of the opinion that this act of his rendered the expedited service *contra bonos mores* and against public policy. **Whether the money went farther than the person who received it; whether it was divided with officials in the Post Office Department, the court does not inquire.** It is sufficient to know that the expedited service was not ordered in conformity with the petition of inhabitants along the post office routes until the money was promised, and that it was ordered immediately after that arrangement had been made, and that the money was paid so soon as the expedition was secured.

This court has always regarded the Government as somewhat in the character of a ward, and its officers in the character of its guardians, and it has never given effect to a contract where it appeared that the contractor had directly or indirectly, by direct bribes or corrupt influences, sought to impair the good faith of the guardian. The corrupt purchase of political or personal influence is more insidious, and in its result as bad as direct bribery. Whoever has business dealings with a trustee, a guardian, an executor, or officers of the Government can sway them by no influence which will be prejudicial to the interests of the cestui que trust."

The significant thing about the foregoing case is that there was no evidence how far the money went or that any person who was actually officially connected with the contract received any of the money. Again, the only way that Appellants' counsel can distinguish the case is by alleging that there are no facts in the record which indicate that the financial transaction between Fall and Doheny was intended to secure to Doheny's company an advantage from the Government. We have heretofore fully commented on the inferences to be drawn from the facts proved and those which the Trial Court did draw.

Atlantic Contracting Co. vs. United States (1922), 57 Ct. Cls. 185.

The plaintiff corporation brought suit against the United States to recover on a *quantum meruit* for work and materials furnished to the United States. In 1896 the plaintiff had made a contract with the United States through the agency of one Captain Carter, of the Army, to do certain work at Cumberland Sound. In 1897 Gaynor and Green, who owned substantially all the stock in the plaintiff corporation, were indicted along

with Captain Carter for conspiracy to defraud and embezzle from the United States, and work was suspended under the contract. Later these three were tried and convicted, it appearing that they had presented false claims against the United States to a large amount, which had been paid to the corporation through the agency of Carter and by virtue of the contract. The Court of Claims denied recovery, holding, first, that the contract itself was tainted with fraud through the conspiracy between the three persons, and that no recovery was therefore possible on the contract; second, that the corporation could not recover on a *quantum meruit*, especially since such a recovery would inure directly to the benefit of Gaynor and Green, who were parties to the fraud. The Court said (p. 196):—

“While the plaintiff seeks to recover upon a *quantum meruit*, yet it is apparent from the evidence that its alleged rights spring directly from the contract, which is illegal and fraudulent. No court will lend its assistance in any way to carry out the terms of an illegal contract, nor will the court enforce any alleged rights directly springing from such contract. *McMullen v. Hoffman*, 174 U. S. 639, 654. * * * **The court will not countenance the attempt made here in the name of the corporation to recover this money when it appears from the evidence that Gaynor and Green are in effect the owners of the corporation and will be the beneficiaries of any recovery which may be made.**”

What is said in the foregoing authority is particularly applicable to the position which Mr. Doheny holds and held in the Appellant companies. The distinction attempted between this case and the case at bar in Appellants' brief is merely a distinction in language, but none in principle.

Hume vs. United States (1889), 132 U. S. 406.

The plaintiff sued to recover an amount alleged to be due him under a contract to furnish shucks to a United States hospital at 60 cents per pound. It appeared in evidence that this was thirty-five times their highest market value, and the defence relied upon by the United States was the unconscionable nature of the contract. This Court sustained this defence and affirmed a verdict for the defendant arrived at in the court below, on the ground that the contract on its face was so extortionate as to raise a presumption of fraud. In reference to the effect of the allegation of fraud this Court said (p. 414):—

“ * * * In such cases the natural and irresistible inference of fraud is as efficacious to maintain the defence at law as to sustain an application for affirmative relief in equity.”

The above case is a valuable authority for the very reason that from the facts and circumstances this Court found that there was a presumption of fraud. This is exactly what the Trial Court has done in the instant case.

Various State cases illustrate the familiar doctrine that bribery or corruption in connection with any contract obtained from public authorities render such a contract voidable at the option of the public.

Seltzer vs. Metropolitan Elec. Co. (1901), 199 Pa. 100.

Suit was brought to rescind a contract made between the city of Reading and the defendant, the electric company, on the ground of fraud. The bill alleged a conspiracy among the councilmen to award the contract to the defendant at exorbitant rates and that certain sums of money were paid to three of them. The lower court sustained a demurrer to the bill on the ground that

the names of all those councilmen in the conspiracy were not set out and that the bill in other respects failed to charge the fraud sufficiently definitely. The Supreme Court reversed this order, saying in part (p. 106):—

“Public policy requires the closest scrutiny to be given the official acts of municipal authorities, and when they are procured by fraud the court should not hesitate to declare them void. While the pleadings charging official corruption should be specific and sufficiently certain to aver the fraudulent conduct and the parties charged therewith, yet the court should not be astute in detecting insufficiency and thus shielding the accused official from disclosing his official acts. If they tend to criminate him he can protect himself; and until he asserts his right to do so his accuser should be granted every facility to investigate his conduct.”

Herman vs. City of Oconto (1898), 100 Wis. 391.

The plaintiff sued the city for the balance due on a written contract for the construction of a sewer. The city pleaded that the contract was secured by the bribery of certain members of its board of public works through payment to some of them, whose names were to the defendant unknown, of certain sums of money. The plaintiff moved for judgment on the pleadings on the ground that the defendant's answer did not state facts sufficient to amount to a defence. The trial court granted this motion and on appeal the Supreme Court reversed the order, saying that the fraud, though alleged in very general terms, was sufficiently set out to constitute a defence. The court also held that (p. 399):

“The mere fact that the contract was let to the lowest bidder does not obviate the objection. Nor does the fact that the contract as made by

the board of public works was not binding until approved by the common council. The action of the board of public works was essential to the making of the contract."

See also **Weston vs. Syracuse (1899)**, 158 N. Y. 274, 286.

Washington Irrigation Co. vs. Krutz (1902), 119 Fed. 279, (C. C. A. 9th).

One Krutz, while Register of the United States Land Office at North Yakima, Washington, had to do with land transactions in which the Northern Pacific Railway Company was interested. The latter was represented by its western land agent, Schulze, who was also president of a canal company. During the course of the negotiations Schulze expressed to Krutz his gratification at the turn which matters had taken and offered to give Krutz 160 acres of land. Krutz rejected the offer, stating that since he was then Register he could not accept it. Krutz testified, however, that he told Schulze, "If he could give me any work for the company after my term of office expired, so that I could feel that I had earned the land, I would then accept it." After Krutz had severed his official connections he gave Schulze certain advice with reference to clearing up title to lands (which services, however, the court found to have been nominal), and Schulze then told him that he had entitled himself to a 160 acres.

The court finds that thereafter a new and distinct contract was made between Krutz and the canal company by which Krutz agreed to convey to the latter 160 acres of land in return for a water right for the benefit of other property which Krutz owned. The case was a suit for specific performance to compel the

conveyance of this water right, Krutz having performed his agreement to cause 160 acres of land to be conveyed to the canal company. The defence relied upon was the invalidity of the second contract.

The Circuit Court of Appeals carefully distinguished between the two agreements, finding that the first was wholly illegal and unenforceable because of the taint of bribery surrounding it, but that the second agreement was made between different parties and rested upon a new and valid consideration and had at most a very remote relationship to the first agreement. The Circuit Court of Appeals therefore affirmed the decree of the court below in favor of the plaintiff.

The importance of the case, however, for our purpose, lies in the consideration given by the court to the first contract by which Krutz became entitled to 160 acres for services alleged to have been performed for the railroad company after Krutz had severed connection with the United States service. The court discusses this agreement in the following language (p. 285):

"It must be admitted that, if Krutz had accepted the offer of Schulze while he was in office, the bribery of the one and corruption of the other could not be questioned. Such a contract would be *contra bonos mores*, and could not be enforced in a court of justice. But Krutz did not accept the offer. He refused it, accompanying the refusal with the statement that he could not accept it while he was in office, but that his term of office would soon expire, and if the railroad company would then give him something to do, so that he could feel that he had earned the 160 acres of land, he would then accept the offer. The services rendered by petitioner to the railroad company at the request of Schulze after he went out of office were, in our opinion, purely nominal, and were so blended with

the original offer made by Schulze, and conditional acceptance by Krutz, as to make it but one transaction; and if the case rested alone on such services, in connection with the manner of the original offer, it would unquestionably be the duty of a court of equity to put its seal of condemnation on the whole transaction, and dismiss a bill brought to enforce such a contract.

"As register of the land office, Krutz was, as he states in his testimony, frequently called upon to give advice to people as to the manner of selecting and locating public lands, etc. It was his duty to inform such parties of the methods and procedure to be pursued in such matters, but he had no right to go outside of his legitimate duties in this respect, and become the partisan adviser of one applicant, and point out to him a course to be pursued whereby he could obtain a preference over others, to their prejudice and detriment. The action of a public officer should always be guided and controlled only by considerations of the public welfare, and a desire faithfully, honestly, and impartially to perform his official duties; and any action taken by him outside of his official duties, which tends to substitute for those considerations others, which are based upon illegal grounds, is clearly opposed to public policy and void. This principle is too well settled to require the citation of any authorities.

"It is unnecessary to criticize the action of Mr. Krutz in regard to his conditional acceptance of the offer. He may have been actuated by good motives, without any intent to do wrong; and he may have thought that by the services he subsequently rendered he had justly earned the fee which entitled him to then accept a deed, as previously offered by Schulze. But it is impossible to separate the services from the original offer, so as to make the last valid if the first was void. The services rendered by Krutz after he went out of office are so blended with the original promise and conditional acceptance as to make the whole a unit and in-

divisible. That which is bad destroys that which is good, and they perish together.

"It is the duty of courts to carefully scrutinize contracts of this general character, and to condemn the very appearance of evil, as the tendency of such contracts is to lead to the encouragement of wrongdoing. Hence the relief asked for in such cases should not be granted. This result follows 'without reference to the question whether improper means are contemplated or used in their execution. **The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country.'** Tool Co. v. Norris, 2 Wall. 45, 56, 17 L. Ed. 868; Trist v. Child, 21 Wall. 441, 452, 22 L. Ed. 623; Meguire v. Corwine, 101 U. S. 108, 111, 25 L. Ed. 899; Oscanyan v. Arms Co., 103 U. S. 261, 275, 26 L. Ed. 539."

Appellants in their brief fail to see the bearing of the Seltzer case. The very point they make here was made in that case, that there was no proof but that councilmen who had not been tampered with in sufficient number had voted affirmatively and that therefore the contract was not brought about by a fraudulent act, but the court would have none of this argument.

We cannot understand Appellants' attempted distinction of the Herman case. A reading of that case will disclose that the very defenses were attempted there which Appellants have attempted here. It was argued that no damage had been done to the city because the contract was in fact let to the lowest bidder. The court held that this was beside the point. It was further argued, just as Appellants argue here, that the action of the members of the Board of Public Works was immaterial because the contract was not binding until approved by another body, the common council. Here the Appellants argue Fall's actions were immaterial

because the contract could not have been lawfully made unless Denby had signed it. The courts below would have none of this argument.

Nothing said by Appellants in their brief concerning the Krutz case serves in any manner to avoid the unequivocal language of the court touching such dealings as there were in that case and as there are in the case at bar.

5. The statements of Edward L. Doheny made before the Senate Committee on Public Lands were properly admitted in evidence.

(Point XII (3), Appellants' brief, p. 294.)

After E. L. Doheny, Jr., and E. L. Doheny, Sr., had claimed their constitutional privilege against giving evidence that would incriminate themselves (R. I-185-188), the Appellee introduced in evidence certain statements made by E. L. Doheny, Sr., before the Senate Committee on Public Lands. In considering the admissibility of this testimony it is necessary to have in mind the circumstances under which the statements were made.

In January and February of 1924, E. L. Doheny, Sr., voluntarily appeared before the Senate Committee on Public Lands and made the statements which were introduced in evidence. At that time, namely, January and February of 1924, the appellant corporations were operating under the terms of the documents here sought to be cancelled. They had various dealings at that time with the United States in connection with them, and the United States in turn was supervising and checking up upon the operations of the appellant corporations.

Under its contract with the Government the Transport Company was constructing tanks at Pearl Harbor

and preparing to, or had filled them with oil. The construction as it progressed had been supervised by the Government. The work had to be approved by Government inspectors.

In California the Petroleum Company had transactions with the Government relating to the payment of royalty and the gauging and accounting for oil taken from the leased property, as well as general questions pertaining to the conduct of the lessee under the lease. Both corporations had expended large sums of money under their agreements with the Government.

In the fall of 1923, in view of charges that were current, the Senate authorized one of its Committees to make an investigation into the granting of the leases and the making of the agreements with the appellant corporations. This is a matter of common knowledge, and it is also the subject of various public resolutions of which this Court will take judicial notice.

As a result of that investigation Congress might conceivably direct the legal officers of the Government to take appropriate action to cancel and declare void the agreements under which the appellant corporations were acting. It was to the interest of Appellants to satisfy Congress that there was no necessity for such suit, and thereby to render secure the large expenditures which they had theretofore made. In particular, in the accomplishment of this purpose, it was to the interest of Appellants to have the \$100,000. "loan" of Doheny to Fall treated as a private personal transaction, having no relation whatsoever to the making of the leases and agreements here in suit. Statements and representations that this loan was a personal matter were within the corporate purposes and were for the advantage of the corporations.

There was no one so competent to represent the

appellant corporations in such a matter as was Doheny. The latter, as president of both Appellants, had negotiated the agreements which were being attacked. He was thoroughly familiar with all of the facts pertaining to them. He was in fact in January and February, 1924, still an important executive officer of both the Appellants.

A glance at the Record, pages 50 and 65, will show that on the same day he signed the contract of December 11, 1922, as president of Transport Company, and the lease of the same date as Chairman of the Board of Petroleum Company. The Record, page 84, shows he became Chairman in July, 1922, and thereafter, as before, he continued to act as the person who could speak with authority and deal for both companies, without the slightest question being raised as to his authority. The Record is full of evidence as to this. The companies always ratified and acted upon what he did in their behalf. By virtue of his stock ownership and of his family relations he was the dominating and controlling figure at that time, as well as earlier, in the policy of both of them.

Because of his control and because of his activity in moulding the policies of the corporations, the public might well consider that he was, in effect, the Pan American Companies. The Committee before whom he appeared might well also have this understanding.

These facts, upon which Mr. Doheny's authority to speak for the appellant corporations is based, appear *aliunde* any statements of Mr. Doheny about his authority. If, however, we look at his statement before the Committee, the fundamental purpose appears to be to insist that the \$100,000. "loan" was a private and personal transaction of his with Mr. Fall, and that it did not enter into and poison the agreements which his

corporations had with the Government. His companies, of course, as well as he, wanted to divorce the two so that the investment and expenditures made by the appellant corporations under the leases and agreements should not be lost to him and the other stockholders.

Under these circumstances E. L. Doheny, Sr., voluntarily came before the Senate Committee on Public Lands and made certain statements in connection with which he coupled a formal offer that if a board of experts should report that the contracts with the Government were not advantageous to the Government, he on his part would cause the board of directors of the Transport Company to reconvey all interests in such contracts to the Government (R. I-206-207). This shows his own appraisal of his powerful position with his companies.

The District Court received Mr. Doheny's statements before the Senate Committee as being admissions by an officer of a corporation acting for it and within the scope of his authority. This clearly appears from the opinion of the District Court (R. I-191), wherein it is stated:—

“It seems to me the question is whether, at the time it is claimed these declarations were made, the declarant was acting within the scope of his authority as an agent of the defendant corporation.”

The discussion in Appellants' brief about “*res gestae*” is quite beside the point.

The Circuit Court of Appeals likewise held the admissions of Mr. Doheny to be admissible because he was an officer of the appellant corporations acting for them and within the scope of his authority (R. III-1499-1501). Cases supporting this proposition are:—

Xenia Bank vs. Stewart (1884), 114 U. S. 224.

Fidelity & Deposit Co. vs. Courtney (1902), 186 U. S. 342, at p. 351.

Chicago vs. Greer (1869), 76 U. S. (9 Wall.) 726.

- Aetna Indemnity Co. vs. Auto-Traction Co.** (1906),
147 Fed. 95 (C. C. A. 9).
Joslyn vs. Cadillac Automobile Co. (1910), 177
Fed. 863 (C. C. A. 6).
Rosenberger vs. Wilcox Motor Co. (1920), 145
Minn. 408.
Kirkstall Brewery Co. vs. Furness Railway Co.
(1874), L. R. 9 Q. B. 468.
Chicago, Burlington and Quincy R. R. Co. vs.
Coleman (1857), 18 Ill. 297, 298.
2 Wigmore on Evidence, Sec. 1048.

Most of these authorities are cited by the Circuit Court of Appeals in its opinion supporting the admissibility of this evidence.

The cases cited by Appellants in their brief as contrary are readily distinguishable. The fact situations in those cases differ from the facts in this case upon one or more of three broad general lines of distinction.

In some of the cases cited by Appellants the testimony would not have been admissible if given by the declarant in court subject to cross examination, because the declarant was without competent knowledge of the facts whereof he spoke, or because his declarations were irrelevant and immaterial. This is true of *Goetz vs. Bank of Kansas City* (1886), 119 U. S. 551, and of *Winchester, etc., vs. Creary* (1885), 116 U. S. 161, as well as of many of the other cases cited by Appellants.

A second broad ground of distinction running through the cases cited by Appellants is that the declarant had no authority, either express or apparent, to transact business for the corporation. Characteristic cases of this kind are *Vicksburg & Meridian R. R. Co. vs. O'Brien* (1886), 119 U. S. 99, and *Northwestern Union Packet Co. vs. Clough* (1874), 87 U. S. 528. Obviously neither the engineer in the O'Brien case, nor the master of the vessel in the Clough case, had authority to settle controversies in which their corporations were involved.

A third broad line of distinction in the cases cited by Appellants is that in many of them there was no pretense on the part of the declarant that his actions or words were on behalf of his corporation. The *Goetz case*, mentioned above, would seem also to fall within this category. So also do the cases cited by Appellants on page 296 of their brief in their "witness" section. It will be found that all of the cases cited by Appellants are distinguishable on their facts upon one or more of the three grounds given above.

The Circuit Court of Appeals suggested that the statements of Mr. Doheny before the Senate Committee were likewise properly admitted in evidence as being declarations against interest. It appears from the record (R. I-259-260; 263-265) that Mr. Doheny intentionally tore the signature from the note in order that it would not be a valid subsisting obligation. The testimony further shows (R. I-244-245; 247-249) that it was Mr. Doheny's understanding of the transaction that the note, although on its face a demand note, was not to be paid on demand. On the contrary, Mr. Fall was not to pay the note until he was ready and able to do so. The pecuniary and proprietary detriment to Mr. Doheny personally resulting from these statements is obvious. It is likewise clear that Mr. Doheny, by claiming his constitutional privilege, made himself as unmistakably unavailable as a witness as though he were dead. Under these circumstances the authorities hold that Mr. Doheny's statements were properly received in evidence as declarations against interest:

Weber vs. C. R. I. & P. R. R. Co. (1916), 175 Iowa, 358, 384.

Harriman vs. Brown (1837), 8 Leigh (Va.), 697, 713.

Griffith vs. Sauls (1890), 77 Tex. 630.

3 Wigmore on Evidence, Sec. 1456.

4 Chamberlayne on Evidence, Sec. 2771.

On both the grounds taken by the Circuit Court of Appeals we submit that the statements of Mr. Doheny to the Senate Committee were properly admitted in evidence.

We wish to point out in this connection, however, that the statements of Mr. Doheny made before the Senate Committee are not the only testimony upon which the finding of fact with regard to the \$100,000 transaction rests. From the testimony of the witnesses Youngs and Little (R. I-166-171) it appears that \$100,000 was drawn from the account of young Doheny (an officer of the defendant corporations) on November 29, 1921; that it was drawn in cash in large bills; and that this amount was within a short time reimbursed to young Doheny by his father, E. L. Doheny, Sr. From the testimony of the witnesses Hill and Mack (R. I-171-174) it appears that under date of November 30, 1921, a demand note for \$100,000 was written out by Secretary Fall and was in the custody of Doheny, Sr., on February 1, 1924, when it was produced by him before the Senate Committee on Public Lands. From the testimony of the witnesses Benton, Harris and Flory (R. I-174-179) it appears that beginning December 5, 1921, and during the days immediately following, Fall contracted to purchase a ranch property for between \$90,000 and \$100,000, and that in making payment for this property, directly or indirectly, he produced and used \$98,700 in bills of large denominations.

There is also the testimony of Mrs. E. L. Doheny, to be subsequently noted.

The foregoing testimony, irrespective of Doheny's statements, would be sufficient, in the absence of explanation by either Fall or Doheny, to justify the findings as to the financial dealings between Fall and Doheny on or about November 30, 1921.

6. The Trial Court properly admitted the evidence of Mrs. Edward L. Doheny.

(Point XIII (3), Appellants' brief, p. 294.)

All of the testimony given by this witness and appearing in Vol. I of the Record on pages 181 and 182, down to the matter in quotation marks seven lines from the bottom of page 182, is obviously relevant and competent testimony. It will be borne in mind that any supposed privilege Mrs. Doheny had was expressly waived. It will be noted that her testimony down to the point indicated was solely as to facts and not as to communications by her husband to her. It was solely with regard to the physical whereabouts of a certain paper and where she had seen it, etc. That paper had already been identified as a promissory note in the usual form and in Fall's handwriting, but with the signature torn therefrom. Testimony as to facts regarding that paper, the time of the tearing of the signature therefrom, etc., was obviously relevant and competent and was obviously, in view of the stipulation made when the witness was called, admissible so far as any question of privilege was concerned.

If it be claimed that the conversation detailed by Mrs. Doheny on the last seven lines of page 182 and the first four lines of page 183 was irrelevant as hearsay, the worst that can be said of it is that the admission of it was immaterial and was not harmful error for the reason that all this matter was covered by the admissions of Mr. Doheny before the Senate Committee, which were afterwards admitted in evidence. Furthermore, counsel for Appellants evidently placed no stress on their objection, for they themselves examined Mrs. Doheny as to said conversations and brought out a number of matters in the nature of communications to her by Mr. Doheny in her cross examination. See pages 183 to 185 of the Record.

Moreover, if the ground of the objection was the hearsay character of the statements, on which ground counsel now object, we submit that this specific objection should have been made at the time. It was not, but counsel relied merely on their initial objection to all the testimony of the witness. We submit that, in view of these facts they have no standing now to object on the ground of hearsay evidence.

7. The Trial Court properly admitted evidence of communications between applicants for leases and various Government officials during the period covered by the negotiation and execution of the contracts and leases in question.

(Point XIV, Appellants' brief, p. 305.)

Unless the whole theory on which the case was tried and decided was wrong, the matter of the motive and intent of the Government departments concerned with the leasing of Naval Reserve No. 1, which motive and intent was known by Doheny, was highly important in determining the good or bad faith of Fall and Doheny and how it was evidenced in what was done. A most pertinent inquiry would be, were the purposes and intentions with regard to these contracts and leases made known, were they open and above board, or was there secrecy and suppression of fact practiced in connection with this matter.

We have above, pages 75-89 of this brief, treated in full of the secrecy enjoined and observed with regard to these matters. We shall not here repeat the argument. The whole burden of the defence in this case is the utter good faith of the Government officials concerned. One of the arguments is that the secrecy was maintained because of military reasons. We have above, pages 87-89 of this brief, shown the futility of this

contention. Another argument is that these letters, when written, were not misrepresentations or suppressions because they represented when written the true situation, since the Government did not have any intent at the time the letters were written to make any further leases in the reserves. Of course this argument, if sound, lends no support for the exclusion of the letters, for, if sound, then the admission of the letters helps the Appellants and does not harm them.

The matter, however, goes somewhat deeper than this, and the letters cannot be disposed of in this cavalier manner. There is sufficient evidence in this case to convince that secrecy was enjoined by Fall on all the parties concerned in these transactions, and that for whatever reason the secrecy was imposed the employees of the department understood that it was the policy and sought to comply with that policy. (Pages 78-82 of this brief.)

Having shown that Fall enjoined secrecy on his subordinate officials and the Government officers associated with him, and that this was part of the conspiracy, it became relevant and material to show that this policy of secrecy was actually effective in the consummation of the conspiracy. The letters written by applicants for leases show that they were desirous of obtaining them. They were put off from time to time, and did not have and were not given information respecting the exact situation with regard to the reserves. The replies of the Government officials show the continuance of the purpose and design of secrecy and its effective operation up to the time that the conspiracy as planned was fully consummated. This correspondence shows the effectiveness with which Fall was able to impose his will upon and control his subordinates and associates to make them innocent instruments in carrying out his designs.

8. Pecuniary damage to the United States was shown by Appellee; but in the absence of any such showing the decree against the Appellants was justified and required.

(*Point XV, Appellants' brief, p. 307.*)

Appellants contend that in this case the burden lies upon Appellee not only to prove fraud, but also to prove that that fraud actually pecuniarily injured the United States. If this be the law, it is our contention that the Appellee has shown that it suffered serious pecuniary damage. It is to be borne in mind that the United States is here seeking to rescind *inter alia* the leases of June 5 and December 11, 1922, whereby the Appellants fraudulently and contrary to law acquired possession of certain public lands of the United States.

It is admitted that the leased public lands are and were at the time known to be valuable oil lands. It is further admitted that the Appellants have entered into possession of the said lands and have extracted therefrom large quantities of oil, gas and other petroleum products. This waste not only runs into several millions of dollars, but also has impaired the value of the leased lands by reason of the mineral extracted therefrom. There can be no doubt but that the United States has therefore suffered pecuniary damage in the instant case.

The argument for the Appellants entirely overlooks the fact that the United States has suffered pecuniary losses by reason of the aforesaid deprivation of its right to possession and by reason of the extraction of minerals to which it has lawful title. They mean by pecuniary damage that the United States must show that the contracts and leases were not good contracts and leases, in a commercial sense; that is to say, that better contracts and leases could and ought to have been obtained by the United States. They say that if an

officer of the United States, be his motive good or bad, transcends the law, makes a contract by law forbidden, and under it property of the United States is bartered away, the Government is helpless to redress the wrong unless it proves pecuniary damage. The implications of this doctrine are, indeed, startling.

Such an argument is not sound and is not supported by the authorities. There is an unbroken line of decisions to the effect that in a suit brought by the United States to recover possession of public land of which it has been fraudulently or unlawfully deprived by lease or otherwise, a cause of action is stated and proved by showing that the lands in question were a part of the public domain, that the United States was fraudulently or illegally deprived of its title thereto, or of its right to the immediate possession and usufruct thereof, and that the United States now seeks to regain its title or right of possession of said public lands. No burden therefore rests upon the United States to establish as a condition precedent to its right to relief that the contracts and leases are not commercially good ones and that better ones might have been obtained.

A particular province of a court of equity is the redressing of wrongs resulting from the breach of a fiduciary relationship. Such a breach of duty is the acceptance by an agent of improper inducements designed to tempt him to violate his duty to his principal. When that situation exists, as it does in the present case, a court of equity will grant relief without requiring the injured principal to prove that the contracts which his agent made for him were not good ones, or that better ones might have been obtained. Because of its baneful tendency, equity is eager to do all it can to redress this kind of a fraud.

In *United States vs. Carter* (1909), 217 U. S. 286,

it was held that where a fraud of this kind had been committed against the United States, the fact that the United States had suffered no pecuniary damage did not prevent recovery. This suit was one for the recovery of the illicit profit made by the agent, but the language cited with approval by this Court in the Carter case, is, we submit, also conclusive upon our present point.

In that case, discussing the obligations of an officer of the Government, Mr. Justice Lurton said (p. 306):—

“‘Thus, in *Aberdeen Railroad Company v. Blaikie Brothers*, 1 MacQueen’s Appeal Cases, 461, 472, it was applied to a contract of a director dealing in behalf of his company. Lord Chancellor Cranworth, in respect to the general rule, said:

“‘And it is a rule of universal application, that no one having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict with the interest of those he is bound to protect.

“‘So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

“‘It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the *cestui que trust*, which it was possible to obtain.

“‘It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person—they may even at the time have been better.

“‘But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform.’”

City of Findlay vs. Pertz (1895), 66 Fed. 427, (CCA, 6).

Here the firm of Pertz and Stewart, who had for some time employed one "B" as a selling agent, sued the City of Findlay on a contract for certain gas separators furnished to the city. "B," during the time of his agency, had been appointed Superintendent of the city gas plant, and as such had negotiated the purchase of the separators and had received commissions from the sellers, without disclosing same to the city. There was evidence that the city continued to use these machines after it had discovered "B's" dual relationship; that the machines were patented and were never sold except for one price, and that the plaintiffs (the sellers) "had not induced or procured 'B' to influence this particular sale." The city attempted to defend on the ground of "B's" improper relationship to both parties, but the lower court withdrew this defense from the consideration of the jury and a verdict was rendered in favor of the sellers. The Circuit Court of Appeals reversed the judgment holding that there was sufficient evidence of fraud to go to the jury, and, furthermore, if in fact "B" had received the commissions as above stated this *per se* vitiated the contract between the sellers and the city, regardless of whether it was a fair and equitable contract or not. The court states in part (p. 437):

"* * * Upon this discovery of this improper inducement operating upon its agent, the city had a right to repudiate the purchase and return the property bought. **This right it might exercise without regard to any actual injury it had sustained, and without regard to the effect of the allowance of the commission upon the integrity of its agent.** *Harrington v. Dock Co.*, cited above, and *Lister v. Stubbs*, 45 Ch. Div. 1."

The Court cites **Michoud vs. Girod** (1846), 4 How. 502, and **Robertson vs. Chapman** (1893), 152 U. S. 673, which both hold that a secret profit derived by an agent may be recovered back by his principal without any showing of injury to the principal.

Commonwealth S. S. Co. vs. American Ship Building Company (1912), 197 Fed. 780.

The plaintiff steamship company sued to rescind the contracts made with the defendant on the ground that the defendant paid a secret commission to the promoters of the plaintiff corporation, the latter having organized the plaintiff and assigned to it the contract to build a steamship at a stated price. Upon demurrer to the bill the court held that the promoters were acting in a trust capacity, and that the secret commission amounted to a bribe which vitiated the contract, regardless of whether the contract was fair or otherwise. The demurrer was, therefore, overruled. The court quotes with approval from the language of *Alger v. Anderson*, 78 Fed. 729, where the court states that the principal who asks relief on account of an alleged fraudulent payment made to his agent is not under the burden of showing that such an alleged bribe had any influence upon the agent. " * * * it is not necessary as a basis for relief for such principal to show the actual effect of the bribe or gift upon the agent." (P. 787.)

In the Commonwealth case the defendant contended that the bill was bad on its face for the reason that "It is plainly apparent on the face of the bills that had the representation and fraud complained of not occurred the conduct of the parties would have been the same; that the fraud complained of did not in any way affect the substance of the contract and the thing desired and contracted for by the complainant was in all respects according to the terms of the contract."

The court overruled this contention, holding the point to be immaterial and quoting with approval from 34 O. S. 460:

“ * * * in all cases where, without the assent of the principal, the agent has assumed to act in such double capacity, the principal may avoid the transaction, at his election. No question of its fairness or unfairness can be raised. The law holds it constructively fraudulent and voidable at the election of the principal.” (P. 790.)

The court then goes on to state that it “will not stop to inquire whether the contract was fair or otherwise, but will set aside the entire transaction as fraudulent and inequitable. * * * Fraud should be prevented by being made as far as possible impossible of perpetration, and the party who enters into a fraudulent transaction should do so at his peril. **It is no duty of a court to weigh the equities of joint tort feorsors or of bribe givers and bribe takers.**” (P. 791.)

The peculiar position which the Government occupies in suits to recover public lands illegally or fraudulently obtained from it is recognized by courts of equity. The Government is the custodian of public lands for the benefit of all of the people and it owes a duty to the public to see that the lands belonging to all are not obtained by individuals in violation of the statutes enacted for the purpose, nor in violation of the rules of honest dealing with Government officials.

The books are full of cases where the United States has brought suit to cancel patents granted illegally or fraudulently.

Causey vs. United States (1916), 240 U. S. 399.
United States vs. Trinidad Coal Co. (1890), 137
U. S. 160.

Diamond C. & C. Co. vs. Payne (1921), 271 Fed. 362.
United States vs. Poland (1920), 251 U. S. 221.
Heckman vs. United States (1911), 224 U. S. 413.

No suggestion is found in any of them that the United States must show a pecuniary damage to it by the issuance of the patent. In addition we submit the following list of cases in all of which relief was granted where title to lands had been fraudulently obtained from the United States, and in none of which was a word said on the subject of pecuniary loss or damage to the United States. In all of them, as here, the United States was seeking to have its title restored to it.

Curtis Co. vs. United States (1922), 262 U. S. 215.
United States vs. So. Pac. Co. (1919), 251 U. S. 1.
Wright Blodgett Co. vs. United States (1914), 236 U. S. 397.
Wash. Sec. Co. vs. United States (1913), 234 U. S. 76.
Diamond Coal Co. vs. United States (1913), 233 U. S. 236.
United States vs. Kettenbach (1913), 208 Fed. 209 (9th C. C. A.).

The Appellants, at page 312 of their brief, seek to distinguish these cases upon the alleged ground that they were actions brought not upon the general theory of fraud remedial in equity, but to redress the violations of provisions of specific statutes. We are entirely at a loss to see any force in this distinction. The present case is distinctly one in which, as held by the Circuit Court of Appeals, the lands were obtained by Appellants in violation of the provisions of specific statutes. Moreover, in the "land patent" cases, which we have cited, the lands were obtained by fraud, as were the lands in the present case. The Government was occupying precisely the same position as a litigant in those as it

occupies in the present case, and no ground or basis for the contrary assertion by Appellants at the top of page 313 of their brief can be perceived.

In the *Heckman* case, which was a suit by the United States to cancel certain conveyances of allotted Indian lands made not by the United States, but by members of the Cherokee Nation, the bill alleged that the conveyances were in violation of United States statutes touching the conveyance of Indian lands. A demurrer was filed on the ground that the bill was wholly without equity. The demurrer was sustained by the District Court, overruled by the Circuit Court, and this Court affirmed, using this language:

"Whether these restrictions upon the alienation of the allotted lands had been violated and the alleged conveyances were void, was a justiciable question; and in order that it might properly discharge its duty, and that it might obtain adequate relief, suited to the nature of the case in accordance with the principles of equity, the United States was entitled to invoke the equity jurisdiction of its courts. **It was not essential that it should have a pecuniary interest in the controversy.**" (Bottom 438.)

On page 439 the Court refers to *U. S. v. San Jacinto Tin Company*, and referring to the very language quoted by counsel for Appellants in this case, quotes with approval its own language in *U. S. v. American Bell Telephone Company*, as follows:

"* * * This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was

careful to say that the cases in which the instrumentality of the court can not thus be used are those where the United States has no pecuniary interest in the remedy sought, **and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual.'"**

The Appellants attempt to distinguish the *Heckman* case on the ground that the United States was suing there as guardian of an Indian tribe. This is not the fact. The Government was suing on behalf of numerous Indian allottees of public lands. The defendants had acquired these lands in violation of the statutes which prevent Indian allottees of public lands from alienating their lands within the period of twenty-one years after the allotment. It was not alleged that the Indians themselves had suffered any pecuniary loss or damage, other than having lost their lands in violation of the statutory restrictions. So far as appears from the case, they had received full and adequate consideration for them. Therefore, whether the United States was suing in its own right or in the right of the Indians, the case is definitely an authority for the proposition that a violation of the public statutes is in itself ground for cancellation and rescission in equity.

In the case of

Hammerschmidt vs. United States (1924), 265 U. S. 182.

this Court was called upon to define the crime of defrauding the United States. It did so at page 188 in the following words:—

“To conspire to defraud the United States means primarily to cheat the Government out of property

or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the over-reaching of those charged with carrying out the governmental intention."

This case cannot be distinguished by asserting that it was a criminal prosecution. The statute merely makes it criminal to defraud the United States, and the Court in this case defines what was meant by defrauding the United States.

The foregoing authorities fully establish the proposition that the United States need not prove pecuniary damage in a suit brought to recover title or possession of public lands of which it has been deprived by fraud or in violation of law.

It is, of course, not necessary for the Appellee in the present case to rely upon the proposition that no injury was done the United States by these contracts. It stands admitted that the lands in question were, at the time of the execution of the contracts and leases, estimated to contain many millions of barrels of oil. (R. II-864; III-1034). Mr. Doheny acknowledged that he expected to make a profit of at least \$100,000,000 out of the leases. Petroleum products of great value have already been extracted and removed from the leased lands. Under such a state of facts can there be any doubt but that the United States had, at the time of suit, actually suffered pecuniary damage of a serious amount? In addition, a court will always presume injury where favoritism was shown to the contracting party by Government officials, and will more readily do

so where, as here, there is an admission of an enormous profit to be made out of a contract granted by private negotiation to a favored party and where, also, performance under the contract shows that the expected profits will, in all probability, be realized.

The Appellants cite two cases, *Smith vs. Bolles* (1889), 132 U. S. 125, and *Sigafus vs. Porter* (1900), 179 U. S. 116, which they assert establish the proposition that parting with property, given for full value, on the faith of false representations, does not constitute damage. These cases were controversies between private litigants, and moreover they were actions at law and not suits in equity. They assert the obvious proposition that a money verdict cannot be recovered unless the plaintiff has a loss for which he is to be made whole. They discuss and decide the question that the damages at law in an action for deceit should not be measured by the difference in value between what the plaintiff parted with and what the defendant's representations induced him to believe he would get.

The cases cited by Appellants on page 309 of their brief are not in point. *Ming vs. Woolfolk* (1886), 116 U. S. 599, and *Stratton's Independence vs. Dines* (1905), 135 Fed. 449 (C. C. A. 8), are actions at law and not suits in equity. All of the cases on that page are suits between private parties and in none of them was the Government a party. Moreover, none of them involved a breach of fiduciary duty.

In *Garrow vs. Davis* (1853), 15 Howard, 272, cited by Appellants at page 310 of their brief, it appears that the plaintiffs no longer had any legal rights of any kind under their lapsed contract for the purchase of land. They thought that perhaps the vendor entertained a certain amount of good will toward them and so alleged, but the evidence proved that such was not in fact the

case. The Court held, therefore, that the plaintiffs never had anything of which they could be defrauded. They had parted with nothing whatsoever. Moreover, the Court found as a fact that their agent had not acted in bad faith. The case therefore is no authority in favor of Appellants' position.

Hyde vs. Shine (1905), 199 U. S. 62, is cited at page 310 of Appellants' brief. This was a case in which an indictment was found against a defendant charging a criminal conspiracy to defraud the United States out of public lands. A warrant of removal was issued and thereupon the defendant took a writ of *habeas corpus* to resist his removal to the place of trial, alleging that the indictment set forth no actual monetary loss or damage to the United States and therefore the indictment was bad and he should not be removed. The short answer to this of course was that a conspiracy to defraud the United States required no averment or proof of monetary damages.

Purely by way of dictum and in passing, in its opinion this Court said what is quoted on page 310 of Appellants' brief. It is to be noted, however, that the Court did not suggest what the rule in equity was. Nowhere in the case can any further statement with regard to the rule in equity be found than the one quoted by Appellants in their brief. Of course it constitutes no statement of what the rule is in equity, but a mere statement that the Court does not have to consider what the rule is in equity.

Counsel for Appellants, probably realizing that their cases heretofore mentioned are beside the point, aver that there are two "important cases in which the matter arose in actions like the present, *i. e.*, suits of equity to cancel instruments pursuant to an alleged conspiracy." We say without fear of contradiction that the actions were in no sense like the present.

United States vs. San Jacinto Tin Company (1888), 125 U. S. 273, cited on page 311 of Appellants' brief, is in fact an authority in favor of Appellee. The case is a complicated one, but the first four paragraphs of the syllabus make it entirely clear that it is full authority for the bringing of the present suit. The bill was dismissed in that case solely and only because the Court held that the fraud alleged in the bill had not been proved in fact. The case is authority on its facts for the proposition merely that when the United States brings a bill to set aside a title solely on the ground that it was obtained by fraud, and the fraud is not proved, the United States can not succeed.

The other question, namely, of the interest of the United States as plaintiff, was a collateral question, and this Court refused to dismiss on the allegation that the United States had no interest in the land in controversy. The suit was brought to annul a patent to lands upon the ground of a fraudulent survey whereby valuable mineral land had been included in the patented territory.

It was alleged by the defendant that the proofs in the case showed that the United States had no interest in the matter because if it should succeed in cancelling the patent of the defendant the land would immediately pass to another private claimant and not return into the ownership and possession of the United States. A claimant to the land who, it was alleged, would get the land if the United States recovered it, had in fact given a bond to the United States to indemnify it for the cost and expense of the proceeding. There was therefore some color to the position of the defendant that the United States was not in good faith prosecuting the action to get back its own land, but was acting as a cat's paw for another private claimant.

Nevertheless the Court held that it would not dis-

miss the bill on this ground because it was not stated that the United States was not attempting to get back the land **for itself**.

The quotation on page 311 of Appellants' brief is quite misleading. It appears to stop with the end of a sentence and the end of a thought. It does not, however, do so in the original report. It stops with a semicolon in the first line of page 286 of the report, and the Court then proceeds:

"and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; **in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own,** it can no more sustain such an action than any private person could under similar circumstances.

"In all the decisions to which we have just referred it is either expressed or implied that this interest or duty of the United States must exist as the foundation of the right of action. **Of course this interest must be made to appear in the progress of the proceedings, either by pleading or evidence, and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail.** In the case before us the bill itself leaves a fair implication that if this patent is set aside the title to the property will revert to the United States, **together with the beneficial interest in it.** It is argued in the brief that this is not true; that in fact the government is but the instrument of one Baker, who married the widow of Abel Stearns; and that Stearns contested the correctness of this survey with others before the land department

very actively and energetically, because he had such an interest in the land covered by it that if it was defeated he would become the equitable or beneficial owner of the land. This view is supported by some pretty strong testimony and by the fact that Baker was the man at whose instance the action was begun.

"When the Attorney General required that a bond should be given to save the United States harmless with regard to the costs of these proceedings, Baker was the man who furnished the security and signed the bond himself. The condition inserted in that obligation recited 'that whereas the Attorney General of the United States of America has this day filed, at the request of the above-named R. S. Baker, a bill in equity in the name of and on behalf of the United States of America against the San Jacinto Tin Company: * * * Now, therefore, if the said Baker shall well and truly save the United States of America harmless from all costs and expenses which may be incurred by or against them in the prosecution of said suit to its final determination, and pay or cause to be paid on demand all such costs and expenses as may necessarily be incurred in such prosecution, then this obligation to be void.' Taking all these circumstances together, it raises a very strong implication that Baker expected that if the patent was set aside his right to the land covered by it, or to a large part of it, would become paramount.

"But we are not so entirely satisfied of the want of interest of the United States in the whole or a part of the land which is covered by this patent as to justify us in saying that the bill in the present case ought to be dismissed on that ground."

From the above case it is quite clear that if the United States claims that it has lost title or the right of possession to a piece of land through an instrument obtained

by fraud, the fact that the United States desires to repossess itself of its land is all the interest that is required to maintain its suit.

In *United States vs. Conklin* (1910), 177 Fed. Rep. 55, (C. C. A. 9) cited on page 311 of Appellants' brief, it appeared that the defendant by fraud had procured certain California forest lands and exchanged them for a United States patent to other public lands. The fraud which he had committed was in the acquirement of the forest lands from the previous owner of them. There was no fraud in the exchange of these lands with the United States, and the United States was content to retain the exchanged lands. The bill was for the cancellation of the patent to the lieu lands which had been patented to this fraudulent party when he turned over the forest lands to the United States.

There was no thought that the United States would give up these forest lands or take the patented lands back in lieu of them and return them to anybody. The United States brought the suit to get back the patented lands on behalf of whoever might be entitled to them in view of the fraud that had been practised in taking from them their original forest lands. It is quite evident from the case that the United States was not going to take back title to the patented lands and hold those lands for itself. It being an innocent party and having taken the forest lands, it had the consideration which it desired and intended to keep it.

A demurrer to the bill was sustained and a decree of dismissal entered for the obvious reason that the United States was not trying to retake in its own right lands which it alleged had been fraudulently obtained from it. It is unfortunate that counsel for the Appellants did not cite the language from this case which shows the very reason why it was decided. On page 59 Judge Hunt said:

"The object of the suit is not restitution to the government of property, or anything of pecuniary value, of which it has been wrongfully or fraudulently deprived; nor is its purpose to restore to the former owners any lands for which they have not been fully paid. What is really sought to be accomplished is the annulment of the patent and of the conveyance of the lands therein described to the defendant Walker, in order that the tract of 200 acres of the 'Monache Lands' may be returned to the original owners, or, as stated by the government's counsel, if the selection made in lieu of the Monache lands 'should stand on account of the fact that the United States acted without knowledge of the fraud practiced upon Mrs. Conklin and Mrs. Reddy, and without knowledge of the fraud that was being practiced upon it,' the patent, and conveyance of the patented land to Walker, should be set aside, 'in order that the appellant may confer these lands upon the persons entitled thereto by virtue of the selection, if such selection is in fact legal;' and that, 'if the selection should be allowed to stand, then the patent which was issued erroneously should be canceled, so that the proper transfer could be made by the federal government to Mrs. Conklin and Mrs. Reddy by a new patent.' In short, the main object and purpose of this suit is to clear the way for a return to Mrs. Conklin and Mrs. Reddy of the lands sold by them to Benson and for which they have been fully paid, or, if that can not be done, then to reinvest them, by the issuance of a new patent, with the title to the land once before patented to them, in exchange for the 200 acres of the Monache lands." (59-60.)

On page 60 the court lays down the principle on which we may rely, as follows:

"The government unquestionably may maintain an action for the annulment of its patents, and recover property of which it has been defrauded.

But, like any other party coming into a court asking for redress, it must, in its complaint, state facts *prima facie* sufficient to entitle it to the relief demanded; '* * * the respect due to a patent, the presumption that all the preceding steps required by law have been observed before its issue, the immense importance and necessity of the stability of titles depending upon these official instruments, demand that suits to set aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof.' *U. S. v. Stinson*, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724. If the title to the land involved in the suit was fairly acquired, it matters not what wrongs may have been done by the defendants in acquiring other lands. **The inquiry is confined to the question whether the lands described in the patent, whose validity is attacked, were fraudulently obtained from the government.** *U. S. v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384."

This case is therefore an authority in Appellee's favor. Like all of the other authorities cited by Appellants it fails signally to establish their contention. It is unthinkable that a court of equity should not be able to protect the public policy of the United States with respect to the disposition of its public lands and with respect to enforcing honest dealing by individuals with its public officers. The Appellants would have this Court say that though acts may be illegal, and though they may be criminal, nevertheless a court of equity will not move to protect the public interest. Surely this cannot be the law.

D. THE ILLEGALITY OF THE CONTRACTS AND LEASES.

1. Analysis of the contracts and leases.

(a) *The contract of April 25, 1922.*

The agreement is between Pan American Company, called the "Contractor," and the United States, by the Acting Secretary of the Interior and the Secretary of the Navy, called the "Government." (R. I-26.)

Article I makes the specifications and plans a part of the agreement and calls for a bond in \$250,000. (R. I-27.)

Article II states the intent to exchange crude oil, unsuitable for navy use, for fuel oil. (R. I-28.)

Article III is a covenant to furnish 1,500,000 barrels of fuel oil in storage to be constructed and erected by the contractor as per plans and specifications, for a lump sum of 5,878,905 barrels of crude oil from Naval Reserves 1 and 2, "of from 14 to 17.9 degrees (Baume) gravity or **crude oil in such other quantity and quality as shall be of equal value**, which lump sum shall be termed the **proposal sum**." The paragraph then proceeds as follows (R. I-29):—

"It is hereby mutually understood and agreed that said proposal sum is based upon the November-December, 1921, published field price of California crude oil of from 14 to 17.9 degrees (Baume) gravity (\$1.10 per barrel), which for the purposes of this agreement shall be termed the reference price of basic crude oil, and upon the November-December, 1921, market price of fuel oil at Bay Point, California (\$1.50 per barrel), which for the purposes of this agreement shall be termed the reference price of fuel oil."

It will be observed that the contractor does not agree in any and all events to take the 5,878,905 barrels of crude oil as his pay. He will only take that many barrels so far as this clause discloses at a certain gravity, and if that gravity is not delivered then the Government must deliver such other quantity and quality **"as shall be of equal value."** Value of the oil delivered, and, as appears just below in the same clause, **value in United States dollars**, is what the contractor demands for his performance. It is therefore perfectly plain that the so called "lump sum" of 5,878,905 barrels only means barrels of a certain quality, and that if the quality of the oil is higher and thus the oil is more valuable, the Government will need to deliver less barrels, whereas if the quality is lower and the oil therefore less valuable the Government will need to deliver more barrels.

How shall the Government know how many more barrels or how many less barrels it ought to deliver? The answer is found in the figure quoted in the same clause, viz.: \$1.10. It is agreed in this paragraph that a barrel of oil of 14 to 17.9 degrees gravity is valued at \$1.10. The amount the contractor is willing to take for his work and services is \$1.10 times 5,878,905, the number of barrels mentioned in the proposal sum. As a matter of fact this amounts to \$6,466,795.50. So Mr. Ambrose stated in his report of April 17, 1922 (Pl. Ex. 119; R. I-412). In order to compare the Pan American's bid with the other bids Ambrose found it necessary to reduce the number of barrels of oil to dollars by the simple expedient of multiplying by \$1.10. As we shall hereafter see, throughout the contract and its performance this has to be done. It is evident, therefore, that the so-called lump proposal sum in barrels is camouflage. What the parties are really talking

about is the "**value**" of the oil to be delivered by the Government in ease of its debt to the Pan American, and this value is measured in dollars and nothing else.

Again, it will be observed that the contractor agrees to deliver 1,500,000 barrels of fuel oil to the Government. It is of course uncertain just when the delivery will take place. This will depend upon how soon the storage facilities to receive the oil are finished. Here again comes in a new variant factor. Fuel oil may go up or go down. If fuel oil goes up the contractor, in order not to suffer a loss, will have to get a greater value of crude oil in payment. If on the other hand fuel oil goes down, the Government ought to pay less value for the fuel oil. The parties fixed in the language above quoted a so-called "reference price" of fuel oil of \$1.50. As we shall see in a moment, this means nothing, because the fuel oil is not to be delivered at that price. For the moment, however, we shall pass to the adjustments to be made depending upon the changes in price of crude oil. We shall thereafter take up the question of the changes in the so-called "reference price" of fuel oil.

In the next clause of Article III (R. I-29) it is provided that if on the day when the Government delivers any given number of barrels of 14 to 17.9 degrees gravity crude oil, "the published **field price**" of that kind of oil has changed "from the reference price" of said oil (that is, if the then current published field price of crude oil has gone up or gone down from \$1.10), "the Government shall be credited **on account of the proposal sum** with a number of barrels of 'basic crude oil' which bears to the actual number of barrels delivered the ratio which the **published field price on that date** bears to the reference price of basic crude oil."

Now this simply means: That as above stated, if

the actual value as fixed by the published field price of the crude oil which the Government delivers has gone up, then the so-called proposal sum is cut down. That is to say, this so-called lump sum of 5,878,905 barrels of oil is changed automatically and the so-called lump sum of barrels is decreased. On the other hand, if oil has gone down in value, then the Government will have to add to the proposal sum, in the ratio in which crude oil has fallen in price. In this event the proposal sum goes up in the number of barrels it contains. So it will be seen that the proposal sum, which is supposed to be a lump sum, may, and, as a practical matter has, changed from time to time, and it changes every few days as deliveries are made. It changes not only, as above shown, by reason of the difference in gravity of the oil delivered from that specified in the contract, but, as we now see, it also changes by reason of changes in market price.

The next clause in the contract (R. I-30) deals with a change in gravity and shows what we have just set forth, that the proposal sum vaults about from one figure to another with every change in the gravity of the crude oil delivered. We again call attention to the fact that it is not barrels of oil that the parties are discussing, but in essence it is the **market value** of the oil delivered. The parties intend that the Government shall deliver and the contractor receive enough royalty oil to make up the value in dollars of \$6,466,795.50, no matter what shifts in price or in quality there may be in the oil delivered.

In the next two clauses (R. I-30) the parties attempt to take up any differences there may be in the market price of fuel oil at the time of delivery. These paragraphs look very formidable in their wording. As a matter of fact they are extremely simple if we always

keep in mind that what the parties are trying to do is to deliver this \$6,466,795.50 worth of crude oil, **unless** the price of fuel oil has gone up, in which case they will deliver enough more to take up the rise in the price of fuel oil, or **unless** the price of fuel oil has gone down, in which case the contractor will not need as much as \$6,466,795.50 to reimburse him. \$1.10 bears a fixed ratio to \$1.00. If this had been a dollar contract the price of fuel oil, \$1.50 per barrel, would have been stated, and it would have been added that if the price went up or down the Government would pay the increase or decrease in market price at the time of delivery. But as has been made so clear by the witnesses, the parties did not dare to talk openly about dollars in this contract, so they had to translate an increase or decrease in the price of fuel oil into barrels of "basic" crude oil. Now one barrel of basic crude oil liquidates \$1.10 worth of indebtedness (see above for variants). Fuel oil goes up or down in dollars, and the scheme was therefore devised of adding to or subtracting from the proposal sum, so called, which was made up of barrels of \$1.10 crude oil, barrels of basic crude to take up increases or decreases in the price of fuel oil. This had to be done by working out the decimal or fraction which represents

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1.10, which would give the ratio of barrels to dollars. As a little additional camouflage, apparently, the parties

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translated this fraction into 100,000 to make the fraction mills (tenths of a cent) instead of dollars. It therefore becomes clear that the proposal sum has to vault about again for another reason, namely, increase or decrease in dollar value of the fuel oil delivered. What a precarious life the proposal sum lives when it has to change its nature from day to day by reason of all these

variant factors! All this has to be done to conceal "price" under the term "barrels." We shall show hereafter that the effort to conceal and avoid the words "price" and "value" was not very successful.

The last clause of Article III (R. I-31) provides for the payment of interest on credits and debits. Credits and debits are used only in expressions of indebtedness. Interest means debt, for people do not pay interest except they owe something. But of course the Government did not dare to spend money under this contract, so the interest had to be translated into barrels, and the clause provides that after calculating the interest it shall be added or subtracted from the proposal sum, depending upon which way the account stands, that is, in favor of the Government for oil delivered in advance of work, or in favor of the contractor for work delivered in advance of oil. Here again the proposal sum changes from time to time and is not really a lump sum at all, but simply a measure of value, really in dollars, but thinly veiled in barrels of oil.

Article IV (R. I-31) provides that the Government will continue to deliver oil "until **all claims** of the contractor under this contract **are satisfied.**" It may be pertinent in passing to ask how a claim can be satisfied by an "exchange" arrangement.

Article V (R. I-31) provides for granting by the Secretary of the Interior in his discretion of further leases if the amount of oil delivered annually runs below a certain fixed figure.

Article VI (R. I-32) provides for the delivery of accumulated royalty oil against the contract.

Article VII (R. I-32) provides that the contractor takes the crude oil at the well and bears the expense of any movement of it, and delivers the fuel oil in storage and pays for the transportation of it to storage.

Article VIII (R. I-32) provides for the gauging of the oil.

Article IX (R. I-33) provides for the payment of demurrage in case the Government delays the contractor's vessels at Pearl Harbor. The only interesting feature of this article is that demurrage is to be calculated in barrels of oil and added to the proposal sum. Here again that football, the proposal sum, is kicked about. If the Government incurs \$1.10 worth of obligation for demurrage one barrel of "basic crude" oil is added to the proposal sum.

Article X (R. I-33) deals with certain extra lengths and extra numbers of piles and with certain extras concerning dredging. These extras are all stated as so many barrels of basic crude oil for each unit of extra work. It also provides for deduction at the same rate in barrels of oil for decrease of work.

Article XI (R. I-34) confers the preferential right on the Pan American to receive any additional leases in a described portion of Reserve No. 1. This Article, as we shall hereafter show, transfers the administration of and all discretion concerning these lands to the Secretary of the Interior.

Article XII (R. I-35) provides for the giving of any saving in the construction of the storage facilities to the Government, such saving to be determined by agreement between the contractor and the Secretary of the Interior.

(b) *The lease of June 5, 1922.*

This lease was made by the Assistant Secretary of the Interior to the Petroleum Company, the subsidiary of the Transport Company, pursuant to the covering letter of April 25, 1922 (R. I-65), which was delivered at the same time the foregoing contract of April 25,

1922, was made. It followed necessarily, and formed a part of the transaction represented by the contract of April 25, 1922.

(c) *The contract of December 11, 1922.*

The parties are recited as the Transport Company, designated as the "Contractor," and the United States, acting by the Secretary of the Interior and the Secretary of the Navy, designated as the "Government" (R. I-41).

The preambles (R. I-41-42) recite the contract of April 25; recite that it is desired to fill the tanks built under that contract as fast as they are completed and also to procure for the Navy additional amounts of fuel oil and other petroleum products in storage at Pearl Harbor, T. H., and elsewhere; that the Secretary of the Navy in his letter of November 29, 1922, copy of which is attached, has requested the Secretary of the Interior as administrator of the naval petroleum reserves to arrange for such additional fuel oil and other petroleum products in storage through exchange therefor of additional royalty crude oil belonging to the Government in the California naval reserves, the probable cost of the additional products and storage immediately planned for being estimated at fifteen million dollars, more or less; recite the willingness of the contractor to do the work and furnish the oil, and then recite as follows:

And whereas the furnishing of such additional amounts of fuel oil and other products in storage on the basis of exchange for the Government royalty crude oils cannot be accomplished from the present leases in the California naval reserves. They then recite the preferential right of Pan American to leases in Naval Reserve No. 1, and recite that the contractor "is planning to provide refinery facilities at Los Angeles, California," etc.; and states "the following agreement is supplemental to the said contract of April 25, 1922."

Article I (R. I-43) provides for bond, and then in numbered paragraphs provides as follows:

1. For the provision of fuel oil to fill the storage tanks built under the April contract.

2. For the construction at Pearl Harbor of additional facilities at cost.

3. For the furnishing of fuel oil to fill the new construction and for charging the Government for such fuel oil at the Bay Point market price plus cost of transportation.

4. For the furnishing of other petroleum products than fuel oil for filling the facilities to be constructed at Pearl Harbor for such products under the present contract, at contractor's current sales price, not, however, to be in excess of the current price under navy contracts.

5. For furnishing free storage for 1,000,000 barrels of fuel oil and for the filling of that storage with fuel oil to be exchanged for crude oil after the Government shall have delivered enough crude oil to have paid for all of the above recited matters.

6. To maintain subject to the demands of the navy 3,000,000 barrels of contractor's C grade fuel oil on the Atlantic coast in commercial storage, any part of said fuel oil to be allocated to the navy on thirty days' written notice and held for not more than six months in storage for the navy at one cent per barrel per month storage charge, said oil when purchased by the navy to be paid for at market prices.

7. To go on to other storage projects beyond the Pearl Harbor project if and when the navy shall have reimbursed the contractor for all matters previously agreed to be done.

8. An option for purchase at ten per cent. less than market price of fuel oil.

9. An option to purchase other petroleum products on the same basis.

Article II. (R. I-47):

A. Agreement by the Government to deliver all its royalty oil from No. 1 and 2 reserves, subject to its obligation to deliver enough to pay out the contract of April 25, 1922, "until the Government's obligations under this instant contract are discharged, and in any event for a period of 15 years from the date of the expiration of said contract of April 25, 1922, the Government **to be given credit by contractor for such crude oil delivered by the Government at the published field price thereof on date of delivery,**" and for gas and casing-head gasoline at certain rates provided. It then provides: "any surplus of Government **credits** thus accruing are to be **satisfied** by delivery of fuel oil or other petroleum products, by construction of additional storage facilities, or **to be payable in cash,** as the Government may at that time elect." (R. I-48.)

B. A covenant to lease to Pan American Petroleum Company lands in Naval Reserve No. 1 described in the accompanying lease of same date. (R. I-48.)

Article III (R. I-49) deals with gauging of the oil and provides that the interest item mentioned in the contract of April 25, 1922, shall cover fuel oil as well as construction.

This agreement abandons any thought of exchange of one thing for another. It is frankly a "dollar" contract. The clumsy expedient of translating dollars into illusory and fictitious barrels of "basic" crude oil (which means nothing, because basic crude oil means nothing) has been abandoned; and the books and accounts under this contract were kept in dollars and cents (R. II-688).

(d) *The lease of December 11, 1922.*

Pursuant to the preferential right which is recited in the contract of December 11, 1922, and which was created by the contract of April 25, 1922, and as the contract of December 11, 1922, states, in order to obtain crude oil to be used as a medium of payment for storage and the construction of storage facilities, this lease, covering the whole unleased portion of Naval Reserve No. 1, was made to the nominee and subsidiary of the Transport Company,—Petroleum Company. It forms part of the consideration to Transport Company for entering into the contract of December 11, 1922. No extended analysis of it need be given, as it is an ordinary form of oil and gas lease, specifying certain royalties to be paid to the United States out of the crude oil and gasoline recovered by the lessee.

2. The Act of June 4, 1920, did not authorize the execution of the contracts and leases.

(*Point III, Appellants' brief, p. 100.*)

(a) *What the act is in fact.*

What has been spoken of for the purposes of this case as the Act of June 4, 1920, is not in fact an independent Act of Congress. The language quoted on page 14 of Appellants' brief, is a proviso or rider to that portion of the annual Naval Appropriation Act of June 4, 1920, for the ensuing fiscal year. One section of that appropriation bill deals with the subject "Investigation of fuel oil and other fuel" (41 Stat. 812-813); and under that heading appropriates \$30,000 for an investigation of fuel oil, gasoline and other fuels adapted to naval requirements, including the question of supply and storage, and the availability, economically and otherwise, of such supply as may be allowed by the

naval reserves on the public domain, etc. Then occurs a proviso containing the language quoted at page 14 of Appellants' brief. The proviso has a proper place in the act because it makes an appropriation of \$500,000 for the purpose mentioned in the proviso.

(b) *The purpose of the act.*

It is important to form a correct idea of the purpose in the mind of Congress in enacting the Act of June 4, 1920, since the terms of that act with which we are here most concerned, especially the power of sale, exchange and storage, will be colored by the conception of its general purpose. Appellants argue, in brief, that Congress contemplated a right about face with regard to the reserves, that is, a departure from the policy of an underground reserve established and adhered to since 1912, and an adoption of an aboveground fuel-oil-in-storage policy. We believe Congress contemplated no such thing, but that on the other hand the language of the act and its surrounding circumstances and history will show that its purpose was to enlarge the powers of the Secretary of the Navy so that he might at will provide adequate protection against drainage where such was needed.

Consider first the statutory situation. The underground reserve idea had been in well known effect in the case of Reserves Nos. 1 and 2 since their withdrawal by President Taft in 1912. It was impliedly ratified by Congress in the year 1920 itself, in that the Leasing Act of February 25, 1920, conferred a right to lease land in the naval reserves only where there were already producing wells and in compromise of valid existing claims.

Had Congress intended or expected a sharp departure from this established policy presumably some definite

indication to that effect would be found in the Act of June 4th. Instead, this short enactment, which is itself a mere rider to the Naval Appropriation Act for the fiscal year 1921, begins its operative language with reference to the naval reserves by the word "conserve." The further language of the act does give the Secretary of the Navy an unrestricted power as to how much of the lands he shall lease. We think, however, that it shows an assumption on the part of Congress that this power was needed, and presumably therefore would be exercised, for the purpose of more adequate protection of the reserves against drainage from neighboring drillers.

That this would render advisable development of certain portions of the land by leases under which royalty oils would accrue to the United States, and that such oils, or part of them, would be sold, is apparent from the act, which states, "that such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the Naval Petroleum Reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922." In other words, from the sales of royalty oil a sum of \$500,000 is made available to enable the Secretary to carry out the necessary development and storage which might be incident to protection of the reserves.

We submit that this was a reasonable provision for such purpose if, as we have argued, Congress contemplated only such development as was needed for protection. We agree, however, with the Appellants, that it was a wholly and ridiculously insignificant appropriation if Congress contemplated that the Secretary of the Navy would suddenly throw the reserves open to unlimited exploitation.

It must not be forgotten in this connection that we are not dealing merely with Reserves Nos. 1 and 2 in

California. There were in all three petroleum reserves with a total acreage of nearly eighty thousand acres (R. III-1072) and in addition two shale oil reserves, the extent of which we are not informed in the Record. Certainly had Congress anticipated the full development of such a vast and admittedly rich reservoir of oil, some indication of that expectation and some provision for the disposal of the resulting products or money would be found in the act.

Certainly something on such a subject would have found its way into the debates of Congress or the reports of committees.

If we look to departmental construction of the purpose of the act we find that for more than a year after its passage the established policy of an underground reserve was rigidly adhered to. Not until Secretary Fall kindled the imagination of certain enthusiasts in the Navy Department in the summer of 1921, with the idea of an exchange for storage proposition, did the thought occur to anyone even to investigate as to whether the act permitted such a policy.

But this is not all. The uncontradicted Record in this case shows that down to the very end of all the transactions here involved, the Secretary of the Navy maintained a fixed purpose of leasing only where according to representations in which he had confidence such leasing was required as a protective measure. Robison knew this was the policy of his chief and the policy of Congress. He testified (R. III-1141) "Mr. Denby had a fixed idea that the immediate necessity was the drilling of offset wells where they were required. Witness thinks that it was his idea to keep as much of the oil in the ground as long as he could, and the policy of his department was fixed by him. **Witness understood that the policy when the reserves were created**

was to retain as much of the petroleum as could be retained in the ground against some time when petroleum would become so scarce or so dear that the United States would need to drill on this reserve supply."

Moreover, Fall well understood the purpose of the legislation. More than a year after its passage (July 18, 1921), he wrote to the Vice President of the Pacific Oil Company a letter (R. I-143) answering a suggestion of the Pacific Company that for the better conservation of the Government oil reserve as well as the reserved oil of the Pacific Company, an exchange of sections within the reserve might be desirable, and in this letter referred to the proposition as one "by which **the primary purpose of the naval reserves—namely, the retention in the ground of a supply of oil ample for the needs of the Navy in the future**—may be accomplished and at the same time the interests of your company, through its private holdings in the reserve, duly protected."

Apart, therefore, from the question of the extent of power granted in the act, it is plain that the Appellants alone have discovered in it any purpose or intent to put in force a policy of complete exploitation and above-ground storage. It is only by presupposing the latter policy that their argument for the supposed necessity to exchange oil for storage in order to carry out the purpose of the act finds any basis.

(c) *Disposition of proceeds of royalty oil.*

Prior to the Act of June 4, 1920, the royalty oil accruing to the Government from compromise leases made on Naval Reserve Lands, was, pursuant to the Leasing Act of February 25, 1920, sold; and the receipts from such sales were paid into the Treasury. This was the express mandate of the Act of February 25, 1920. After the

passage of the Act of June 4, 1920, any cash received from sales of royalty oil from leases made pursuant to it would also go into the Treasury as miscellaneous receipts—R. S. 3617, 3618 (quoted in full at p. 219 this brief), providing that all moneys received from the sale of Government property, shall be covered into the Treasury.

There is no dispute about these propositions, and in fact the Record is full of references to this situation. Admiral Robison repeatedly calls attention to the fact that these proceeds of sales of royalty oil were going into the Treasury, and that consequently the Navy was losing the benefit of the naval reserve oil because once the money got into the Treasury it could not be gotten out again for the benefit of the Navy unless and until Congress appropriated it. (R. II-957, 959, 980, III-1075, 1082.)

Everyone recognized that under the Act of June 4, 1920, the royalty crude oil coming to the Government under any leases theretofore made or thereafter to be made on lands in the naval reserves could be exchanged for fuel oil and other petroleum products useable by the Navy in its current operations. Nobody suspected or suggested apparently that the royalty oil could itself be used as a consideration for the procurement by the Navy of other physical property and assets, until more than a year after the Act of June 4, 1920, became law.

(d) *Genesis of the plan to avoid payment into the Treasury.*

In the summer and autumn of 1921 Fall hit upon, and he and Robison developed, the plan of so using royalty oil and attempting to justify its use under the Act of June 4, 1920. We shall not stop here to repeat what we have already elaborated: that there was in

Fall's mind and in that of many others in the departments, grave doubt as to the legality of this program. The reason for these doubts is not far to seek. It at once appears when we realize the magnitude of the plan Robison had in mind.

He had it in mind to leave out of account altogether the purpose of the Act of June 4, 1920, viz., the retention of oil in the ground and the protection of that oil so far as possible by defensive drilling, because he thought he saw a way for the Navy Department to provide fuel depots for the storage of great quantities of petroleum products without asking leave of Congress for their location, and without having Congress consulted as to their extent and cost.

There is no contradiction that his plan soon enlarged itself into a program for the taking out of all the petroleum in the reserves, thus reversing the policy adopted by Congress and adhered to for many years, and using the royalty oil which would come to the Government from the lessees for the construction of approximately \$50,000,000 worth of structures and appurtenances and the filling thereof with approximately \$50,000,000 worth more of petroleum products useable by the Navy. Robison says in so many words that the plan was to go on and on from one project to another practically as long as petroleum could be gotten out of the naval reserves to furnish consideration for defraying the costs of these projects. (R. III-1103.)

The Act of June 4, 1920, authorizes the Secretary of the Navy to "conserve, develop, use and operate the lands in his discretion, directly or by contract, lease or otherwise." Therefore, under the power thus given the plan contemplated the leasing of the reserves. The act goes on to authorize the Secretary of the Navy "to use, store, exchange or sell the oil and gas products"

of the reserves "and those (*i. e.*, the oil and gas products) from all royalty oil from lands within" the reserves, "for the benefit of the United States." The plan could not be accomplished by the storage of the **crude oil**, nor could it be accomplished by the use of the crude oil, for the Navy did not use crude oil, but a derivative—fuel oil.

The burden of Robison's complaint was that to sell the crude oil defeated the plan, because the proceeds of the sale under the law were bound to go into the Treasury of the United States. (R. III-1075.) The expedient was adopted of "exchanging" the crude oil for so called reserve fuel oil and petroleum products, and as an ancillary or incidental matter, as it is said, "exchanging" this royalty crude oil also, and in addition, under construction contracts for the building of naval fuel depots in which the fuel oil and petroleum products acquired were to be stored at various points in the United States and its possessions.

It is small wonder that the exchange-for-storage idea, carried to such proportions as Robison proposed, staggered Fall and that at first he was very doubtful of the legality of it (R. III-1076). It is small wonder that the Bureau of Yards and Docks of the Navy thought the plan of doubtful legality—so doubtful, in fact, that they questioned whether any bidders would submit proposals under it. It is small wonder that all the oil concerns consulted, except the Pan American, were advised by their counsel that the plan was illegal. We recognize that the attitude of any or all of these persons is in no wise conclusive upon any court upon the question of the legality, but it is at least persuasive, that the legal opinion in and out of the department seems to have been almost universally opposed to its legality.

So far as Fall and Robison were concerned, the legal difficulty was overcome by the opinion of Judge Advocate General Latimer. We call attention to the fact that this opinion definitely held that "the authority granted 'to exchange' is unrestricted; *i. e.*, the Act does not specify nor limit what may be taken in exchange for the oil and its products." (R. II-701.) This goes farther than counsel for Appellants dare to go in defending the contracts of April 25 and December 11, 1922. As we shall hereafter point out, they limit the authority and power of the Secretary under this act to an exchange for so-called "fuel reserve" purposes. As we shall hereafter endeavor to point out, this is a purely arbitrary limit, and there is really no escape from one of two positions: Either that the act authorized an exchange of royalty oil for petroleum products and for nothing more, or it authorized the exchange of the royalty oil for anything that the Secretary of the Navy in his uncontrolled discretion considered "for the benefit of the United States."

(e) *The act does not authorize the contracts.*

(*Points I and III, Appellants' brief, p. 120.*)

We assert that not only was the act passed in pursuance of a conservation rather than of a development and exhaustion policy, but that disregarding all other statutory and constitutional provisions, and supposing it stood alone, the act of June 4, 1920, does not confer an authority for the making of the contracts under attack.

We shall here discuss the matter upon the assumption that the Secretary of the Interior has and had no part in the making and administration of the contracts and leases. The question then becomes, does the act confer upon the Secretary of the Navy authority for the mak-

ing of such contracts and leases as were made in this case?

It may be conceded that the language of the act confers broad powers. A direction to take possession of the lands in the reserves which are free of claims, and "to conserve, develop, use and operate the same in his discretion, directly, or by contract, lease or otherwise," gives him a right to make leases or operating contracts.

The act then says: "and to use, store, exchange or sell the oil and gas products thereof, and those from all royalty oil from lands in the Naval Reserves, for the benefit of the United States." This language must unquestionably be read in connection with the remainder of the act. We shall analyze these powers separately.

(1) "To use."

Use connotes consumption. It excludes sale or barter or exchange. Particularly pointed is this fact when we find the word in collocation with other words, which distinguish the idea of parting with the oil from the idea of use.

But, further, when we examine the last two provisos of the act, we find the "use" specifically limited. The one proviso appropriates "not exceeding \$500,000" of the moneys turned in or to be turned into the Treasury from royalties on Naval Reserve lands prior to July 1, 1921, "for this purpose." So that any "use" that is to be made of the oil must not cost in excess of that sum. The other proviso makes clear that "use" means "consumption" for it requires that the \$500,000 appropriation shall be "reimbursed from the proper appropriations, on account of the oil and gas products from said properties **used by the United States** at such rate not to exceed the market value of the oil as the Secre-

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tary of the Navy may direct." It is, therefore, clear, that if the Government "uses" this oil for any purpose for which Congress has appropriated money for the purchase of oil, such appropriation must be debited and the appropriation made in the Act of June 4, 1920, must be credited with the value of the royalty oil so "used."

(2) "To store."

The effect of the use of this word can only properly be ascertained by inquiring what it is the act authorizes the Secretary to store. Obviously what he may store is "the oil and gas products thereof" (*i. e.*, of the lands). Also, he may store "the oil and gas **products** from all royalty oil from lands in the naval reserves." The power to store, therefore, covers both the royalty crude oil which is a product of the reserves and the products of the royalty oil. There are certain products such as gasoline and gas, a quantity of which is obtained from the royalty crude oil. As the Secretary is given power to operate the reserves by contract or otherwise, it is entirely conceivable that he might make a contract whereby the operator would turn over to him crude oil and/or certain of the products of the crude oil which are obtained therefrom. These he might store.

What may he spend for this purpose? The answer is found in the next proviso. There is "made available" "not exceeding \$500,000" "for this purpose." What purpose? Obviously, one purpose is "to store." Did Congress intend that the Secretary might spend the \$500,000 in cash and then spend \$57,000,000 worth of royalty oil for storage facilities?

Moreover, these contracts are not for the storage of "the oil and gas products" of the naval reserve lands, nor for the storage of the "products" of such oil and gas. The oil and gas products from the lands are under

these contracts bargained and bartered away—for what? (1) For a construction contract to build facilities. Surely that is not “storing” them. (2) For a covenant that these facilities will be filled with what? With fuel oil, etc. Whence? Not from the naval reserves, but from whatever source the contractor may buy them. And if he fails, what then? A suit for damages by the United States. The oil and gas products are gone, their products in turn,—the gasoline, the fuel oil, etc., have been manufactured by the contractor (or, as in the present case, by his vendee, Associated), and sold to the public. The United States retains neither title to nor lien upon them. It has a contract right to call upon the contractor to furnish other “products” bearing no relation, **save one of value**, to those made from the royalty oil it owned and bargained away. Can such a performance be denominated a storing of the oil owned by the United States or a storing of the products of its oil? We say not.

(3) “To exchange.”

On this phrase Appellants, in effect, base their whole argument. We contend that however the phrase is construed it cannot carry the load of these contracts.

a. Exchange for Fuel Oil Intended.

The exchange Congress had in mind was undoubtedly for fuel oil. That was what the Navy was then using. Congress had not authorized the creation of reserve fuel depots. It had authorized only depots for current-use fuel oil.

b. Power to Exchange Not Unlimited.

The exchange contemplated was limited to fuel oil and other derivatives of petroleum. It could not extend to the acquisition of **anything** which might be

of benefit to the United States. In holding that it did so extend, we submit, the Judge Advocate General of the Navy fell into grave error. He held the word to be unlimited. If he is right, royalty oil may be exchanged for a battleship, for a navy yard, for land, for aviation, for airplanes, for uniforms, for ships' stores, for guns, for what not.

Of course, even on this construction of the act, the Secretary of the Navy would be bound to exchange only for **something which would be a "benefit" to the United States.** Did Congress intend to invest him with the unrestricted discretion to expend all the royalty oil which might accrue to the United States for anything which he might think beneficial?

We do not wish our position to be misunderstood. We do not claim, and never have claimed, that where a discretion is vested in an executive officer, the courts may review his exercise of that discretion. So long as he stays within the limits of the powers granted him, the methods he adopts for the exercise of those powers are not subject to review. **The question is and always has been what powers were granted** to the Secretary of the Navy by the Act of June 4, 1920, and not whether he exercised those powers in a wise or discreet manner.

We think it entirely clear that no such intention existed or can be drawn from the words of the act. We again repeat, it is not a question whether the Secretary of the Navy exercised his discretion wisely or unwisely. The question is whether the Court shall construe this act as granting such unbridled legislative discretion to an executive officer.

Appellants' counsel are forced to take the position that while the word "store" as used in the act does not expressly authorize the storage of something obtained by the Secretary of the Navy through an exchange,

yet by implication, if the Secretary of the Navy is authorized to exchange royalty oil for some commodity or other he is also authorized **to do whatever is necessary** to obtain proper storage for the thing acquired.

The argument in logic must go to the length of saying that if the Secretary of the Navy were authorized by an act to exchange royalty oil for airplanes, he would, by implication, be authorized to build hangars and depots for these airplanes, and pay for them in royalty oil. The only alternative to this argument would be for Appellants to allege that the airplanes were "products" of the royalty oil and as such products could be stored under the authority to store the products of royalty oil. It is of course obvious that the word "products" cannot be used and was not used in fact in any such sense. A thing I buy with a dollar is not the product of a dollar, and a thing I get in exchange for a chattel is in no sense a product of the chattel.

c. The supposed intent of Congress.

There was in the Court below, and is in Appellants' brief in this Court, much argument in an effort to convince the Court that the provision and the filling of a fuel depot at Pearl Harbor, Hawaii, was in effect in the contemplation of Congress as a probable result of the operation of the Act of June 4, 1920, at the time that act was passed. They definitely assign to Congress an intent in the passage of the act. They variously designate it as an act intended to create a fuel reserve, as an act intended to meet military necessity, as a national defense act, and similar phrases, and it is therefore argued that if what was done by the contracts of April 25 and December 11, 1922, was something that tended to create a reserve of fuel, that tended to strengthen the national defense, it was clearly a matter

within the purview of the legislators who passed the act. So far as we can gather from their brief, there is nothing specific from which they deduce this general purpose. It looks very much like an assumption on their part.

The assumption of the purpose Congress had in mind, followed by a construction of the act in the light of that assumed purpose, is the old fallacy of begging the question. The very thing that we are trying to do is to find out what the purpose and intent of the act was. When we attribute to the Government the policy of storage in the ground we point to definite facts, namely, the executive withdrawals and separate treatment of the naval reserves in the Leasing Act of February 25, 1920, and the actions of the Navy Department over a number of years; but the Appellants point to no definite facts upon which they base their assumption. They merely state it and then use it as a guide for interpreting the act.

Furthermore, the latter part of the assumption, namely, that the act sought to make the oil available for naval purposes, is too broad a statement. **There is nothing to evidence an intent to take all the oil out of the naval reserves. On the contrary it was desired to take out as little as possible.** The Secretary of the Navy did not want to make the oil in the reserves presently available for naval purposes. He felt that he would be forced, however, either to lose some of it or presently to use it. To authorize this limited use was one of the purposes of the Act of June 4, 1920.

The assumption is also unwarranted because there was no authorization in the Act of June 4, 1920, to construct "fuel depots." This is highly significant in view of the general policy that "fuel depots" should not be built except when authorized by Congress. There

is in the act the appropriation of \$500,000 for the purposes of the act and whatever storing of oil might be allowed as one of the purposes was obviously limited by the extent of this appropriation. We discuss this at greater length hereafter.

Although Appellants apparently do not realize the fact, their assumption of the general purposes of the act logically forces them to take the same view of it as did the Judge Advocate General of the Navy, for, as we understand their argument, it is that since the act authorized a storing of oil and since its purpose was to make oil available for naval purposes, it authorized the construction of storage reasonably necessary to accomplish these things. Upon the same premises we may say that since the act authorized a use of the oil and since its purpose was to render the oil available for naval purposes, it authorized battleships and airplanes because such things are reasonably necessary for the use of naval oils; such things benefit the United States and carry out its naval policy. We submit that there is nothing specious in this argument, but, on the contrary, that it fairly rests upon the same premises as does the position of the Appellants with regard to storage.

At page 114 of Appellants' brief it is suggested that the act does not, under Appellants' construction of it, give the Secretary authority to exchange oil, *e. g.*, for battleships, because it does not give him "sole discretion as to every matter connected with the entire Navy." But if it is an all-sufficient code, why does it not give him such discretion? Its language is that he may exchange the oil "for the benefit of the United States." Are not battleships beneficial? Where do Appellants find in the act the limitation to the "reserve idea," on which they so constantly dwell?

While we are speaking of this reiterated argument

about the contracts in this case rendering oil available for naval use and thus preserving the reserve idea, and therefore being within the purview of the act, and therefore lawful, let us refer to several other considerations.

Appellants must and do admit that there is nothing in the law to prevent the Secretary, once the United States has the storage facilities and the fuel oil, from changing the same to a depot for current-use fuel. Thus he may, by a mere order, destroy entirely the "reserve idea." Surely the legality of what has been done cannot rest on the question of the intended use of the fuel depot when contracted for, or the whim of the Secretary of the Navy.

Again, Appellants admit, as they are bound to admit, that the act authorizes the sale for money of the royalty oil. They admit, as they are bound to admit, that upon such a sale the proceeds of the sale must go into the Treasury, subject to appropriation by Congress. If the act is a national defense act intended to enable the Secretary of the Navy to create and perpetuate an above-ground reserve of petroleum products, why was it left to him to destroy any such plan by selling the royalty oil and allowing Congress to determine what should be done with the money? The argument that if and so long as the Secretary stayed within the orbit of the reserve idea, whether reserve above ground or reserve under ground, what he did was within the act, and that if he went outside the orbit of that concept what he did was violative of the act, will not do. That argument cannot be used to buttress what was done in this case.

As we have above pointed out, our opponents admit that under their theory power rested in the Secretary to destroy the reserve character of the storage at his wish or whim, by ordering the stored oil to be currently

used. As we have pointed out, he could at any moment destroy it by a sale of royalty oils. We come back inevitably to the proposition that if the power to exchange is to be construed to give the Secretary more than the right to exchange royalty oils for other petroleum products, the act becomes a roving commission appropriating some hundreds of millions of the property of the Government to be transferred and expended for such consideration as the Secretary of the Navy may in his judgment think best.

We see, therefore, that, as we have in the preceding section of this argument contended, there is no middle position; either the power to exchange was unlimited and unrestricted, or it was limited to exchange for fuel oil and similar petroleum products.

d. The transactions under the contracts of April 25 and December 11, 1922, are not in fact exchanges within the meaning of the act.

(Point III, Appellants' brief, p. 125.)

We have previously in this brief analyzed the provisions of the contracts. We contend that the transactions provided for in those instruments are not exchanges such as the Act of June 4, 1920, authorizes. In them the parties use the language of sale rather than that of exchange. We do not intend here to repeat what we have above said in our analysis of the contracts (this brief, pp. 188 to 198). Not only the nature of the transaction, but the language used by the parties, shows that they realized a sale was being consummated, and not an exchange. Everything indicates that the emphasis was upon value in dollars as of the time the royalty oil was delivered to the contractor, and as of the time the fuel oil was delivered to the Government and construction work done for the Government.

The legal concept of an exchange as distinguished from a sale is a transaction whereby little or no emphasis is placed upon value; whereby the parties intend to trade one specific article for another specific article or articles of property. When the element of value creeps in as a primary consideration we have a sale and purchase rather than an exchange. In these transactions the element of value is not only predominant; it is the essence of the transaction. The machinery would not work without the valuation of the crude oil in dollars and the valuation of the storage construction in dollars. The transaction is not legally an exchange.

The meaning of the word "exchange" as used in the act is to be found by reference to the facts and circumstances then existing. The policy up to the passage of the act was to retain the oil in the naval petroleum reserves underground. It became known that some of it, particularly the oil in Naval Petroleum Reserve No. 2, was subject to drainage. The act was confessedly passed to give the Secretary of the Navy an opportunity to save such oil, if he could, as was subject to drainage. The plan evolved and carried out in the leases and contracts converts the royalty oil somewhat as follows:—

The royalty may average about twenty per cent. of the total oil removed. It takes roughly two-thirds of that twenty per cent. to build and equip the storage facilities for fuel oil and about one-third of that twenty per cent. to exchange for the fuel oil to go into the storage facilities. The result of the operation of the plan is that the United States has in the end in storage of oil an amount representing not over eight per cent. of the value of the crude oil which came out of the reserve. We do not make this argument for the purpose of showing that the Secretary misused his discretion. We make it for the purpose of showing the baneful

result of this performance if it was properly within his discretion. It shows how fallacious is the argument of the Appellants that just such a performance as this must have been in the contemplation of Congress when it passed the act and used the word "exchange." We make the argument to show that Congress never by the use of that word **granted any such power.**

We further contend that the word "exchange" cannot possibly be given a meaning whereby it would authorize an agreement to deliver a commodity to another, in "exchange" for which that other enters into an executory contract to perform work and labor and build a construction project according to certain plans and specifications. Certainly when Congress used the word it did not mean that royalty oil might be pledged to a building contractor as the consideration for such an executory building or construction contract.

The Appellants, however, contend that it is immaterial whether the transaction is technically an exchange or a sale, for they say if it is not an exchange, then surely it is a sale, and the act authorizes both sorts of transactions. We shall discuss this proposition under our next heading.

(4) "To sell."

It is plain, as Appellants allege, that the Act of June 4, 1920, conferred upon the Secretary of the Navy full power to sell the royalty oil accruing from leases of naval reserve lands. When Congress inserted into that act the word "sell," did Congress have in mind that the courts have sometimes said that the consideration received upon a sale may be something other than money? Our opponents say this is entirely probable. We say that the plain intendment of the act makes it not only improbable but impossible. Congress had authorized the Secretary to use, store or exchange the

royalty oil, and as a final alternative gave him the right to sell it.

Do Appellants contend that an act of Congress authorizing an administrative official to sell property of the United States means that he can take that property, hand it over to a contractor and make that transfer the consideration for a building contract by the contractor? It seems to us that to state the proposition is to answer it.

Secretary Fall and Admiral Robison well understood that if the Navy exercised the option to sell its royalty oils, the proceeds of those sales must go into the Treasury where, as Robison says, they would become unavailable except by appropriation by Congress, and it was the necessity to go to Congress that he wanted to avoid. (R. III-1075.)

It was for the very reason that they knew that if the transaction were to be a sale it must be a sale for money, and that the plain intendment of the act was that it should not be a transfer for a construction covenant, that Secretary Fall, on April 12, 1922, wrote Secretary Denby suggesting an amendment to the law whereby the Navy should be authorized to sell the royalty oils and apply the proceeds of the sale upon construction contracts or to exchange it for storage facilities. (R. I-393.)

None of the defenders of these contracts ever suggested that the transaction was a sale until Appellants so urged in the Court below, as an alternative to their argument that it was an exchange.

If their argument is sound, then Congress, in authorizing the officials of the United States to sell property of the United States, would be under the necessity of stipulating in every such act that the sale must not be by way of transfer of property of the United States for

property of the contractor. The persons who acted in this matter for the Government, and the Appellants themselves, realize only too well that if the royalty oils were in fact "sold," they must be sold for money, and that under the law the proceeds of the sales must be covered into the Treasury as miscellaneous receipts.

Section 3617 of the Revised Statutes provides as follows:

"The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in the next section, shall be paid by the officer or agent receiving the same into the treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department."

Section 3618, as amended February 27, 1877, c. 69, Sec. 1, 19 Stat. 249, provides as follows:

"**All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind**, except the proceeds of the sale or leasing of marine hospitals, or of the sales of revenue-cutters, or of the sales of commissary stores to the officers and enlisted men of the army, or of materials, stores, or supplies sold to officers and soldiers of the army or of the sale of condemned navy clothing, or of sales of materials, stores or supplies to any exploring or surveying expedition authorized by law, shall be deposited and covered into the treasury as miscellaneous receipts, on account of 'proceeds of Government property,' and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law."

It was confessedly to escape these very provision that it was attempted to cast the transaction into the form of a so-called "exchange contract" rather than a sale contract.

Our contention with regard to the meaning of the word "sell" as used in the act is supported by another clause in the act. The appropriation clause states "that such sums as have been or may be turned into the Treasury of the United States as royalties from lands within the Naval Petroleum Reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922." The only sums that could be turned into the Treasury from royalty oils would be the proceeds of sales thereof. It is quite evident, therefore, that Congress contemplated that the Secretary of the Navy might continue to sell the royalty oils, as had been the practice, and it made the proceeds of such sales as might be turned into the Treasury up to July 1, 1921, available for the purpose of the act.

At pages 139 and 140 of their brief Appellants wholly misconceive the position taken by Government counsel from the start of this case. It was that neither the word "exchange" nor the word "sell" describe what was done in this case, and that it was never the intent of Congress by the use of those words to authorize the employment of royalty oil as the medium of payment for a building construction plan of fuel depots for the Navy. The acts of Congress on the subject of sales of Government property were quoted to show that in legislation which Congress had passed on the subject it obviously contemplated that sales would be for money and that it never intended by authorizing a department head to sell property to allow him to use it as a means of procuring for his department some other property

but did intend that the proceeds of sale should go into the Treasury where they would be subject to appropriation by Congress. We have never contended that the Secretary did not have power to sell royalty oil, but we have always contended that such a transaction as the contract of April 25, 1922, or that of December 11, 1922, was not within the fair intendment of the word "sell" as used in the act.

(f) *The appropriation clause of the Act of June 4, 1920, makes Appellants' construction untenable.*

(Point II, Appellants' brief, p. 120.)

The second proviso of the clause of the act in question reads that "such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922; * * *."

The important language in the above clause consists of the words "for this purpose." The purpose of the act included "store", used with reference to royalty oil and the products thereof.

What is the effect of the language of the appropriation clause and the next following clause on the scope of the power to store? We have above quoted the appropriation clause and we now call attention to the clause immediately following, which directs the reimbursement of the \$500,000 appropriation "from the proper appropriations on account of the oil and gas products from said properties used by the United States."

Obviously when the appropriation clause states that the appropriation is for "this purpose" the purpose includes storage of oil. If what the Government is to receive under the contracts in exchange for its royalty oil may be designated as a "product" of that royalty

oil, the act gives the Secretary of the Navy an appropriation for the storage thereof.

The appropriation also clearly covers the storage of the royalty oil itself if the Secretary should decide to store it. If, when the Secretary has exhausted that appropriation, he attempts to go further and exchange oil for storage, this in effect authorizes him to increase the amount of the appropriation.

The matter is most clearly illustrated by taking for example the storage of the royalty oil itself as it comes from the ground. Suppose the Secretary desired to store it. Suppose he expended the entire \$500,000 for this purpose and suppose that then more royalty oil was coming in which he thought it wise to store and not to sell. Do Appellants contend that the authority to store and the appropriation for "this purpose" leave an opening for the implied authority to bargain away some of the royalty oil to get storage facilities for the balance of the royalty oil? Such a transaction would amount to an arbitrary increase of the appropriation made by Congress by the mere fiat of the Secretary of the Navy.

As we understand Appellants' argument, they agree that the Secretary may use the \$500,000 for building storage. In other words, they agree that the "purpose" mentioned in the appropriation is *inter alia* the provision of storage. But they then argue in effect that Congress also made what they styled in the oral argument in the court below an "oil appropriation" for the same purpose and **they infer such an oil appropriation from the use of the word "exchange."** It will, however, be noted that nowhere in the act is the Secretary authorized to exchange royalty oil "for this purpose."

As an alternative argument Appellants assert that the authority to store vested in the Secretary implied authority to provide the means of storage. In making the

argument they entirely overlook the fact that the act itself, by an appropriation, provides the means of storage.

Stripping off all casuistry the Appellants' argument comes to this: that where an act of Congress (a) authorizes an officer of the United States to do a certain thing and (b) appropriates \$500,000 for "this purpose," if the \$500,000 is insufficient to do all that the official thinks should be done in the premises he may do more than the appropriation will permit and make the United States liable to pay for that for which he has contracted. It seems to us that to state this proposition is to answer it, but if any further answer be needed the authorities and the statutes are clear.

But there are other acts declaring the general policy of this Government, which render void the contracts in question. They are:

R. S. 3732 (U. S. Comp. Stat. 1918, Sec. 6884) (Sec. 6233, Barnes Code):

"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfilment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

R. S. 3733 (U. S. Comp. Stat. 1918, Sec. 6886) (Barnes Code, Sec. 6234):

"No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

Act of June 12, 1906, c. 3078, 34 Stat. 255 (U. S. Comp. Stat. 1918, Sec. 6885) (Barnes Code, Sec. 6235):

"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfilment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

Act of June 30, 1906, c. 3914, Sec. 9, 34 Stat. 764 (U. S. Comp. Stat. 1918, Sec. 6763):

"No Act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed."

The foregoing statutory provisions respectively forbid any contract being entered into, such as those in issue in this case, which will bind the Government to pay a larger sum than the amount in the Treasury appropriated for the specific purpose, **unless the act shall in specific terms declare that such contract may be executed.**

**Sutton vs. United States (1921), 256 U. S. 575,
Hooe vs. United States (1910), 218 U. S. 322,
Chase vs. United States (1894), 155 U. S. 489, and
Bradley vs. United States (1878), 98 U. S. 104,**

are typical cases showing that this Court construes this matter strictly and never from a general authority to contract or to do a certain act conferred upon an executive official draws the conclusion that the policy of

Congress touching the limitation of projects by appropriation was intended to be overruled or an exception created.

Finally, what shall be said of the effect of the reimbursement provision so far as storage is concerned? The last proviso requires the appropriation of \$500,000 to be reimbursed from the proper appropriation on account of the use of the royalty oil. The appropriation of \$500,000 is itself an appropriation for the procurement of storage. Shall it be reimbursed from itself? Such a construction involves an absurdity and there is no absurdity whatever if we read the act in its natural meaning. If royalty oil is used to procure fuel oil which has been appropriated for by Congress then the fuel oil appropriation is to reimburse this \$500,000 appropriation. Such an operation is easily understood, but if royalty oil is used to procure storage by so-called exchange, pray how can the appropriation be reimbursed out of itself to the extent of the value of that storage?

The plain meaning of the act is that for any purposes comprehended within it where it was necessary to expend money, (and of course it would not be necessary to expend money in a sale of royalty oil or in an exchange of that royalty oil for other petroleum products for the use of the Navy), the limit of the money so to be expended, subject only to reimbursement out of fuel oil appropriations and similar appropriations, should be \$500,000. It will not do to claim that by the use of the innocent word "exchange" Congress has in some magic way increased this appropriation so that the Secretary of the Navy is no longer limited to the amount of \$500,000 in the storage he may provide, but may provide, without the consent of Congress, storage to the extent of half a hundred millions of dollars.

3. The contracts were violative of the law as to the location and establishment of fuel depots.

(Point V, Appellants' brief, p. 145.)

Admiral Robison has repeatedly stated, as we have above shown, that it was to avoid taking cash for royalty crude oil that the construction contracts were made. Accordingly the costly plan was adopted of making these construction and storage contracts, the consideration being payable in crude royalty oil. Although Admiral Robison realized that the power to construct such fuel depots lay within the exclusive province of Congress he decided not to go to Congress for authority to establish them. Consequently Congress has never approved of the fuel depots established under the contracts. These fuel depots form part of a building plan which called for the ultimate expenditure of approximately \$103,000,000, without reference to or consent of Congress.

The power to construct such fuel depots lay in Congress and not in the Secretary of the Navy. The following sections of the United States Constitution are important, namely:

Article I, Section 1, which provides:—

“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

Article I, Section 8, Clause 13, which provides:—

“The Congress shall have power * * * to provide and maintain a Navy.”

Article I, Section 9, Clause 7, which provides:—

“No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all Public Money shall be published from time to time.”

Article IV, Section 3, Clause 2, which provides:—

“The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”

The power to establish depots of coal and other fuel was delegated by Congress to the Secretary of the Navy under the Act of August 31, 1842 (5 Stat. 577), which Act later became R. S. 1552. That Act reads in part:—

“The Secretary of the Navy may establish, at such places as he may deem necessary, suitable depots of coal and other fuel for the supply of steamships of war.”

But this delegation of power was subsequently revoked by Congress by the Act of March 4, 1913, (37 Stat. 898) which provides:—

“Section Fifteen Hundred and Fifty-two of the Revised Statutes of the United States authorizing the Secretary of the Navy to establish, at such places, as he may deem necessary, suitable depots for coal and other fuel for the supply of steamships of war, is hereby repealed.”

The House Committee on Naval Affairs on reporting the bill containing this repealing provision (House Report, 62nd Congress, 3rd Session), stated:—

“The Committee recommends the repeal of Section 1552, Revised Statutes, which authorizes the Secretary of the Navy to establish coal depots without the supervision of Congress as to where the depots are to be located. Heretofore a large amount of money has been expended to establish coaling

stations which have since been abandoned, and the Committee deems it necessary to repeal the Statute in the interest of economy. An appropriation of \$500,000. for 'depots for coal and other fuel' to complete authorizations heretofore made, is recommended."

From the foregoing statutes and provisions of the Constitution, it is clear that Congress, and Congress alone, was empowered to select the sites of fuel depots for the Navy and to authorize their construction. That the Navy Department so understood matters is evidenced not only by the fact that commencing in the year 1914 it requested Congress for authority to establish fuel depots at certain specified places at certain specified costs, but also by the long list of Appropriation Acts from 1914 onward, wherein the various fuel depot projects are specifically mentioned and a separate appropriation is made for each.

The following excerpt from the Act of March 3, 1915, c. 83 (38 Stat. 928, 937), is typical:—

"DEPOTS FOR COAL AND OTHER FUEL: For additional fuel oil storage at Melville, Rhode Island, \$40,000; additional fuel oil storage at Norfolk, Virginia, \$90,000; fuel oil storage at San Diego, California, \$40,000; fuel oil storage at Puget Sound, Washington, \$80,000; fuel oil storage at Mare Island, California, \$80,000; fuel oil storage at Guantanamo Bay, Cuba, \$50,000; fuel oil storage at Pearl Harbor, Hawaii, \$80,000; custody and care of Naval Petroleum Reserves, \$10,000; contingent \$30,000; in all \$500,000."

A list of such Appropriation Acts follows:—

March 4, 1913, c. 148, 37 Stat. 891, 898; June 30, 1914, c. 130, 38 Stat. 392, 401; March 3, 1915, c. 83, 38 Stat. 928, 937; August 29, 1916, c. 417, 39

Stat, 556, 570; March 4, 1917, c. 180, 39 Stat. 1168, 1179; June 15, 1917, c. 29, 40 Stat, 182, 207 (a War Deficiency Appropriation Act); July 1, 1918, c. 114, 40 Stat. 704, 726; November 4, 1918, c. 201, 40 Stat. 1020, 1034 (a War Deficiency Appropriation Act); July 11, 1919, c. 9, 41 Stat. 131, 145; June 4, 1920, c. 228, 41 Stat. 812, 822; June 5, 1920, c. 253, 41 Stat. 1015, 1030; July 12, 1921, c. 44, 42 Stat. 122, 130.

The stipulation as to the testimony of Admiral Parks and certain members of Congress (R. II-682-5) shows that appropriations were asked by the Navy Department for "fuel depots" at the very points where these "fuel depots" are to be erected under the Pan American and the Mammoth contracts and leases, and that the Congress failed to make the appropriations. It is noteworthy that the minute the above scheme of evasion was perfected, the Navy Department ceased to knock at the door of Congress for appropriations for reserve "fuel depots."

Admiral Robison,—a witness called by the Appellants, and the personal representative of the Secretary of the Navy in charge of Naval fuel matters,—admitted under cross examination that the Pearl Harbor project was an extraordinary performance, entirely out of the ordinary; that usually before starting such a project, the Navy asked Congress for an appropriation for a fuel depot to be erected at a particular place, but did not do it here; that because they feared trouble from Congress or some member thereof, they kept their silence (R. III-1061, 1074).

In addition, both Admiral Robison and Admiral Gregory (R. II-576; III-1082-3) testified that the Pearl Harbor project was but the first step in a fuel depot building plan, which had never been referred to Congress

and which called for the ultimate expenditure of approximately \$103,000,000 (R. II-545, 560; III-1103-4).

Counsel open their defense of the establishment of fuel depots under the contracts of April 25 and December 11, 1922, without the prior consent and approval of Congress, by referring to the repeal of R. S. 1552 by the Act of March 4, 1913; and then state that counsel for the Government are directing the attention of this Court to a situation where no statute at all existed, instead of a situation where an affirmative statute containing specific provisions exists (Appellants' brief, pp. 145-46). This contention overlooks the fact that upon the repeal of R. S. 1552, the exclusive authority to locate and establish fuel depots was re-vested in Congress by virtue of the above quoted sections of the Constitution. What stronger situation could there be than that fixed and determined, as here, by constitutional provisions?

Section 1552 would hardly have been passed if the Secretary of the Navy had power to establish fuel depots without it. If Congress intended in 1920 to re-vest him with this power, it would have been by terms definite and certain. It cannot be assumed that this power thus first conferred, and then taken away, would be re-vested in the Secretary of Navy by the confessedly uncertain language contained in the Act of June 4, 1920, whose primary purpose was the conservation of the reserves.

Appellants also argue (Appellants' brief, p. 145 ff.) that a fuel depot is coterminous in meaning with a navy yard or a naval station. Congress has always authorized fuel projects under the phrase "Depots for coal and other fuel." A glance at the appropriation acts will demonstrate this. It is the uncontradicted evidence in this case by those competent to speak

accurately and technically, that the Pearl Harbor projects covered by the contracts of April 25th and December 11th constituted complete fuel depots.

Admiral Robison, Chief of the Bureau of Engineering of the Navy and Admiral Gregory, Chief of the Bureau of Yards and Docks of the Navy, both of whom certainly ought to be competent to speak authoritatively, testified that the contracts called for the erection of complete fuel depots. (R. II-576; III-1082-3.) When the contracts were in contemplation, Admiral C. S. Williams, President of the War College and Director of War Plans of the Navy wrote of the scheme: " * * * it operates to create reserve fuel storage, the construction of which has not been specifically authorized by Congress." (R. III-1058.)

Compared with this expert opinion, we submit that counsel's labored attempt to prove the contrary is not convincing.

Counsel for the Appellants observe that if these new tanks, built, as they claim, as an addition to an existing fuel depot, could not have been constructed without the prior express approval of Congress as to their location, then the Secretary of the Navy could not even have used any part of the \$500,000 general appropriation contained in the Act of June 4, 1920, **for the construction of a storage tank at any place whatsoever**, etc. (Appellants' brief, p. 151.) Such an observation arises from the failure to recognize that a fuel depot is something more than a storage tank. If reference be had to page 240 of their brief, it will appear that a storage tank is but one of many integral parts of a fuel depot. It must be remembered that over one third of the cost of the contract of April 25th is traceable to those other integral parts such as wharfage, bunkering facilities, channel dredging, embankments, pipe lines, pumping

houses, and the like. It should be further remembered that both Admiral Gregory and Admiral Robison testified without contradiction that the storage facilities constructed under the instant contract constituted complete fuel depots; and in so denominating the Pearl Harbor storage facilities, they clearly had in mind the many integral parts of a fuel depot. In fact, Admiral Gregory had testified at length as to these non-tankage features of the Pearl Harbor project.

Nor does it matter, in our judgment, whether the transaction be construed into an enlargement costing millions of dollars, of an existing fuel depot, or the building of a brand new one. It is too plain for argument that where the sole power to establish a fuel depot, or, as Appellants prefer to style it, a naval station, lies in Congress, there is no power without Congressional action, in the Secretary of the Navy, to enlarge or rebuild such depot or station. To hold otherwise would be to subvert the whole theory upon which the division of powers in our Government rests. It would be to give to administrative officers a roving commission to purchase land and to erect structures thereon for the use of the Government without the consent of Congress for the operation.

Finally it matters not one whit whether these depots were desired for reserve fuel or for current use fuel. In either case they would be fuel depots.

4. The contracts of April 25 and December 11, 1922, were not made by advertisement and competitive bidding, as required by law.

(Points VI and VII, Appellants' brief, pp. 152 and 161.)

The contract of April 25, 1922, apart from the preferential right clause, was distinctly a contract for the procurement by the Navy Department of fuel (a supply)

and the building of tankage for said oil, which construction work certainly constituted the furnishing of supplies and of services other than personal services. We do not care whether the delivery of royalty crude oil from the naval reserves is to be treated as a sale of that oil to the Transport Company, or payment of that oil by the Government to the Transport Company, or whether the transaction be treated as the acquirement by the Government of fuel oil storage tankage by purchase or by exchange.

The Government contends for a narrower, the Appellants for a broader construction of the words "store" and "exchange" which are used in the Act of June 4, 1920. But whether the Court shall adopt the one or the other, or some different construction of these words, the true question is, does this act repeal or suspend the statutes relating to competitive bidding.

Clearly they are not expressly repealed or suspended. What language is there in this act which can be held to repeal by implication the competitive bidding statutes? What reason can be urged for such construction? Were not the dangers apprehended by Congress at the time these statutes were passed present when the Act of June 4, 1920 was adopted?

In any aspect of the situation R. S. 3709 applies to the situation. That statute is as follows:

"R. S. Sec. 3709; Act March 2, 1861, c. 84, Sec. 10, 12 Stat. 220; (Sec. 6174 Barnes Code, page 1492).

"All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by

the public exigency, the articles or services required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

It will be noted that the statute not only covers all purchases, but all contracts for supplies or services. Do the Appellants say that the statute does not cover exchange contracts? It does not say so. Its language could not be more inclusive. It was upon the statute books long before the Act of June 4, 1920, was passed. Why is it claimed that it does not apply to the procurement of fuel oil, or the procurement of storage by the Navy?

Appellants say that the Act of June 4, 1920, was a remedial statute. Let us for the purpose of the argument grant that this is so. Appellants' own argument is to the effect that it was to remedy the inability of the Navy to get the benefit of the royalty oil which was running from leases in naval reserves, and which, therefore, had to be sold for cash and the proceeds turned into the Treasury as miscellaneous receipts, thus depriving the Navy of the use of those proceeds unless and until Congress had appropriated the same. If that was the matter to be remedied the remedy certainly did not require that when the Navy procured fuel oil or storage tankage it should not be bound to get the best deal it could by public competition, but the Secretary be handed a roving commission to make private contracts for such things.

Do they rely on the use of the words "in his discretion" in the act? It will be noted that that phrase is applied to the words "conserve, develop, use and operate" the reserves and does not either in sense or by collocation apply to the power to "use, store, exchange or sell" the oil and gas products of the reserves. Let us con-

cede, however, that the use of the words "use, store, exchange or sell" gives the Secretary the discretion to do **any one of those things**. What is the necessity for saying that the grant of that discretion revoked a plain act of Congress which said to the Secretary that when he made contracts for the procurement of supplies or services other than personal services he must do so by competitive bidding? No argument that is not forced and strained can possibly torture the act of June 4, 1920, into a repealer of the general law applicable to contracts for supplies and services. R. S. 3709 has been repeatedly construed.

United States vs. Purcell Envelope Co., (1919), 249 U. S. 313, was an action for damages for breach by the United States of a contract for the purchase of envelopes. The Postmaster General advertised under R. S. 3709 for bids for furnishing stamped envelopes and newspaper wrappers for a period of four years beginning October 1, 1898. The envelope company submitted the lowest bid in answer to the advertisement, which bid was accepted. A contract in quadruplicate was sent to the envelope company for execution, was signed by it and returned to the department. The department never executed the contract and the succeeding Postmaster General cancelled the same. Upon learning that the Postmaster General intended to readvertise for proposals the envelope company brought an action to enjoin him from so doing. The bill was dismissed upon the ground that there was an adequate remedy at law. The department declared the existence of an emergency under R. S. 3709 and accepted the offer of another envelope company without competitive bidding, and entered into a contract in accordance therewith.

The Court of Claims rendered judgment for the envelope company. The Court of Claims (**51 Ct. Cls.**

211, 1916), in discussing the sufficiency of the advertisement, said (p. 214):

"This Court has held, except in certain cases of emergency, that all contracts between individuals and the Government are void, unless they are made upon advertisements for proposals previously published, and that a compliance with such statutes is a condition precedent, upon the performance of which only can a binding contract with the Government be made by its officers. **It acts by its public officers, and their powers and duties are prescribed and limited by laws which they must follow.**"

In affirming the judgment of the Court of Claims this Court held that the contract had been completed by the acceptance of the bid and that it was not necessary that it be formally executed by the Government, and that the succeeding Postmaster General had no discretion to revoke it. It was argued that the action of the Postmaster General was quasi-judicial and that he had the right to review and set aside the decision of his predecessor, since the contract was not consummated.

Mr. Justice McKenna held that the procedure under R. S. 3709 was mandatory and not permissive, in spite of the broad power of the Postmaster General, and that upon accepting the bid of the envelope company any discretion in the Postmaster General ceased (page 318).

"In the present case it is insisted his action is not so subordinate, that he has discretion, and when exercised, it is paramount, his action being 'quasi judicial,' the contract not having been consummated, and that, therefore, it was within his power to review and set aside the decision of his predecessor. We are unable to concede the fact or the power asserted to be dependent upon it. There must be a point of time at which discretion

is exhausted. The procedure for the advertising for bids for supplies or services to the Government would else be a mockery—a procedure, we may say, that is not permissive but required (Section 3709, Rev. Stats.). By it the Government is given the benefit of the competition of the market and each bidder is given the chance for a bargain. It is a provision, therefore, in the interest of both Government and bidder, necessarily giving rights to both and placing obligations on both."

United States vs. Ellicott, (1911), 223 U. S. 524.

This was a suit to recover damages from the United States for the abrogation of a contract. The Isthmian Canal Commission, by advertisement and specifications, invited proposals for six steel dump barges, and in response thereto the claimants submitted two bids, the second one of which changed the weight of the framing and the plates from that set forth in the specifications. The general purchasing officer for the Commission, after examining the bids, submitted a draft of contract to the claimants. After several changes a contract was executed and signed by both parties based upon the second bid. Subsequently the claimants submitted a list of materials to be used in the construction of the barges, and the Isthmian inspector then discovered that the barges which the claimants proposed to construct differed from the specifications and the circular letter inviting proposals. The Commission disapproved the list of materials and demanded that the claimants adhere to the original specifications. This the claimants refused to do and the contract was thereupon abrogated by the Commission. Suit was commenced in the Court of Claims and judgment was rendered against the United States for anticipated profits and gains.

Upon appeal to this Court it was argued by the Solicitor General that the contract was let under R. S. 3709 and that the Commission was without authority to enter into a contract for dump barges of a radically different type from those originally specified unless and except the Commission readvertised for proposals. **Counsel for the claimants contended, however, that there was no statute requiring the Isthmian Canal Commission to advertise for bids and to award the contract to the lowest responsible bidder.**

In other words, the claim was there, just as it is here made, that the Canal Act superseded the general law on the subject of competitive bidding. This Court reversed the judgment of the Court of Claims and held that there was no valid contract, for the reason, *inter alia*, that it had been let without competitive bidding.

Chief Justice White delivered the opinion of the Court, and in discussing the question of readvertisement said (pp. 542-3):

“This result of the absolutely antagonistic and destructive character of essential provisions of the contract, one upon the other, can only be escaped by indulging in one of two hypotheses, either that the terms of the advertisement and specifications as incorporated in the assumed contract overshadowed and virtually destroyed the proposals resulting from the bid of the claimant, which also was incorporated in the contract, or conversely that the proposals which the bid embraced had the effect of setting at naught the provisions of the specifications. But if the first assumption were indulged in, it would clearly result that there was no right to recover, since that right is based upon the theory that the specifications are not binding and need not be complied with; and if the second were indulged, the same result would follow, since it would then come to

pass that the contract was so irresponsible to and destructive of the advertised proposals as to nullify them, **and therefore cause it to result that the contract was one made without the competitive bidding which was necessary to give it validity."**

Nothing can be clearer than that there was not even competition, let alone advertisement for the contract of December 11, 1922. Nothing can be clearer than that although there was a sort of illusory competition for the contract of April 25, 1922, there was no advertisement, and in essence there was no competition. We shall not burden the Court with any lengthy argument to demonstrate that the award of the contract of April 25, 1922, did not conform to the law as to competitive bidding, leaving out of account entirely the fact that there was no advertisement. We have above quoted quite fully from *United States vs. Ellicott* and that case is a full authority that where a contract is let on different terms than those contained in the advertised proposal, such letting is destructive of competitive bidding and violates the act. Again and again it has been held that any material departure in the contract awarded from the terms and conditions under which the bidding is had renders the contract in a sense a private one, opens the door to favoritism and to the defeat of that which the law intended to safeguard in requiring contracts to be let upon bids and after advertisement.

Inge vs. Mobile (1902), 135 Ala. 187.

Wickwire vs. Elkhart (1895), 144 Ind. 305.

Shaw vs. Trenton (1887), 49 N. J. L. 339.

Chippewa Bridge Co. vs. Durand (1904), 122 Wis. 85.

People vs. Board of Improvement (1870), 43 N. Y. 227.

Mazet vs. Pittsburgh (1890), 137 Pa. 548.

A number of the above cases are authority for the proposition that where alternatives in the bidding are

permitted such permission of alternatives must clearly define the nature of the alternatives. Otherwise the bidders are not on an equal basis. As we have above pointed out, the invitations for proposals for the first Pearl Harbor job did permit certain alternatives which were clearly defined and of which some of the parties availed themselves, but there was no suggestion that an alternative proposal would be entertained which involved a preferential right to future leases in Naval Reserve No. 1. This is entirely apart from the other proposition of the fraud which entered into the making of the contract of April 25, 1922, on the basis of which the Court found that the officials most nearly concerned with the making of that contract knew that there would not be any real competition before the bids were opened. That, however, goes to an entirely different point. That might have been true even if the proposals were advertised and bids submitted pursuant to the advertisement. What we are now arguing is that as a matter of law the Navy Department was required to advertise for proposals and to permit all bidders to bid on an equal and even basis without unspecified alternative bids and to award the contract only on bids that conformed to the invitations. In all these respects the awarding of the contract of April 25, 1922, was wholly without authority of law and in the teeth of express statutory provision. There was no advertisement and not even a pretense of competition for the December 11th contract. Plainly, therefore, the United States is bound by neither of them, and no rights of any kind can flow from them in favor of the Appellants.

In the Courts below Appellants strenuously contended that the contract of April 25, 1922, was in fact

let upon competitive bidding, and that as the contract of December 11, 1922, was merely "supplementary" thereto it was not required to be so let. These untenable positions they have now wholly abandoned. They have substituted two others equally untenable.

The first is that an "exchange contract" cannot be let by competitive bidding. (Appellants' brief, p. 152.) This is merely to deny the obvious facts. If one has a quantity of a commodity which he wishes to exchange for various other commodities he can frame an invitation whereby the bidder will tell him how much (in units—or in bulk) of that commodity the bidder will require as payment for what he proposes to furnish. Moreover, the impassable difficulty which Appellants now perceive is of recent creation. It apparently was not sensed when the invitations to bidders for the contract of April 25, 1922, were issued. Competition, it is true, was absent in the bidding for that contract, but merely because of favoritism and the acceptance of alternative bids not contemplated by the invitation for bids. But true competition could have been secured.

The second position now taken is that R. S. Sec. 3728 which gives the Secretary of the Navy power in purchasing fuel "to discriminate and purchase, in such manner as he may deem proper, *that kind of fuel which is best adapted for the purpose for which it is to be used,*" does away with the necessity for purchasing fuel by competitive bidding. (Appellants' brief, p. 153.) The argument is seriously made that this discretion given to select one kind of fuel rather than another gives the Secretary the right to purchase that kind from one seller by private negotiation without advertisement or competition. The argument answers itself.

5. The Act of June 4, 1920, did not repeal or supersede prior general statutes on fuel depots, competitive bidding, Government contracts, and the sale of Government property.

Appellants contend that the statutes we quoted on the subjects mentioned, have no application to the contracts of April 25 and December 11, 1922. They are chary of claiming that the Act of June 4, 1920 "repealed" those earlier and general statutes by implication. We are not sure that they would even aver that the Act of June 4, 1920 "superseded" these earlier general statutes. They apparently attempt to evade the applicability of the several statutes by an argument that the Act of June 4, 1920 is a special act, and as such is complete in itself, and that the actions of the Secretary of the Navy thereunder are not limited by any general legislation whatever applicable to any acts or conduct which he may be called upon to perform under the Act of June 4, 1920.

However the matter is expressed, we contend that these general statutes are applicable. Unless the Act of June 4, 1920 in some way affected these prior statutes, those statutes are the law of this case. They are on the statute books; they are pertinent, and in and of themselves they admit of no exception within which this case falls.

The argument that they are inapplicable to this case can be predicated only upon some principle of nullification of a prior statute by a later statute. This is usually denominated a repeal, either total or partial. If instead of using the term "partially repealed" the term "superseded" is preferred, we have no quarrel with the terminology, provided it is clearly perceived that the effect is the same, namely, a *pro tanto* nullification of a prior statute by a later one.

We are familiar with nullification by express repeal. We are also familiar with the principle that where there is a repugnancy of terms, or an inconsistency between earlier

and later statutory provisions, the latter provision prevails over the former. There is no question of express repeal in this case. We understand the principle of statutory construction to be then, that the earlier statutes are not affected by any later enactment unless repugnancy or inconsistency exists.

Wherein is the Act of June 4, 1920, inconsistent with the earlier statutes herein referred to? In the Act of June 4, 1920, we find no mention whatsoever of fuel depots. They simply are not there. There is nothing either positive or negative about them. Moreover, we find nothing in the Act of June 4, 1920, that is inconsistent with R. S. 3709 requiring advertising and competitive bidding in the letting of Government contracts. We search the Act of June 4, 1920, in vain for anything inconsistent with the statutes forbidding the making of contracts to bind the Government beyond the amount appropriated therefor, unless otherwise specifically provided, or anything inconsistent with the statutes that make it obligatory to turn into the Treasury all proceeds of sales of Government property.

In truth, there is no inconsistency. There is no need to invoke the principles of statutory construction. There is nothing to construe, because all of the acts harmonize and fit together.

The very reason for the enactment of a general statute requiring advertising and competitive bidding for Government contracts is to insure those things being done **in all cases**. Such a general statute finds its utility in those instances where the authorization of a particular contract is silent on the subject. If Congress authorizes a building to be put up, or certain materials to be contracted for, R. S. 3709 provides how the contract is to be entered into. The same observations are pertinent with regard to the statutes about fuel depots, and other statutes herein referred to governing Government contracts and the sale of Government property.

**Great Northern Ry. Co. vs. United States,
(1908), 208 U. S. 452.**

This Court was called upon to determine the effect of Section 13 of the Revised Statutes upon later provisions of the Hepburn Act. Section 13 of the Revised Statutes prescribes general rules which are to govern particular cases as they arise. In stating the opinion of the Court, Justice, later Chief Justice, White, said at page 465:

"As the section of the Revised Statutes in question has only the force of a statute, its provisions can not justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. **But while this is true the provisions of Section 13 are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of Section 13.**"

The decision in the case was to the effect that full force should be given to Section 13, there being nothing necessarily to the contrary in the later statute.

**Erie Coal & Coke Corp. vs. United States,
(1925), 266 U. S. 518.**

The Secretary of War had entered into negotiations to sell surplus supplies as authorized by the Act of July 11, 1919. That Act authorized the Secretary of War to sell "upon such terms as may be deemed best." A proposal was submitted after advertisement to the Secretary of War, but he refused to enter into a written contract upon the basis of the pro-

posals received. R. S. 3744 required all Government contracts made by the Secretary of War to be in writing.

The close analogy of this case arises from the fact that the Act of July 11, 1919, was special in its scope and subject matter, because it applied only to the sale of surplus war supplies. The act also purported to vest discretion in the Secretary of War. Nevertheless this Court held that the Act of July 11, 1919, did not in any way modify the earlier general statute. Mr. Justice Butler speaking for the Court, stated at page 521:

"Moreover, Sec. 3744, Revised Statutes, required the Secretary of War to cause every contract made by him, or by officers under him appointed to make contracts, 'to be reduced to writing, and signed by the contracting parties with their names at the end thereof.' The Act of July 11, 1919 authorizing the Secretary to sell surplus war supplies, is not inconsistent with that section and does not repeal or modify it. There is no reason why it should not apply to contracts made in pursuance of the later act. It must be held that, because of the failure to make and sign a written contract as required by Sec. 3744, the United States was not bound."

United States vs. Barnes, (1911), 222 U. S. 513.

The question arose as to whether a later statutory enactment of restricted scope and subject matter modified, superseded or prevented the application of earlier general statutes. In holding that it did not the Court said, at page 520:

"Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it

an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears."

See also:

- Robertson vs. Railroad Labor Board**, (1925), 268 U. S. 619;
In re: East River Co., (1924), 266 U. S. 355, 367;
United States vs. Sweet, (1917), 245 U. S. 563;
Panama R. R. Co. vs. Johnson, (1924), 264 U. S. 375;
United States vs. Greathouse, (1896), 166 U. S. 601, 605;
Ex Parte Webb, (1911), 225 U. S. 663, 690;
Washington vs. Miller, (1914), 235 U. S. 422;
Bookbinder vs. United States, (1923), 287 Fed. 790, (C. C. A. 3),
(*Certiorari denied* 262 U. S. 748);
Witte vs. Shelton, (1917), 240 Fed. 265, (C. A. 8),
(*Certiorari denied* 244 U. S. 660).

The reasoning of the Apellants on this subject is indeed strained. They first attribute a sweeping scope to the Act of June 4, 1920. They would have this Court enter the realm of judicial legislation and hang a whole legislative code upon one or two words. Then they would have the Court, after attributing great breadth and generality to the provisions of the Act of June 4, 1920, call it a special act, and find it inconsistent with earlier general acts. As we have pointed out, the alleged inconsistency is a figment of the imagination. The earlier acts and the Act of June 4, 1920, are completely harmonious. The Chief Justice has pointed out the fallacy of this argument in the recent case of

United States vs. Noce, (1925), 268 U. S. 613.

In that case an Army officer claimed longevity pay on the basis of his services as a cadet at the United States Military Academy. He relied upon a proviso of the Act of 1920:

"That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey, shall be based on the total of all service in any or all of said services."

Earlier Acts of 1912 and 1913 had provided that services at the Military or Naval Academy should not be counted in computing longevity pay. At page 618 the Chief Justice said:

"It is, indeed, very difficult to say that there is any real inconsistency between the proviso of 1920 and the Acts of 1912 and 1913. It is supposed to be shown in the use of the words 'any or all the services,' and it is said that as 'any' may mean one or more, it may apply to the Army alone, and can only be satisfied by making it apply to the total service in the Army alone, and must therefore mean service in the Army as construed by this court in the Morton Case and the Watson Case, in which it was held that under then-existing legislation, service in the Military Academy was service in the Army. **This, it seems to us, is a strained method of first finding an inconsistency by no means clear, if it exists at all, and then erecting it into an implied repeal. Implied repeals are not favored.** United States v. Greathouse, 166 U. S. 601, 605; Frost v. Wenie, 157 U. S. 46, 58; United States v. Yuginovich, 256 U. S. 450, 463."

The very cases upon which Appellants rely (pp. 157-158) are examples of the rule that statutes should be harmonized where this is possible.

6. The provisions of the contracts and leases constituted an illegal attempt to delegate the power conferred upon the Secretary of the Navy by the Act of June 4, 1920.

(Point X, Appellants' brief, p. 244.)

(a) The Executive order of May 31, 1921.

The Trial Court held that the Executive order, so far as it attempted to transfer the administration of the reserves to the Secretary of the Interior and pass over to him discretionary powers vested in the Secretary of the Navy, was void and of no effect. We understand that counsel for Appellants concur in this view. If, therefore, purporting to act under the Executive order, Secretary Fall had made contracts and leases in an attempt to do the very things entrusted to the Secretary of the Navy by the Act of June 4, 1920, his acts would have been void. Anyone dealing with him would have been on notice of his utter lack of power, and the contract taken from him and containing his signature would have been of no more value than a worthless piece of paper.

Having in mind that the President of the United States had no power to transfer the administration of the naval reserves from the Navy Department, where Congress, the custodian of the public lands, had placed it, into the Interior Department, where Congress had not placed it, let us see what situation arises as a result of the contracts made.

It will, we suppose, be admitted that the "use, storage, sale or exchange" of naval royalty oils and the leasing of lands in the naval reserves was committed solely to the Secretary of the Navy by the Act of June 4, 1920. We suppose it will not be denied that the duty and function of contracting for fuel oil for the Navy and for construction of wharves, docks, tanks, etc., constituting a fuel depot, belongs exclusively to the Secretary of the Navy. We suppose

that no contractor would be aided by a court to enforce his contract if he made a contract for fuel oil for the Navy or for storage facilities for naval oil, with the Secretary of State or the Secretary of Commerce. The court, we take it, would simply say that no contract existed.

We assume that the Appellants would not argue in such a case that the action of the Secretary of State or the Secretary of Commerce **estops** the United States to denounce the contract, to refuse performance of it, and if any moneys or property of value of the United States had passed into the possession of the contractor, to prevent the United States from recovering its property.

As we will demonstrate, this is the exact situation in this case.

(b) *Delegation of powers under the contract of April 25, 1922.*

By the contract of April 25, 1922 (Exhibit B of the bill, R. I-26) the Secretary of the Navy, a party to that contract, by solemn covenant purported to transfer the procurement of fuel oil and of storage tankage therefor, dredging, docking, etc., at the Pearl Harbor Naval Station to the Secretary of the Interior. He further purported by that contract to transfer the entire administration over half of Naval Reserve No. 1 and its leasing to the Secretary of the Interior.

In order that there may be no misunderstanding of our position, let us say that we definitely assert that the Secretary of the Navy did not turn over to the Secretary of the Interior ministerial powers. He put the Secretary of the Interior in the position of the contracting party, of one with absolute and complete power over the subject matter. Let us see if this statement is true.

By Article I (R. I-28) the Government agrees to accept as the penal bond required, the personal bond of Mr. Edward L. Doheny in the sum of \$250,000 but reserves the right to call

later for a corporate bond **"when and if in the judgment of the Secretary of the Interior such bond shall be deemed necessary or advisable, * * *."** Since when did the Secretary of one department acquire the power to leave it to the Secretary of another department to say what sort of security should be given by a contractor with the first named department?

By Article V (R. I-31) it is provided that if the production from the leases heretofore granted or hereafter granted in reserves Nos. 1 and 2 "decrease to such an extent that the time of this contract shall be unduly prolonged, then the Government will, **in the discretion of the Secretary of the Interior, grant additional leases on such lands as he may designate in naval petroleum reserve No. 1 as shall be sufficient to maintain total deliveries of royalty oil under this contract at the approximate rate of five hundred thousand barrels (500,000) per annum**"; so that the Secretary of the Interior by this clause obtains the sole power to determine the rate at which the consideration shall be paid to the contractor.

By Article XI (R. I-34) it is provided that if during the life of this contract future leases shall be granted by the Government within that portion of reserve No. 1 situated in Townships 30 and 31 south, range 24 east, Mount Diablo base and meridian, **"the contractor shall first be called upon by the Secretary of the Interior to meet such drilling conditions and to pay such royalties as the Secretary may deem just and proper, and in the event of his acceptance of such conditions and of his agreement to pay such royalties, the contractor shall be granted by the Government a preferential lease on such tracts as the Secretary of the Interior may decide to lease. In the event of the failure of the contractor to agree to the conditions and royalties as proposed by the Secretary of the Interior, then said lease or leases may be**

offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in said bidding." By this clause the Secretary of the Navy absolutely and completely surrenders all power over the territory mentioned to the Secretary of the Interior and deprives himself of the exercise of any discretion as to the amount to be leased or the terms of the leasing.

By Article XII (R. I-35) it is provided that if the contractor completes the construction of storage facilities for less than 3,197,086 barrels of "basic" crude oil the contractor will give the Government the benefit of the saving **"as determined by agreement between the contractor and the Secretary of the Interior by crediting such saving in barrels of basic crude oil on account of the proposal sum."** By this clause the Secretary of the Navy surrenders absolutely the right to determine the cost of the naval structures to be constructed and vests that power in the Secretary of the Interior.

By the terms of this contract the specifications are made a part of it. See Article I (R. I-27). These specifications were offered in evidence as Pl. Ex. 126, and so far as material are summarized in the Record at page 425. The provisions which are important are as follows:

The paragraph numbers refer to the paragraphs of the specifications as they appear in Plaintiff's Exhibit 126 (R. I-425ff).

Par. 12 Before commencing installation of any work the contractor shall submit to the Secretary of the Interior for approval drawings showing complete details of all reinforced concrete, pump installations, shop details of tanks, etc.

Par. 132 Details of the foam fire protection system to be installed by the contractor shall first be submitted to and approved by the Secretary of the Interior before such installation.

- Par. 210 The successful bidder will be the party of the first part to the contract and will be known as the contractor, **and the Secretary of the Interior will be the party of the second part and known as the Government.**
- Par. 215 The work will be under the general direction of the Secretary of the Interior * * * appeals may be made to the Secretary of the Interior.
- Par. 225 Applications for extension of time on the part of the contractor must be made to the Secretary of the Interior through the officer in charge and the contractor agrees to accept the decision of the Secretary of the Interior as binding.
- Par. 227 In ascertaining liquidated damages which the contractor must forfeit by reason of delays, the Secretary of the Interior will determine what delays in the receipt of materials by the contract were unavoidable and therefore excused. A certified copy of the contractor's record of orders for materials must be made available to the Secretary of the Interior in determining the above question.
- Par. 229 The Secretary of the Interior may declare the contract null and void if it evidently cannot be completed within the prescribed time, or if the contractor commits a breach thereof. If the contract is annulled a board of U. S. officers shall determine the value of the work done by the contractor, plus a reasonable profit allowable thereon. The Secretary of the Interior has the right to approve such findings and to approve the inventory which the board shall prepare of materials, tools, etc., belonging to the contractor, which said findings and inventory when so approved will be conclusive in an accounting between the parties. If the work is thereafter completed by the Government, the cost of completing same shall be determined, and when approved by the Secretary of the Interior shall also be binding upon the parties.
- Par. 230 The Government reserves the right to make changes in the plans, specifications and contracts, and the cost of such changes when approved by the

Secretary of the Interior shall be added to or deducted from the contract price. The contractor agrees to proceed with such changes as directed in writing by the Secretary of the Interior.

- Par. 231 The contractor's claims for extras will be referred to the Secretary of the Interior for approval and the finding of the secretary shall be conclusive.
- Par. 236 Any violation of the eight-hour day law coming to the notice of Government officers will be reported to the Department of the Interior for such legal action as may appear warranted.
- Par. 237 Special or detailed plans, whenever it is necessary for the contractor to prepare them, must be submitted to the officer in charge or to the Secretary of the Interior, as may be directed, for approval.
- Par. 241 If conditions at the site of the work are discovered to be different from the plans and specifications, a report shall be made to the Secretary of the Interior, who will determine whether a change in the contract price is to be made. If made, it will be adjusted as per paragraph 230.
- Par. 255 Before the first payment is due the contractor must furnish to the officer in charge a schedule of prices of materials. This will be forwarded to the Secretary of the Interior and after his approval will govern the preparation of monthly estimates.
- Par. 256 Monthly vouchers covering all work done and materials furnished during the month shall be prepared by the officer in charge, certified by the contractor, and "forwarded to the Secretary of the Interior for approval and for crediting on account toward the delivery of the proper amount of oil in accordance with the terms of the exchange." The final payment shall not be made until the contractor shall deliver a release of all claims against the Government in such form as shall be approved by the Secretary of the Interior.
- Par. 258 The contractor shall furnish to the officer in charge, for the information of the Secretary of the Interior, statements showing the substance of all subcontracts.

- Par. 259 Bids must be accompanied by certified checks payable to the Secretary of the Interior as a guarantee that the bidder will not withdraw his bid except with the approval of the Secretary of the Interior, and that if successful he will execute a contract and give bond satisfactory to the Secretary of the Interior, and will return the same to the Secretary of the Interior within ten days after forms are furnished to him.
- Par. 265 Prospective bidders are requested to report to the Secretary of the Interior for correction or interpretation before the date of opening of bids, any errors or omissions which they observe in the drawings and specifications.

If anything more were needed to convince that the Secretary of the Navy laid down every power in him vested by law, these provisions of the specifications would seem to be conclusive. The Secretary of the Interior is even made by the contract the party of the second part and known as the "Government." Wherever, therefore, in the contract or in Proposal B on which it was based, and which is copied at R. I-36, the word "Government" appears in any matter of covenant with the Government, the words "Secretary of the Interior" must be read in place of the words "the Government," and it thus appears that Secretary Fall was, by the contract, given all power of every kind. Under this all-inclusive clause Secretary Fall had all and every power, but lest there should be any mistake about the matter, every conceivable thing which an owner, acting in his own right, would desire by contract to reserve to himself by way of discretion or power, is, by the clauses of the specifications, reserved not to the Navy Department, not to Secretary Denby, but to Secretary Fall.

(c) *Delegation of powers under the contract and lease of December 11, 1922.*

At the trial we heard much from Appellants of the argument that this contract was merely a "supplementary" con-

tract to the contract of April 25, 1922. Now we learn from Appellants' brief that it is a brand new contract. It is interesting, however, in the light of this averment, to read its preambles. They appear on page 41 of the Record.

The first of them recites the contract of April 25, 1922.

The second recites the desire to fill the tanks under construction and to procure additional amounts of fuel oil in storage at Pearl Harbor and that the Secretary of the Navy **"has requested the Secretary of the Interior as administrator of the naval petroleum reserves to arrange for such additional fuel oil and other petroleum products in storage * * *"**

At the middle of page 42 of the Record this recital appears, **"And, whereas under the terms of said contract of April 25, 1922, contractor is granted preferential right to leases to certain lands in naval reserve No. 1 on such terms and conditions as may be determined by the Secretary of the Interior."**

Let us now inquire what it is the contractor agrees to do. We find in paragraph 1 of the contract (R. I-43): "Provide the fuel oil required to be furnished under said contract of April 25, 1922, and to fill the storage tanks therein called for when and as directed by the **Secretary of the Interior.**" The contractor then goes on to covenant to construct fuel oil storage and furnish certain storage for fuel oil in its own tanks, and to sell the Navy certain products; and the Government on its part agrees to deliver its royalty oils to the contractor in payment for the things the contractor is to do and to continue to deliver such oils for a period of fifteen years, payment by the contractor to be by delivery of fuel oil, petroleum products, construction of additional storage facilities, or in cash, as the Government may at the time elect. The Government then agrees to make the lease to the unleased portions of Reserve No. 1. The specifications attached to this contract provide *inter alia* as follows:

"States that the specifications which form a part of the contract No. 4800 are prepared by the Chief of the Bureau of Yards and Docks 'under authority of the Acting Secretary of the Interior as given in his letter dated May 5, 1922 * * *.'" (R. I-429.)

It may be well in this connection to call the Court's attention to the terms of the letter of May 5, 1922, (Pl. Ex. 129) mentioned in the specifications. It is copied in Volume I of the Record at page 433, and reads in part as follows:

"The Department of the Interior shall retain direct control of the oil business involved in this contract; in other words, of the first part of the contract mentioned above.

"The Chief of the Bureau of Yards and Docks, Navy Department, Admiral L. E. Gregory, is designated as the representative of the Secretary of the Interior in handling the second part of the contract as noted above. This involves, first, all technical matters in connection with the plans and specifications for storage, and which in its general phases can be most expeditiously handled in Washington; second, the supervision of construction work in the field at Pearl Harbor; and third, the receiving of the oil at Pearl Harbor from the tankers and placing same in tank storage as it becomes available under this contract until such time as the completed plant shall be turned over to the Government.

"The Secretary of the Interior expressly reserves at all times the right to recall the foregoing representative and to designate a successor from the Navy Department as his representative. The right of the contractor to appeal to the Secretary of the Interior, as provided in the contract, is not affected hereby. Notice of any appeal by the contractor from the decision of the officer in charge of the work and the reasons therefor shall be forwarded promptly, being routed through the commandant and the Chief of the Bureau of Yards and Docks on their way to the Secretary of the Interior."

The specifications further contain the following provisions:
(R. I-429ff.)

"Before installing any work the contractor shall submit to the Secretary of the Interior for approval drawings showing complete details of all reinforced concrete, pump installations,' etc.

"Work shall be under the general direction of the Secretary of the Interior. Appeals may be made to the Secretary of the Interior.

"Applications by the contractor for extensions of time are to be transmitted by the officer in charge to the Secretary of the Interior for action. Failure of the contractor to submit such applications within thirty days of the happening of a cause of delay may be construed by the Secretary of the Interior as a waiver by the contractor of his right to an extension. Decisions of the Secretary of the Interior on applications are to be conclusive.

"In ascertaining liquidated damages for delays, the secretary will determine what delays in the receipt of materials by the contractor were unavoidable and therefore excused. A copy of the contractor's records of orders for materials must be made available to the Secretary of the Interior.

"The Government reserves the right to make changes in the contract, etc., and the contractor agrees to proceed with same as directed in writing by the Secretary of the Interior.

"Violations of the eight-hour day law are to be reported to the Department of the Interior for such legal action as may be deemed warranted.

"Whenever it is necessary to prepare special or detailed plans, copies of same must be submitted for approval to the officer in charge or to the Secretary of the Interior, as may be directed.

"If changed conditions are encountered during the work, a report of same will be submitted by the officer in charge through official channels to the Secretary of the Interior, 'who will decide what changes are to be made.'

"Before the first payment is due the contractor must furnish to the officer in charge a schedule of prices for all work covered by lump sum subcontracts. This will be forwarded to the Secretary of the Interior, and after his approval will govern preparation of monthly estimates.

"As soon as the contractor has executed any subcontracts he shall furnish a statement showing substance of same to the officer in charge for the information of the Secretary of the Interior."

Appellants make reference on page 246 of their brief to the admission made by counsel for the plaintiff in the Mammoth Oil case, that the delegation of the right to consent to an assignment or a termination of the lease involved in that case, which delegation conferred said right upon Secretary Fall, did not necessarily render that lease void, but could be severed therefrom. From this admission counsel for Appellants infer that the duties involved in that delegation were regarded by us as non-discretionary. They then proceed to argue that it must follow that the various delegations of authority contained in the contracts herein involved were also non-discretionary and subject to be delegated. This argument entirely overlooks the fact that the admission made in the Mammoth case was not based in any way upon the discretionary character of the duties therein involved, but was based upon the principle that a provision in such an instrument inserted for the benefit of the lessee might, if found to be illegal, be stricken from the instrument without destroying its integrity.

We think it a fair statement from the above that no power of any kind is left in the Secretary of the Navy. He obviously cannot exercise powers of an owner towards the contractor doing work for such owner.

It will not do to suggest that what was transferred to the Secretary of the Interior were **ministerial duties**. It will not do to say that the Secretary of the Navy had to depend on somebody to look after the details of matters in his de-

partment and that he might just as well delegate the attention of these details to the Secretary of another department as to some one of his subordinates.

The answer is two-fold. In the first place the matters delegated to Secretary Fall by these contracts are not mere details. They constitute every reserved right and power that one of the contracting parties has. It is not merely the making of Secretary Fall an umpire or a referee in case of dispute. **It is making him, in effect, the owner and the contracting party.**

How easy it seems to counsel for Appellants airily to remark with a wave of the hand that the Appellants either did waive or would have waived all these illegal provisions; and that having gone ahead under these totally unauthorized and illegal contracts and placed property and done labor upon the lands of the United States it is too late for the Court to declare a rescission of the contracts **and that the United States is in effect estopped to have these contracts rescinded because forsooth they have been executed.** We submit that that is not the law.

(d) *The authorities.*

Filor vs. United States, (1869), 76 U. S. 45.

"The agreement or lease was, so far as the government is concerned, the work of strangers" (p. 48).

"The officers at Key West did not represent the United States, except in their military capacity, though assuming to do so. In signing the agreement, and in taking possession of the premises claimed by the petitioners they acted on their own responsibility. **Their unauthorized acts cannot estop the government from insisting upon their invalidity, however beneficial they may have proved to the United States.** If the petitioners are entitled to compensation for the use of the property they must seek it from Congress. The Court of Claims can award them none." (P. 49.)

Utah Power & Light Co. vs. United States, (1916), 243 U. S. 389.

"Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." (P. 408.)

"A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it." (P. 409.)

To the same effect:

Chanslor-Canfield Co. vs. United States,
(1920), 266 Fed. 145 (C. C. A. 9);
Jeems Bayou Club vs. United States, (1922),
260 U. S. 561.

(e) *There is no power to delegate.*

That there is no power in an official, in whom discretionary powers have been vested by law, to delegate them is well settled. That he cannot by contract lay them down or vest them in another is equally well established.

Mechem—Public Officers; Sec. 567:

"Judgment and Discretion can not be delegated.

It is a well settled rule in the case of private agents that where the execution of the trust requires upon the part of the agent the exercise of judgment or discretion its performance can not, in the absence of express or implied authority, be delegated to another. In such case it is presumed that the agent was selected because his principal desired and relied upon the agent's personal judgment and discretion, and unless authority to delegate it be expressly or impliedly given, the agent can not entrust the performance to another to whom the principal may be perhaps a stranger, and in whom he might not be willing to confide.

"This rule applies also to public officers. In those cases in which the proper execution of the office re-

quires on the part of the officer the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and unless power to substitute another in his place has been given to him he cannot delegate his duties to another. * * *

Sec. 568—**Mechanical or ministerial duties may be delegated.** Where, however, the question arises in regard to an act which is of a purely mechanical, ministerial or executive nature, a different rule applies. It can ordinarily make no difference to anyone by whom the mere physical act is performed **when its performance has been guided by the judgment or discretion of the person chosen.** The rule, therefore, is that the performance of duties of this nature, may, unless expressly prohibited, be properly delegated to another. Where, however, the law expressly requires the act to be performed by the officer in person, it cannot, though ministerial, be delegated to another. * * *

See: **San Francisco Gas Light Co. vs. Dunn**, (1882), 62 Cal. 580;

Brummett vs. Ogden W. W. Co., (1908), 33 Utah 285;

Oakland vs. Carpentier, (1859), 13 Cal. 540;

Mann vs. Richardson, (1873), 66 Ill. 481;

Mullarky vs. Cedar Falls, (1865), 19 Iowa 21;

Clark vs. Washington, (1827), 12 Wheat. 40;

People vs. Clean Street Co., (1907), 225 Ill. 470.

Appellants' counsel seem to concede these propositions of law, but to endeavor to escape them, by raising an estoppel against the Government, or by seeking to shred off the illegal provisions.

(f) *The authorities cited by Appellants.*

We have no quarrel with the authorities cited by Appellants at page 247 of their brief, on the question of delegation of authority. Appellants, however, contend that the

rule to be derived therefrom is "ministerial and executive duties may be delegated," and for this so-called rule rely primarily upon the case of *Cass County vs. Gibson*, 107 Fed. 363, and 7 Amer. & Eng. Encl. Law (2nd Ed.) 988. They fail to state the rule as qualified in the two foregoing authorities. We quote it here in full, italicizing the qualification which they omit:

" * * * But the usual limitation to the rule against the delegation of power obtains, and the board may delegate purely ministerial and executive duties, *the discharge of which does not call for the exercise of reason or discretion.*" (P. 369.)

At page 252 and following, Appellants cite certain authorities for the proposition that where a part of a contract is *ultra vires* the officer who made it, the other party to the contract, if the contract be divisible, may waive the *ultra vires* portion of it and call for performance of the balance. **What part, may we ask, of the contract of April 25th might the Transport Company have waived and called for performance of the balance?** We presume it would have had to waive the fact that the Secretary of the Interior was to all intents and purposes the Government under that contract. We presume it would have had to waive its preferential right. We presume it would have had to waive all the provisions in the specifications that **were intended not for its protection but for the protection of the Government.** A fine sight indeed to observe it waiving these things which bound it and were not for its benefit. We presume it would have waived the provision with regard to the bond it was to give. What, we ask, would be left of the contract? The same considerations apply to the contract of December 11, 1922.

But there is another answer to Appellants' authorities. It is this. Not a case cited by them deals with an unauthorized and illegal contract made by an officer of the

United States. Not a case cited by them touches the question whether a contract has any validity or existence at all which purports to vest discretionary administrative governmental functions in an officer other than the officer designated by act of Congress to deal with the subject-matter. The truth is that when the scope of the delegation of authority of the contracts of April 25 and December 11, 1922, is seen they are not in any proper sense of the word *ultra vires* contracts at all. They are contracts contrary to public policy, violative of the expressed will of the legislative branch of the Government and on their face utterly null and void.

Assume for a moment that the position asserted by the Appellants were to be accepted by this Court. The result would be this: If an officer wholly unauthorized to contract for the Government because the subject matter had by Congress been committed to some other department, made a contract and if that contract had been performed, or if the contractor could insist that the Government had come to no harm by it, the United States would be helpless to denounce the contract and vindicate its rights. We should soon have a situation where unauthorized Government officials were making contracts right and left, the contractors were hurrying them through to performance and the Government would stand helpless to stop the matter. This cannot be the law and Appellants do not cite a single case in support of their contention. The probability is that there are no cases in the books dealing with such a situation because we conceive that nobody has ever before had the hardihood to suggest this form of estoppel of the United States Government by the unlawful acts of its officials. The Trial Court held, and properly held, that these contracts were absolutely null and void. It held, and properly held, that the leases of June 5th and December 11th were made pursuant to these contracts and were inextricably tied up with them; that it would not do to strike down the contracts and leave the leases standing,

for such was never the intent of either of the parties to the contracts and it is too evident to require argument that the Court will not rewrite the contracts so as to give the Government something different from what its officers provided in the contracts. If it strikes them down it must strike them all down. If it sustains any of them it must sustain them all.

Counsel for Appellants, on pages 245ff. of their brief, attempt to dispose of this whole question of delegation of powers by an argument upon the alleged facts. It is argued that in fact the powers delegated by the contract of April 25th were not used; that, as concerns the construction of the storage plant at Pearl Harbor, naval officers (although nominally under the control of the Secretary of the Interior), in fact supervised the work; that as concerns the making of the lease of December 11, 1922, that lease was not made by Fall, or its making influenced or participated in by Fall under the power granted to him by Article XI of the contract of April 25, 1922. In support of this argument they make many allegations of fact which we contend the Record does not support. We do not desire to prolong this brief by again repeating the facts, which we have at length set forth, to demonstrate that Secretary Fall had the sole and absolute control of performance under the contract of April 25, 1922, and that he effectively participated in the making of the lease of December 11, 1922, pursuant to the preferential right granted by the contract of April 25, 1922. We have dealt with these matters *in extenso* at pages 249 to 258 and pages 95 to 102, *supra*, of this brief. Certainly the contract of December 11, 1922, would not be, within its own preambles, designated "supplementary" to the contract of April 25, 1922, nor would it so carefully refer to the preferential right to leases provided by the contract of April 25, 1922, if it had been the thought of those who negotiated and drafted it that it and its accompanying lease were made otherwise than pursuant to the contract of April 25, 1922.

E. THE TRANSPORT COMPANY AND THE PETROLEUM COMPANY ARE NOT ENTITLED TO BE CREDITED WITH THEIR RESPECTIVE DISBURSEMENTS UNDER THE FRAUDULENT AND ILLEGAL CONTRACTS AND LEASES.

Despite its finding that the contracts and leases were fraudulently procured from the United States, and despite its conclusion that the contracts and leases were illegal and wholly void, the Trial Court in ordering their surrender for cancellation decreed that (a) credit for the cost of the Pearl Harbor fuel depot should be allowed to the Transport Company in stating its account with the United States, and (b) credit for money expended in drilling and operating certain oil wells and making certain improvements on Naval Petroleum Reserve No. 1 should be allowed to the Petroleum Company in stating its account with the United States. A cross appeal from the allowance of such credits was taken by the Government; and the Court of Appeals held that the Appellants should not be reimbursed for their expenditures and improvements under the fraudulent and illegal contracts and leases. The opinion of Circuit Judge Gilbert clearly recognized that the present suit in equity was brought by the United States not only to protect itself against the fraudulent and illegal acts of its public officers but also to vindicate and enforce its constitutional and statutory "fuel depots" policy.

1. Allowance of credit for the Pearl Harbor project in stating the account of the Transport Company with the United States would be subversive of the "fuel depot" policy of the United States and in violation of the law of illegal public contracts.

(Point XVI, Appellants' brief, p. 316.)

We have above pointed out that by the uncontradicted testimony of Admiral Gregory, Chief of the Bureau of Yards

and Docks, and Admiral Robison, Chief of the Bureau of Engineering (R. II-576; III-1082-3), the storage facilities to be erected at Pearl Harbor were complete fuel depots. We have above pointed out, in Section D, 3, of this brief (p. 226, *ante*) that the power to locate and establish such a fuel depot lay in Congress and not in the Secretary of the Navy. We further call attention to constitutional and statutory provisions and to the uniform practice in connection with appropriations which demonstrate that this is so. We shall not repeat the argument here.

As there shown Admiral Robison admitted that the usual practice of getting approval from Congress and appropriation from Congress was avoided in the present instance because of trouble feared from Congress or some member thereof, and that for this reason silence was maintained about the project (R. III-1061-74). It is uncontradicted that the Pearl Harbor project was but the first step in a fuel depot building plan which had never been referred to Congress and which called for the ultimate expenditure for fuel depots to be located by the Navy Department of approximately one hundred and three millions of dollars (R. II-545-60; III-1103-4). In its opinion the Court of Appeals reviewed the statutory enactments and the legislative history touching the establishment of "fuel depots." In holding that Congress alone was empowered to locate and establish such depots, that Court stated, "it is not conceivable that by the rider to an Appropriation Bill (Act of June 4, 1920) Congress intended in that casual way to surrender its legislative functions as to the control and disposition of the naval oil reserves and the establishment of fuel oil depots for the Navy * * *" (R. III-1504-5).

The Court of Appeals in its decision clearly recognized that the present suit for the cancellation of the fraudulent and illegal contracts and leases was brought by the United States to vindicate and enforce its constitutional and statutory "fuel depot" policy (R. III-1508-10, 1512-13).

This Court and the inferior courts have not been slow to recognize that suits brought by the Government often stand

upon a higher and different footing from those instituted by private suitors. Whenever that situation arises, the special character of the proceedings is acknowledged; and principles of law and equity, which are adapted to the needs of ordinary litigants, are temporarily set aside in the interests of good government. If the implied right of a fraudulent defendant to reimbursement for benefits conferred upon an innocent plaintiff must yield in order to enforce a public statute and the public policy behind it, the defendant still has recourse to Congress, which may be trusted to do what is right under the circumstances and by its judgment he must abide.

This Court has repeatedly held that the equitable maxim: "He who seeks equity must do equity," should have no place in an equitable proceeding brought by the United States to enforce a public statute and its underlying policy. The Federal Courts will not permit the effectiveness of such a statute to be destroyed or its policy to be frustrated by imposing upon the United States the duty of reimbursing the violators for their expenditures as a condition to the granting of equitable relief. This has been frequently decided in proceedings for the cancellation of patents to public lands, regardless of whether the grounds for equitable relief be fraud, or lack of authority, or both.

A leading case involving fraud in the issuance of a patent to homestead lands is that of:—

Causey vs. United States, (1916), 240 U. S. 399.

This was a suit by the United States to recover the title to homestead land patented to the defendant and by him transferred to one Bradford. The bill charged fraud in that the defendant had at the time of the preliminary entry entered into an agreement with Bradford's agent for the transfer of the title when acquired. A demurrer was filed upon the ground, *inter alia*, that the plaintiff had not tendered back the consideration to the defendant.

The demurrer was overruled and an answer was filed by the defendant denying the unlawful agreement and fraud. The suit was then referred to a special master who found fraud and the trial court sustained the finding and entered a decree of cancellation.

The Fifth Circuit Court of Appeals affirmed the decree vacating the patent upon the ground that the appellant was guilty of fraud in obtaining and perfecting his homestead entry.

Counsel for the defendant in his brief in this Court argued that inasmuch as no act of Congress had declared a forfeiture in the case of fraud in the issuance of a patent for homestead land, the United States was bound to tender back to the defendant the consideration paid for the patent as a condition precedent to the maintenance of a bill in equity for cancellation. This Court affirmed the decree of cancellation. Mr. Justice Van Devanter in delivering the opinion of the Court said:—

(pp. 402-3): "The further objection is made that the bill cannot be maintained because it does not contain an offer to return the scrip received when the commuted entry was made. The objection assumes that the suit is upon the same plane as if brought by an individual vendor to annul a sale of land fraudulently induced. But, as this court has said, the Government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization. **And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudu-**

lently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded. *United States vs. Trinidad Coal Co.*, 137 U. S. 160, 170-171; *Heckman vs. United States*, 224 U. S. 413, 447. And see *Rev. Stat.*, Sec. 2362; Act June 16, 1880, c. 244, Section 2, 21 Stat. 287; *Hoffeld vs. United States*, 186 U. S. 273; *United States vs. Commonwealth Trust Co.*, 193 U. S. 651; *United States vs. Colorado Anthracite Co.*, 225 U. S. 219."

A case involving the vindication of the governmental policy underlying the issuance of patents to coal lands, is that of:—

**United States vs. Trinidad Coal Co., (1890),
137 U. S. 160.**

This was a bill in equity brought by the United States to cancel patents to public coal lands procured through fraudulent entries made by the officers and employes of the defendant company. The defendant demurred to the bill upon the ground that it did not make a case for relief in a court of equity, nor allege that any of the entries were fraudulent or in contravention of law. The Trial Court sustained the demurrer and dismissed the bill.

Upon appeal to this Court, counsel for the defendant company argued that the United States must offer to refund the moneys furnished by the defendant company as a condition precedent to the filing of its bill for cancellation of the patent. This Court reversed the decree for dismissal with directions to overrule the demurrer and have further proceedings. In the opinion of Mr. Justice Harlan, the question of "tender of equity" was discussed as follows:—

(pp. 170-1): “* * * It is contended by the defendant that the United States is subject, as a suitor, to the same rules that control courts of equity when determining, as between private persons, whether particular relief should be granted; that the government, asking equity, must do equity; and, consequently, that the bill is defective in not containing a distinct offer to refund the moneys which, it is alleged, were furnished by the defendant to the several persons to whom patents were issued. The rule referred to should not be enforced in a case like the present one. In the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. It is not to be presumed that the small price per acre required from those desiring to obtain a title to such lands had any influence in determining the policy to be adopted in opening them to entry. They were held in trust for all the people; and in making regulations for disposing of them, Congress took no thought of their pecuniary value, but, in the discharge of a high public duty and in the interest of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value. **The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions.** It is not disputed that the Attorney General may, in virtue of the authority vested in him, institute this suit. According to the allegations of the bill, which are admitted to be true, the defendant is a wrongdoer against whom the government seeks to vindicate its policy in reference to the development of its vacant coal lands. Congress when establishing that policy, was not bound to assume that individuals or associations of individuals would attempt to defeat it by means of fraudulent schemes or otherwise. **If the defendant is entitled, upon a cancellation of the patents fraudulently and illegally obtained**

from the United States, in the name of others, for its benefit, to a return of the moneys furnished to its agents in order to procure such patents, we must assume that Congress will make an appropriation for that purpose, when it becomes necessary to do so."

Heckman vs. United States, (1911), 224 U. S. 413.

This was a suit by the United States to cancel certain conveyances of allotted Indian lands made by members of the Cherokee Nation. The bill alleged that said conveyances were in violation of certain statutes restricting the alienation of allotted Indian lands. A demurrer was filed upon the ground, *inter alia*, that the bill was wholly without equity.

The trial court sustained the demurrer and dismissed the bill. The 8th Circuit Court of Appeals reversed the judgment of the trial court in sustaining the demurrer.

Upon appeal to this Court it was argued by counsel for the defendant *inter alia*, that the bill was wholly devoid of equity, because the United States had not offered to return the consideration. This Court was of opinion that the bill was well brought, affirmed the judgment of the 8th Circuit Court of Appeals and ordered that the cause should proceed. Mr. Justice Hughes in delivering the opinion of the Court stated:

(pp. 446-7): "It is said that the allottees have received the consideration and should be made parties in order that equitable restoration may be enforced. Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render them of no avail. **The effectiveness of the acts of Congress is not**

thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the Statute. *United States vs. Trinidad Coal Co.*, 137 U. S. 160, 170, 171."

To like effect are the following cases:

Washington Securities Co. vs. United States, (1913), 234 U. S. 76.

United States vs. Poland, (1919), 251 U. S. 221, 228.

Diamond C. & C. Co. vs. Payne, (1921), 271 Fed. 362, 364-5.

A further citation of authorities is hardly necessary in support of the firmly established rule that in a suit brought by the United States to enforce a public statute and to maintain the public policy underlying it, the granting of relief will not be conditioned upon the reimbursement of the fraudulent defendant, and any affirmative relief, to which such a defendant may in good conscience be entitled, must lie within the sole discretion of Congress.

The present case contains all of the essential elements of the above cited cases. The United States is asking that those provisions in the Constitution and statute law of the United States, which vested in Congress the exclusive power to choose the location of naval fuel depots, and to authorize their construction shall be enforced. Such relief is sought against the Appellants, who have been found guilty of having practiced a fraud upon the Government.

In addition, there is the further element that the Pearl Harbor project is but the first step in a far-reaching building plan calling for the erection, without the consent of Congress, of naval fuel depots at an ultimate cost of approximately \$103,000,000.

The grave consequences that will necessarily follow from the failure of the Court to adhere to this rule of law in the present cause are readily to be foreseen. The reimbursement of the Transport Company for its Pearl Harbor expenditures can only mean that fraudulent and unauthorized Government officials may hereafter with impunity usurp the sole and exclusive power of Congress under the Constitution to select and to authorize the erection of fuel depots for the Navy. If their covinous acts are discovered, no harm can ensue, because, indeed, regardless of how unconscionable their conduct has been, the United States of America must pay the contractors their actual expenditures. Besides, there is always the possibility that their acts may not be discovered and any profits therefrom may thus be retained.

What a rare opportunity would thus be afforded to even well meaning but over-zealous Government agents to conspire to rectify that which in their opinion as patriotic citizens is an inexcusable neglect by Congress of its high duty to provide fuel depots adequate for the needs of the Navy, which it is charged to provide and maintain. But why be content with a modest \$103,000,000 fuel depot building plan? The re-assumption by Congress of the constitutionally given power to establish fuel depots, formerly so unwisely delegated to the Secretary of the Navy, will under court sanction become meaningless and without avail. Such sanction the Court of Appeals refused to give.

We submit, therefore, that this Court should in the interest of good government enforce the laws governing the establishment of "fuel depots;" and that in order to do so effectively, it should deny the Transport Company credit for its Pearl Harbor expenditures. It is our further contention that the allowance of such a credit is contrary to law in that the United States is in no wise bound by the unauthorized and illegal contracts of its agents and officers.

In holding that the Transport Company was not entitled to

be credited with its expenditures under the Pearl Harbor contracts, the Court of Appeals but reaffirmed the well-recognized rule that contracts entered into with the United States without authority of law are illegal and void; and that no liability for benefits received thereunder may be imposed upon the Government. This apparently harsh rule is a necessary corollary of the principle of law that one dealing with public officers is bound to take notice of the extent of their powers and assumes the risk of their acting strictly within their official authority. Upon such a party is imposed the affirmative duty of seeing that the agent of the Government acts fairly and in good faith, as well as within the scope of his authority, in making the contracts; and ignorance of the law furnishes no excuse.

A leading case in point is that of:

Sutton vs. United States, (1920), 256 U. S. 575.

This was an action to recover the balance alleged to be due under a contract with the War Department for dredging and excavating at unit rates. The appropriation was ample to defray the cost of the dredging at these rates assuming that the quantities of material to be removed did not greatly exceed the estimates presented by the specification. Relying upon erroneous estimates of an inspector, the constructor did more work than the appropriation would pay for, before the error was discovered. The Government engineer in charge immediately stayed the operation. The Court of Claims held that the United States was not obliged to pay for the work in excess of the appropriation.

Upon appeal to this Court, judgment was affirmed. Mr. Justice Brandeis sets forth at length in the opinion the acts of Congress authorizing the Secretary of War to undertake this dredging work, and then concludes:—

(p. 579): "The Secretary of War was, therefore, without power to make a contract binding the Government to pay more than the amount appropriated. See *Bradley vs. United States*, 98 U. S. 104, 113, 114. Those dealing with him must be held to have had notice of the limitations upon his authority."

Whiteside et al. vs. United States, (1876), 93 U. S. 247.

This was a suit to recover moneys expended in hauling, baling and ginning captured cotton under a contract with an assistant special agent of the Treasury Department. The Court of Claims held that the assistant special agent had no power to make the contract, and therefore dismissed the suit. This Court affirmed the judgment of the Court of Claims.

(p. 257): "Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusions, might be turned to the detriment and injury of the public. *Mayor vs. Eschback*, 17 Md. 282.

"Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act. *State vs. Hayes*, 52 Mo. 578; *Delafield vs. State*, 26 Wend. 238; *People vs. Bank*, 24 id. 431; *Mayor vs. Reynolds*, 20 Md. 10."

The following decisions are in accord:

The Floyd Acceptances, (1868), 74 U. S. 666, 680;

- Chase vs. United States, (1894), 155 U. S. 489, 502;**
Hooe vs. United States, (1910), 218 U. S. 322, 333-4;
Utah P. & L. Co. vs. United States, (1916), 243 U. S. 389, 408-9;
United States vs. Levinson, et al., (1920), 267 Fed. 692, 694;
United States vs. Bentley & Sons Co., (1923), 293 Fed. 229, 234-5.

The Appellants emphasize in their brief the fact that the alleged contracts of April 25 and December 11, 1922, were beneficial ones and that the United States of America received full value for every dollar spent thereunder. A like argument was unsuccessfully advanced in aid of an illegal government contract in the case of:—

Filor vs. United States, (1869), 76 U. S. 45.

An action was brought in the Court of Claims for rent alleged to be due under a lease of premises for the use of the Quarter-Master's Department of the United States Army. No rent was paid during the five years' use and occupancy and the lease was not disapproved by the Quarter-Master General until four years after its execution.

The Court of Claims held that the lease was illegal and void. Upon appeal to this Court, the decision was affirmed in an opinion which held that the claimants must seek relief from Congress, if they were entitled to compensation for the use of their property:—

(p. 49): "The doctrine of estoppel, which the counsel invokes, has no application. There is no place where the doctrine can come in. The officers at Key West did not represent the United States, except in their military capacity, though assuming to do so. In signing the agreement and in taking possession of the premises claimed by

the petitioners, they acted on their own responsibility. **Their unauthorized acts cannot estop the government from insisting upon their invalidity, however beneficial they may have proved to the United States. If the petitioners are entitled to compensation for the use of the property they must seek it from Congress. The Court of Claims can award them none."**

From the foregoing cases, there can be no doubt but that under the existing federal law an illegal contract with the United States of America is a nullity and will impose no liability express or implied upon the Government to pay for work done or benefits received thereunder.

The instant case cannot be distinguished in principle or fact. Here, as there, we have a contract made with a public officer, whose powers are strictly defined and limited. Here, as there, the authority of that public officer is transgressed and exceeded. Here, as there, a court of competent jurisdiction has decided that the contract is for that reason illegal, void and of no effect. **Here, however, as contradistinguished from those cases, the attention of the contracting party is directed to the possible illegality of the contract and he knowingly assumes the risk of the Government agent having exceeded his authority.**

Even if it be assumed for the purposes of the present argument that a court of equity may in the exercise of its discretion disregard the law and by entering a conditional decree, create an implied liability under an illegal contract, what is there in the actions of the Appellants to move the conscience of a court of equity? They deliberately disregarded their legally imposed duty of seeing that a Government officer acts fairly and in good faith and within the limits of his power and were not only unwilling to submit the question of the legality of their government contract to the law officer of the Government but actually prevented

such a submission. We refer to the letter which Director Bain on May 12, 1922, wrote to Secretary Fall, reciting the difficulties that had arisen through objections raised to the legality of the alleged contract of April 25, 1922, and suggesting that the opinion of the Attorney General be obtained (Def. Ex. EEE; R. II-784). The Appellants blocked the sending of the letter and that was before any work under the contract had been commenced (R. II-786-87).

We do not intend to repeat here the various objections that were raised to the legality of the alleged contracts, both before and after their execution. These we have shown were a very significant badge of the fraud found in this case. Reference was made in passing to the proposed letter of May 12, 1922, from Director Bain to Secretary Fall, to bring out clearly the fairness as well as the necessity of enforcing in the present case the long established rule of law that a party contracting with the Government is bound at his peril to see that the agent of the Government acts *bona fide* within the scope of his authority in making a contract, and not without such scope.

The Court of Appeals cited most of the above authorities in its opinion; and consequently held that the equitable maxim as to doing equity was not applicable in the present suit because the United States here sought to assert its dominion over the public lands, to enforce a long recognized public policy as to "fuel depots," and to avail itself of substantial rights under statutory provisions; and held that the illegality of the contracts barred any express or implied liability on the part of the United States for work done thereunder (R. III-1506-13). To hold otherwise in the present case would not only subvert the constitutional and statutory "fuel depot" policy of the United States but also vitiate and render nugatory that salutary rule of law which, in the interest of good government and the public weal, forbids any recovery against the Government upon the illegal contract of

its officers and agents and relegates the parties to Congress for any relief which justice or the circumstances may peculiarly warrant.

The brief of the Appellants ignores the statutory and legislative history touching the establishment of "fuel depots" and does not deny the well recognized principle of law and equity that the United States is not bound to do equity where it is suing in its sovereign capacity to vindicate its public policy as declared by the Constitution and the statutes. They earnestly contend that the Transport Company is entitled to credit for its Pearl Harbor disbursements irrespective of the illegality of the contract.

The first ground urged in support of such contention (Appellants' brief, pp. 317, 327-29) is that the United States is here seeking to recover back voluntary payments made under a beneficial contract, whereas the Appellants are not asking for affirmative relief against the United States, but are simply seeking to maintain the status existing prior to the execution of the illegal contracts. To support their contention certain language is quoted from the opinions in the cases of *Diamond C. & C. Co. vs. Payne* (1921) 271 Fed. 362, and *United States vs. Royer*, (1925) 268 U. S. 394.

The Appellants fallaciously speak of preserving the *status quo ante*, meaning thereby that they shall be allowed to keep the royalty crude oil received pursuant to the fraudulent and illegal Pearl Harbor contracts. The phrase has no reference whatever to restoring the United States to the position in which it stood before the contracts were entered into. It refers to the position of the parties after the performance of the contract; and is used only as a cloak to cover up an unconscionable retention of benefits unlawfully received at the expense of the Government. The statement by the Appellants that the performance of the fraudulent and illegal contract re-establishes the status existing prior to their execution is obviously unsound and requires no answer.

The authorities cited by the Appellants in support of their contention that the United States should be required to do equity because it is the actor do not sustain their position.

The facts and decision of the *Diamond C. & C. Co.* case are judiciously avoided. The Court of Appeals for the District of Columbia refused to compel the Secretary of the Interior to return scrip used in a fraudulent entry, basing its decision on the very cases cited by the Ninth Circuit Court of Appeals as a reason why the doing of equity was not required in the present case. Chief Justice Smyth distinguished in his opinion the case of *Stoffela vs. Nugent*, (1909) 217 U. S. 499, which was there relied upon by the defendant coal company and is now relied upon by the Appellants, upon the ground that it was a suit between private parties and that therefore the public policy mentioned in the case of *Causey vs. United States* (*supra*), did not apply.

The case of *United States vs. Royer*, (1925) 268 U. S. 394, is cited as a binding precedent permitting the Appellants to retain the reimbursements already received by them under the fraudulent and illegal contracts and leases. But this case too is readily distinguishable upon its facts and law. The United States was there sued for a certain amount deducted from the pay of a *bona fide* and *de jure* army officer. It appears that upon the recommendation of his Commanding General, the officer was promoted from lieutenant to major, in which rank he served for some time performing the duties thereof and receiving the pay therefor. Upon the subsequent discovery that there was no vacancy at that time in the office of major, the increased pay of the major was deducted from his pay as an officer. The Court of Claims held and this Court affirmed that in equity and good conscience he should not be required to refund the money paid to him for services actually rendered in an office held *de facto*, for which services the Government presumably had been benefited to the extent of the payment. It should be noted in the first place that

the army officer was acting *bona fide* and not *mala fide* as the Appellants. In the second place, it is worthy of note that no public policy forbade his appointment as major or his rendering services as such. And finally, it should be noted that the claimant was an officer *de facto* if not an officer *de jure*; whereas, in the present case, the contracts and leases under which the services were performed are wholly null and void for illegality.

The contention that the payments in Government royalty crude oil were voluntarily made and may not therefore be recovered is but covertly contending that the United States may be estopped by the unlawful acts of its public officers, a doctrine which this Court has recently repudiated in the case of **Jeems Bayou Club vs. United States, (1922), 260 U. S. 561.**

Frequent mention is made in the brief of the Appellants (pp. 320, 351) of a supposedly "double accounting," just as if the United States in demanding a return of the property of which it has been fraudulently and illegally deprived is requiring them to make double payments. Complaint is also made that the United States will be unjustly enriched if the Appellants are compelled to disgorge the Government royalty crude oil heretofore received. But the cases above cited establish beyond peradventure that the penalty imposed for the making of an illegal contract is that the Government shall incur no liability for benefits received thereunder. The deterrent feature of that rule will be destroyed if, as here, a fraudulent party to an illegal contract is to be credited with his expenditures thereunder.

And lastly it is contended that a court of equity should not be converted into a tribunal for the administration of penalties (Appellants' brief, pp. 321-22, 324), the Appellants thereby hoping to avoid the consequences of their illegal transactions, viz., that they may not be reimbursed for work performed and materials furnished under fraudulent and illegal

contracts. The rule set forth in the above cited cases (pp. 273-77, this brief *ante*) is that just this penalty follows such fraudulent and illegal dealing with Government officials.

The second reason assigned by the Appellants in support of their contention that the Transport Company should be reimbursed for its expenditures (Appellants' brief, pp. 334-36, 337-39) is that the illegal Pearl Harbor contracts are purely a commercial transaction. All of the cases cited in their brief in support of this argument are clearly distinguishable from the present case because they are suits brought by the United States to cancel or enforce commercial contracts, which were not in violation of any public policy, with the sole exception of the case of *United States vs. Debell*, (1915) 227 Fed. 775, where the United States was required to refund the money paid for Indian lands by a fraudulent purchaser from an incompetent Indian woman allottee **because of its negligence** in issuing the patent in fee. The Debell case did not take into consideration the public policy forbidding the transfer of Indian lands and cannot be considered law in view of the decision by this Court in *Heckman vs. United States*, (*supra*). In the latter case, a bill to cancel certain conveyances of allotted Indian lands made in violation of certain statutory restrictions on alienation was sustained on demurrer in an opinion by Mr. Justice Hughes holding that the policy of the statute and the effectiveness of the Acts of Congress could not be destroyed by requiring the United States to repay the purchase price.

The fallacy of the Appellants' argument is readily apparent. In determining whether or not the equitable principle of doing equity shall yield in the interest of good Government, the Court looks at the nature and character of the present proceedings and the capacity in which the United States sues and is not concerned with the character and nature of the transaction sought to be set aside. Besides, their argument assumes that the United States has acted in an alleged com-

mercial transaction; whereas the Government is never bound by the unauthorized and illegal acts of its public officers, and no transaction whatever, to which the United States is in any true sense a party, was here made.

Much space in the brief of the Appellants (pp. 333-37) is devoted to an attempt to distinguish the cases cited by the Court of Appeals and in this brief in support of the principle that the doing of equity has no place in a suit brought by the United States in its sovereign capacity to vindicate a public policy. The first ground of distinction alleged by the Appellants is that the said cases involve the violation of an express statutory prohibition. This argument overlooks the fact that the contracts and leases now under attack violated the statutory and constitutional provisions governing the establishment of "fuel depots."

Another alleged distinction is that the United States was acting in the said cases in a sovereign capacity. That the United States is so acting in the present suit has already been pointed out in this brief. A further alleged ground of distinction is that the Pearl Harbor contracts involve no questions as to the public domain. This is hardly accurate in view of the fact that the usufruct of the Naval Petroleum Reserves has been fraudulently and illegally converted to reimburse the Transport Company for its Pearl Harbor expenditures and also in view of the fact that the Trial Judge found that the contracts and leases were indissolubly tied together and formed but a single transaction. Finally, it is argued that the contracts of the Transport Company are merely *ultra vires* and involve no violation of the express prohibition of any law. This is a clear evasion of the entire constitutional and statutory declaration concerning "fuel depots."

The case of *United States vs. Detroit Lumber Company*, (1905) 200 U. S. 321, is cited by the Appellants in support

of the statement that the maxim of equity that "he who seeks equity must do equity" should be enforced except as limited by special statutory provisions. The opinion in the Detroit Lumber case is interesting because it shows that the United States was permitted not only to recover the lands from a fraudulent patentee but also to retain the price paid therefor, although it could not recover from a *bona fide* purchaser the price he had already paid to the fraudulent patentee for certain timber.

In an obvious attempt to divert attention from the fact that the Appellants procured the illegal Pearl Harbor contracts by fraud and in pursuance of a conspiracy to defraud the United States, the Appellants repeatedly refer to the good faith of the Secretary of the Navy. How such reference can palliate their bad faith does not appear. They accuse the President and the Congress of the United States as well as the head of the Navy Department of unconscionable conduct because the said parties "with full knowledge that this great and expensive work was in progress, permitted it to proceed to the end that the government might have the manifest advantage thereof" (Appellants' brief, p. 348). We are at a loss to understand this unwarranted aspersion. Well knowing that their illegal contracts and leases were under attack and the subject of Congressional inquiry, the Appellants refused to be deterred thereby but continued to perform the same, thus voluntarily assuming the risk of their contracts and leases being subsequently cancelled for fraud and illegality. After the present suit was instituted, counsel stipulated for the completion of certain tanks because of the danger of their utter destruction pending a final determination of the validity of the contracts, such stipulation expressly providing that the work permitted thereunder would be without prejudice to the rights of the parties. Such a stipulation was as much of an advantage to the Appellants as to the Government.

2. Allowance of credit for expenditures and improvements on Naval Petroleum Reserve No. 1 in stating the account of the Petroleum Company with the United States would be subversive of the "fuel depot" policy of the United States and in violation of the law governing *mala fide* trespasses upon the public domain.

(Point XVII, Appellants' brief, p. 349.)

It stands admitted that one of the prime objects and considerations for the leasing of Naval Petroleum Reserve No. 1 was the construction of "fuel depots" at Pearl Harbor out of the royalty crude oil accruing therefrom. To require the United States to reimburse the Petroleum Company for moneys expended in drilling and operating certain oil wells and making certain improvements under the fraudulent and illegal leases is not only contrary to law and good conscience but is also in derogation of the exclusive right in Congress to establish fuel depots for the Navy. Let us first take up the latter objection.

The leases of June 5 and December 11, 1922, are inextricably interwoven with the fraudulent and illegal contracts of April 25 and December 11, 1922. In fact, they are of the very essence of that vast fuel depot building plan, of which the Pearl Harbor project was the first step and which called for the ultimate expenditure of approximately \$103,000,000. The success of that adventure depended upon the immediate establishment of an oil credit, sufficiently large to meet its rapidly growing demands. Without such a credit, construction work must necessarily lag and eventually be curtailed.

The insufficiency of the oil credit then established to take care of the enlarged Pearl Harbor project manifested itself by December 11, 1922. The erection of that fuel depot must not be stopped or slowed down. Congress under no circum-

stances was to be approached for an appropriation. The only escape then apparent from this dilemma lay in the immediate leasing of Naval Reserve No. 1 under the preferential right conferred under the illegal and fraudulent contract of April 25, 1922. Accordingly, that was done.

In the light of these facts, we submit that if the sole and exclusive power of Congress to select the sites for naval fuel depots and to authorize their construction is to be effectively upheld, then the fraudulent and illegal leases of June 5 and December 11, 1922, must be uncompromisingly struck down. They were the sinews of war which rendered possible and supported the unwarranted attack made upon that power. The line of reasoning followed and the cases cited in the preceding section of this brief in support of the first objection raised to the allowance of credit for the Pearl Harbor expenditure apply with equal force to the objection now being urged. We respectfully refer the Court back to that section of our brief and will thus avoid the necessity of repeating the argument here.

The brief of the Appellants with studied care avoids all reference to the statutory and constitutional "fuel depot" policy of the United States in urging that the Petroleum Company shall be allowed credit for its expenditures and improvements.

The Court of Appeals held that the Petroleum Company could not be allowed credit for moneys expended in drilling and operating oil wells and making improvements under the illegal leases because of the *mala fides* of its trespass upon the public domain. It further held that the *mala fides* of the present trespass followed from the findings of the Trial Court (R. III-1513). The cases cited and followed in the opinion of the Court of Appeals will be hereinafter discussed.

In protecting the public domain from the depredations and devastating waste of unscrupulous parties, the federal courts held at an early date that a distinction must be drawn between the innocent trespasser and the wilful and *mala fide* trespasser.

In assessing the damages for the waste committed by the innocent trespasser, credit was allowed for his costs in extracting the mineral and for the value of permanent improvements to the realty. But no quarter was shown the wilful trespasser in his wrongful raids upon the public wealth. Not only must he account for the full market value of all minerals extracted from public lands, together with any and all accretions thereto; but also he forfeited all permanent improvements to the realty. In no event was he permitted to improve the United States out of its lawful property or to make a profit at its expense. And his actual costs in extracting the mineral were never recoverable.

The foregoing principles of law were laid down and followed in the case of:—

**Pine River Logging Co. vs. U. S., (1902),
186 U. S. 279.**

This was an action in trover brought by the United States against the Pine River Logging Company, *et al.*, to recover damages suffered from an alleged wrongful entry by the defendants upon an Indian reservation and the cutting and removing of certain pine timber thereon. A verdict for \$88,269.94 was directed in favor of the United States, which verdict was affirmed by the 8th Circuit Court of Appeals. Upon appeal to this Court the judgment was affirmed subject to a deduction of \$353.69, being an improperly allowed reporter's fee for transcribing the record.

The complaint charged that nine different parties did at the special instance and request of the defendant enter upon the Mississippi Indian Reservation and cut into logs certain pine trees, which they delivered to the defendants, who thereupon manufactured the logs into lumber, which they subsequently sold and appropriated the proceeds thereof to their own use.

The answers alleged that the logs had been cut under con-

tracts executed under the Act of February 16, 1889 (25 Stat. 673), governing the cutting of timber on Indian lands; and that payment for the logs had been made in full to the United States and to the proper Indian agent in accordance with the said contracts. The answers further averred that the cutting and delivery of the said logs had been in good faith and in the honest belief that said logs had been lawfully cut under the contracts.

The United States replied that the logs had been cut from pine trees that were alive and standing, whereas the contracts authorized only the cutting of dead and down timber.

Mr. Justice Brown in delivering the opinion of this Court found that the Government was not estopped from asserting its rights to recover for timber cut beyond the quantity and quality specified in the contract, although the Government agent had consented or acquiesced in such an unauthorized and unlawful cutting; and also found that because the defendants were not innocent trespassers, the proper measure of damages was the full market value of the timber, when seized, without any credit for the labor expended thereon. We quote the following language from the opinion:—

(p. 292): "The third assignment of error is directed to the proper measure of damages, which were assessed at the value of the logs as they were banked upon the streams and lakes in the neighborhood of where they were cut. It is insisted that the proper measure was the value to the government of the timber before the Indians or the contractors had, by their labors, added to that value."

(p. 293): "The case of *Woodenware Co. vs. United States*, 106 U. S. 432, is decisive of the law in this connection. That was also an action of trover brought by the United States for the value of 242 cords of ash timber cut from the Oneida reservation in the State of Wisconsin. The timber was knowingly and wrongfully taken from the reservation by Indians, and carried to a distant

town, where it was sold to the Woodenware Company, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase. The timber on the ground, after it was felled, was worth twenty-five cents per cord, and at the town where the defendants bought it, \$3.50 per cord. The question was whether the liability of the defendant should be measured by the value of the timber on the ground where it was cut, or at the town where it was delivered. **It was held that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. Upon the other hand, if the trespass be wilfully committed, the trespasser can obtain no credit for the labor expended upon it, and is liable for its full value when seized; and if the defendant purchase it in its then condition, with no notice that it belonged to the United States, and with no intention to do wrong, he must respond by the same rule of damages as his vendor would, if he had been sued. 'This right' (of the recovery of the property), said the court, 'at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer, defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.'**"

Woodenware Company vs. U. S. (1882), 106 U. S. 432.

This was an action of trover brought by the United States to recover the value of 242 cords of ash timber cut and

removed from the Oneida Indian Reservation. This timber was knowingly and wrongfully taken from the land by the Indians, who then carried it some distance to the town of Depere and there sold it to the defendant. The latter was not chargeable with any intentional wrong or misconduct, or bad faith in the purchase.

The timber on the ground after it was felled was worth 25 cents per cord; and at the town of Depere it was worth \$3.50 per cord. The trial Judge found that the defendant was liable for the value of the timber at Depere, and judgment was rendered against the defendant for that sum. On appeal to this Court the judgment of the trial court was affirmed.

In the opinion affirming the judgment Mr. Justice Miller said:—

(p. 433): "The doctrine of the English courts on this subject is probably as well stated by Lord Hatherley in the House of Lords, in the case of *Livingstone vs. Rawyards Coal Co.*, 5 App. Cas. 25, as anywhere else. He said: 'There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, **the court of equity in this country will struggle, or, I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement.**'"

The following cases are in accord:—

- Benson Min. Co. vs. Atla Min. Co., (1891), 145 U. S. 428;
- Guffey vs. Smith, (1914), 237 U. S. 101;
- Union Naval Stores vs. United States, (1915), 240 U. S. 284;
- Big Sespe Oil Co. vs. Cochran, (1921), 276 Fed. 216, (C. C. A. 9).

The Appellants do not deny that under the above cases a *mala fide* trespasser on the public domain is not entitled to be credited with his improvements or costs of extraction and must account in full for the waste committed against the United States. Nor is any effort made to counteract the *mala fides* of the trespass of the Petroleum Company upon the Naval Petroleum Reserve. While not contradicting the measure of damages laid down in these cases, the Appellants, nevertheless, attempt to distinguish them from the present case and thus prevent the instant application of that measure of damages.

The first alleged ground of distinction (Appellants' brief, pp. 349-50) is that these cases are inapplicable because the parties named therein were not trespassers "under a contract." The fact remains, however, that the Appellants were trespassers; and it is immaterial that they entered into possession under leases that were not only illegal, null and void, but also were, in the eyes of the law, known by the Appellants to be thus illegal, null and void. Besides, the shield of "color of title" may never be raised by fraudulent trespassers in their own defense. This was definitely held in the case of **Big Sespe Oil Company v. Cochran**, 276 Fed. 216, (1921) (9th C. C. A.) where a trespasser under a sheriff's deed was strictly held to the measure of damages laid down in the Woodenware case (*supra*). No mention was made of this case by the Appellants for obvious reasons.

We have previously pointed out in this brief how recklessly the Appellants refused to submit to the Attorney General the legality of the Pearl Harbor project before any expenditures whatever had been incurred. Such refusal was all the more remarkable in view of the fact that on or before April 25, 1922, the Appellants questioned the power and right of the Secretary of the Interior to sign the contract of April 25, 1922, and insisted that the Secretary of the Navy should join as a party signatory. Apparently, that fear had subsided by June 5, 1922, for the Secretary of the Interior alone signed the lease of that date. But, on December 11, 1922, this precautionary measure was again taken, as both the contract and the lease

of that date are signed by both Secretaries. These additional circumstances not only emphasize the wilfulness and lack of good faith on the part of the Appellants but also show that the Appellants deliberately assumed the risk that their entry upon the public domain might be subsequently adjudged a trespass.

The other alleged ground of distinction is a slight variation of the foregoing position. It is our old friend "compulsory expenditures" under a new cloak. How this factor can estop the United States or can lessen the fraudulent waste committed on the public domain does not appear. It is suggested that to enforce the rule of the *Woodenware* case (*supra*) in the present case would be "the imposition of an excessively harsh penalty—a thing abhorred by equity—" (Appellants' brief, p. 351); but no account is taken of the fact that such a "harsh rule" has been invariably applied by federal courts of equity in suits brought against *mala fide* trespassers (such as the Appellants) upon the public domain. Little does it lie in the mouth of those who have fraudulently conspired to defraud the United States to complain against a measure of damages adopted for the salutary purpose of preventing spoliation of the natural resources of the Government. The efficacy of that measure of damages is truly tested in cases like the present one and should not be impaired.

The Appellants half heartedly argue (Appellant's brief, p. 351) that an equity is raised in the present case requiring the Government to maintain the Petroleum Company in the position occupied before the leases were made and that such *status quo ante* is re-established by the receipt of oil by the Petroleum Company from the leased lands. The statement shows on its face its inherent fallacy. The Appellants have no intention of restoring to the United States the oil and gas minerals of which the Government has been despoiled but are merely seeking to retain their fraudulent and illegal spoils.

We respectfully submit that the decree of the Circuit Court of Appeals should be affirmed.

ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel for the United States.

APPENDIX.**1. EXECUTIVE ORDER OF WITHDRAWAL OF
SEPTEMBER 2, 1912.****ORDER OF WITHDRAWAL.****Naval Petroleum Reserve No. 1.**

It is hereby ordered that all lands included in the following list and heretofore forming a part of Petroleum Reserve No. 2, California No. 1, withdrawn on July 2, 1910, from settlement, location, sale, or entry and reserved for classification and in aid of legislation under the authority of the act of Congress entitled:

"An act to authorize the President of the United States to make withdrawals of public lands in certain cases" (36 Stat. 847), shall hereafter, subject to valid existing rights, constitute Naval Petroleum Reserve No. 1 and shall be held for the exclusive use or benefit of the United States Navy until this order is revoked by the President or by act of Congress. To this end, and for this public purpose, the order of July 2, 1910, is modified and the withdrawal of that date is continued and extended in so far as it affects these lands.

Mt. Diablo Meridian.

T. 30 S., R. 22 E., Sec. 24, all.

T. 30 S., R. 23 E., Sec. 10, all;

Secs. 12 to 30, inclusive;

Secs. 32 to 36, inclusive.

T. 31 S., R. 23 E., Secs. 1 to 4, inclusive;

Secs. 10 to 14, inclusive.

T. 30 S., R. 24 E., Secs. 17 to 20, inclusive;

Secs. 28 to 34, inclusive.

T. 31 S., R. 24 E., Secs. 1 to 12, inclusive;

Sec. 18, all.

WM. H. TAFT,
President.

SEPT. 2, 1912.

2. EXECUTIVE ORDER OF WITHDRAWAL OF DECEMBER 13, 1912.

ORDER OF WITHDRAWAL.

Naval Petroleum Reserve No. 2.

It is hereby ordered that all lands included in the following list and heretofore forming a part of Petroleum Reserve No. 2, California No. 1, withdrawn on July 2, 1910, from settlement, location, sale, or entry and reserved for classification and in aid of legislation under the authority of the act of Congress entitled:

"An Act to authorize the President of the United States to make withdrawals of public lands in certain cases" (36 Stat. 847), shall hereafter, subject to valid existing rights, constitute Naval Petroleum Reserve No. 2 and shall be held for the exclusive use or benefit of the United States Navy until this order is revoked by the President or by act of Congress. To this end and for this public purpose the order of July 2, 1910, is modified and the withdrawal of that date is continued and extended in so far as it affects these lands.

Mount Diablo Meridian.

- T. 31 S., R. 23 E., Secs. 7 to 9, inclusive;
Secs. 15 to 18, inclusive;
Secs. 20 to 23, inclusive;
Secs. 25 to 29, inclusive;
Secs. 33 to 36, inclusive.
- T. 31 S., R. 24 E., Secs. 30 to 32, inclusive.
- T. 32 S., R. 23 E., Secs. 1 to 3, inclusive;
Secs. 11 to 13, inclusive.
- T. 32 S., R. 24 E., Secs. 2 to 18, inclusive.
- T. 32 S., R. 24 E., Sec. 18, all.

WM. H. TAFT,
President.

December 13, 1912.

3. ACT OF FEBRUARY 25, 1920 (41 STAT. 437).

SEC. 18. That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this act, of all right, title, and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest, under the pre-existing placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than $12\frac{1}{2}$ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: *Provided*, That not more than one-half of the area, but in no case to exceed three thousand two hundred acres, within the geologic oil or gas structure of a producing oil or gas field shall be leased to any one claimant under the provision of this section when the area of such geologic oil structure exceeds six hundred and forty acres. Any claimant or his successor, subject to this limitation, shall, however, have the right to select and receive the lease as in this section provided for that portion of his claim or claims equal to, but not in excess of, said one-half of the area of such geologic oil structure, but not more than three thousand two hundred acres.

All such leases shall be made and the amount of royalty to be paid for oil and gas produced, except oil or gas used for production purposes on the claim, or unavoidably lost, after the

execution of such lease shall be fixed by the Secretary of the Interior under appropriate rules and regulations: *Provided, however,* That as to all like claims situate within any naval petroleum reserve the producing wells thereon only shall be leased, together with an area of land sufficient for the operation thereof, upon the terms and payment of royalties for past and future production as herein provided for in the leasing of claims. No wells shall be drilled in the land subject to this provision within six hundred and sixty feet of any such leased well without the consent of the lessee: *Provided, however,* That the President may, in his discretion, lease the remainder or any part of any such claim upon which such wells have been drilled, and in the event of such leasing said claimant or his successor shall have a preference right to such lease: *And provided further,* That he may permit the drilling of additional wells by the claimant or his successor within the limited area of six hundred and sixty feet theretofore provided for upon such terms and conditions as he may prescribe.

No claimant for a lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

Upon the delivery and acceptance of the lease, as in this section provided, all suits brought by the Government affecting such lands may be settled and adjusted in accordance herewith and all moneys impounded in such suits or under the Act entitled "An Act to amend an Act entitled 'An Act to protect locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest,' approved March 2, 1911," approved August 25, 1914 (Thirty-eighth Statutes at Large, page 708), shall be paid over to the parties entitled thereto. In the case of conflicting claimants for leases under this section, the Secretary of the Interior is authorized to grant leases to one or

more of them as shall be deemed just. All leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear, subject, however, to the same limitation as to area and acreage as is provided for claimant in this section: *Provided*, That no claimant acquiring an interest in such lands since September 1, 1919, from a claimant on or since said date claiming or holding more than the maximum allowed claimant under this section shall secure a lease thereon or any interest therein, but the inhibition of this proviso shall not apply to an exchange of any interests in such lands made prior to the 1st day of January, 1920, which did not increase or reduce the area or acreage held or claimed in excess of said maximum by either party to the exchange: *Provided further*, That no lease or leases under this section shall be granted, nor shall any interest therein inure, to any person, association, or corporation for a greater aggregate area or acreage than the maximum in this section provided for.

SEC. 18a. That whenever the validity of any gas or petroleum placer claim under pre-existing law to land embraced in the Executive order of withdrawal issued September 27, 1909, has been or may hereafter be drawn in question on behalf of the United States in any departmental or judicial proceedings, the President is hereby authorized at any time within twelve months after the approval of this Act to direct the compromise and settlement of any such controversy upon such terms and conditions as may be agreed upon, to be carried out by an exchange or division of land or division of the proceeds of operation.

4. ACT OF JUNE 4, 1920 (41 STAT. 812).

Investigation of Fuel Oil and Other Fuel: For an investigation of 'fuel oil, gasoline, and other fuel adapted to naval requirements, including the question of supply and storage and the availability economically and otherwise of such supply as may be allowed by the naval reserves on the public domain, and for such other expenses for transportation and hire of vehicles in connection with naval petroleum reserves, as the Secretary of the Navy may deem appropriate, for the purchase of necessary instruments and appliances, for the extension of the naval fuel-oil testing plant at the navy yard, Philadelphia, Pennsylvania, and the temporary employment of civilian experts and assistants \$30,000: *Provided*, That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves as are or may become subject to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled "An Act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," or pending applications for United States patent under any law; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States: *And provided further*, That the rights of any claimant under said act of February 25, 1920, are not affected adversely thereby: *And provided further*, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922: *Provided further*, That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct.

5. EXECUTIVE ORDER OF MAY 31, 1921.

EXECUTIVE ORDER

Under the provisions of the Act of Congress approved February 25, 1920 (41 Stat. 437), authorizing the Secretary of the Interior to lease producing oil wells within any naval petroleum reserve; authorizing the President to permit the drilling of additional wells or to lease the remainder or any part of a claim upon which such wells have been drilled, and under authority of the act of Congress approved June 4, 1920 (41 Stat. 912), directing the Secretary of the Navy to conserve, develop, use, and operate, directly or by contract, lease, or otherwise, unappropriated lands in naval reserves, the administration and conservation of all oil and gas bearing lands in naval petroleum reserves Nos. 1 and 2, California, and naval petroleum reserve No. 3 in Wyoming, and naval shale reserves in Colorado and Utah, are hereby committed to the Secretary of the Interior subject to the supervision of the President, but no general policy as to drilling or reserving land located in a naval reserve shall be changed or adopted except upon consultation and in cooperation with the Secretary or Acting Secretary of the Navy. The Secretary of the Interior is authorized and directed to perform any and all acts necessary for the protection, conservation, and administration of the said reserves, subject to the conditions and limitations contained in this order and existing laws or such laws as may hereafter be enacted by Congress pertaining thereto.

WARREN G. HARDING.

THE WHITE HOUSE,

May 31, 1921.